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STATE OF NEW JERSEY

In the Matter of Thalia Mendoza,
Hudson County

CSC Docket No. 2015-3356

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

Request for Reconsideration

ISSUED: DEC 18 2015 (JET)

Thalia Mendoza, a County Correction Officer with Hudson County, represented by Charles J. Sciarra, Esq. requests reconsideration of the attached final administrative decision, rendered on June 3, 2015, which awarded $15,893.75 in counsel fees and $855 in costs. The appointing authority, represented by John A. Smith, III, Assistant County Counsel, also requests reconsideration of the attached final administrative decision.

The petitioner had been removed on charges as more fully specified in the Commission's June 3, 2015 decision (see attached). The appellant appealed her removal and the Commission modified the removal to a six-month suspension. Counsel fees were denied pursuant to *N.J.A.C.* 4A:2-2.12. Subsequently, the appellant appealed the Commission's decision to the Appellate Division of the Superior Court. Upon its review, the Appellate Division reversed the six-month suspension. However, it did not address the issue of an award of counsel fees. The appellant subsequently requested counsel fees and the Commission awarded $15,893.75 in counsel fees and $855 in costs.

In the instant matter, the petitioner asserts that the Commission improperly awarded counsel fees pursuant to the rates established under the Policemen's Benevolent Association's legal protection plan (LPP). The petitioner contends that the LPP was not applicable in the prior matter since the charges against her were dismissed. In this regard, the petitioner explains that the LPP is an excess plan and reimbursement through such plans only occurs when the defense of a client is not successful. The petitioner underscores that attorneys who participate in such

plans are only reimbursed when there are no other sources of payment. In addition, the petitioner states that LPPs are not retainer agreements and should not be considered similar to a specific fee agreement. The petitioner explains that the appointing authority is responsible to pay the fees and it would benefit from unjust enrichment if the fees are not reimbursed as charged by her attorney. The petitioner asserts that the reimbursement rate established by the LPP is significantly less than the customary rates charged by attorneys, and the Commission has the authority to adjust the rates pursuant to *N.J.A.C.* 4A:2-2.12(e). Moreover, the Commission previously awarded counsel fees to her attorney, Mr. Sciarra, in the amount of $200 an hour. *See in the Matter of Joseph Napoleone* (CSC, decided August 13, 2013).

In response, the appointing authority contends that the Commission only assumed that the $125 an hour rate was applicable pursuant to the LPP given that the petitioner failed to disclose the LPP. The appointing authority adds that, since the petitioner failed to disclose such information, she cannot now argue that the rates provided under *N.J.A.C.* 4A:2-2.12 should be awarded. The appointing authority underscores that the petitioner's attorney, Mr. Sciarra, willfully failed to disclose the LPP for review. Nevertheless, the appointing authority maintains that the LPP constitutes a specific fee agreement and it was a material error to have excused the petitioner's failure to submit the LPP for review. The appointing authority adds that it objected when this agency provided the petitioner with additional time to submit a copy of the LPP.[1] In addition, the appointing authority argues that the petitioner should be estopped from submitting any new information pertaining to the LPP, and any information that has already been submitted in that regard should not now be considered.

In reply, the petitioner contends that the LPP's language contradicts the finding in the prior decision that the LPP is a specific fee agreement. In this regard, the petitioner explains that the LPP is an excess plan that allows attorneys to seek their customary rates and, therefore, the $125 an hour reimbursement rate is not applicable pursuant to *N.J.A.C.* 4A:2-2.12(e). As such, the fees should not be limited to the $125 an hour rate. In addition, the petitioner underscores that LPPs issued in 2012 and thereafter do not provide coverage for matters that are successfully defended. The petitioner adds that the excess plan language does not apply to the appointing authority as it is statutorily responsible to pay the fees. Further, the petitioner contends that the LPP language should not be applied uniformly for matters that were vindicated as opposed to matters that were not successful.

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[1] The appointing authority notes that the Division of Appeals and Regulatory Affairs (DARA) was not required under the administrative rules to provide the petitioner's attorney with additional time to respond.

In response, the appointing authority asserts that since the Appellate Division did not address the issue of counsel fees, the appellant's request for fees should be limited to when legal services were rendered by her attorney in 2011. Further, the appointing authority explains that the petitioner's attorney did not provide the LPP that was effective in 2011 at the time legal services were rendered. As such, it cannot be presumed that the 2011 LPP contained excess plan language similar to the LPP that was amended in 2012. The appointing authority adds that any references to the petitioner's LPP effective in or after 2012 are not applicable and should not be considered.

It is noted that the petitioner's attorney, Mr. Sciarra, provides a new certification of counsel dated June 26, 2015 in support of the request for attorney fees. In the certification, Mr. Sciarra requests the same rates for the attorneys that were requested in the prior decision of this matter, *i.e.*, $400 an hour for Mr. Sciarra, $175 an hour for Mr. Curran, and $150 an hour for Ms. Edwards. Additionally, it is noted that Mr. Sciarra provided an unsigned, undated Attorney Acknowledgement of Participation in the Plan which specified the billable hourly rate as $125.00 for the LPP.

## CONCLUSION

*N.J.A.C.* 4A:2-1.6(b) sets forth the standards by which the Commission may reconsider a prior decision. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

In the instant matter, the petitioner does not present that a material error occurred or any new information that would change the outcome of the prior decision. The petitioner argues that the LPP is not a fee agreement or retainer pursuant to *N.J.A.C.* 4A:2-2.12(d). The petitioner contends that the LPP is an excess plan only for PBA members and that her attorney, Mr. Sciarra, is required to pursue all other sources of funding for his usual hourly rate. The petitioner argues that reimbursement through the LPP only occurs when defense of the PBA member is unsuccessful. As such, the petitioner maintains that the appointing authority is statutorily obligated to pay the fees. The petitioner also relies on *Napoleone, supra,* in which the Commission found that the petitioner's attorney, Mr. Sciarra, was entitled to an hourly rate of $200. Additionally, the petitioner argues that the Commission has the authority to assess fees based on circumstances of a particular matter pursuant to *N.J.A.C.* 4A:2-2.12(d), and that her attorney, Mr. Sciarra, is entitled to $400 an hour. The Commission does not find the petitioner's arguments persuasive. As indicated in the prior decision, although the LPP may be an excess plan only, the Commission has consistently determined that participation in a legal protection plan constitutes a specific fee agreement. *See In the Matter of Francesco*

*Grupico and Roy McLeod, supra* (CSC, decided September 16, 2009) (Commission determined that attorney who agreed to participate in the New Jersey State Policemen's Benevolent Association's Legal Protection Plan constituted a specific fee agreement and he was only entitled to the hourly rate agreed to in the Plan). The LPP and the Acknowledgement of Participation in the Plan that the petitioner submitted in this matter now confirms that Mr. Sciarra agreed to accept a rate of $125 an hour. As such, the $125 an hour rate was proper and the petitioner's participation in the LPP does not establish that Mr. Sciarra is entitled to a higher rate. Additionally, the petitioner's reliance on *Napoleone, supra,* is misplaced as that matter did not involve a legal defense plan. Further, Mr. Sciarra did not show that the underlying disciplinary action was novel or that he expended an extraordinary amount of time and labor in this matter, and the plans submitted for other PBA member coverage is of no moment. Moreover, Mr. Sciarra's request for $400 an hour is outside the established rates in *N.J.A.C.* 4A:2-2.12 for a partner attorney. Accordingly, the petitioner did not provide any information to show that a higher hourly rate is warranted and the $125 an hour rate is reaffirmed.

In regard to the appointing authority's assertion that counsel fees should be denied due to Mr. Sciarra's failure to submit the LPP for review, that argument is not sufficient to show that a material error occurred. As noted in the prior decision, an attempt was made to settle the request for counsel fees and settlement could not be reached by the parties. As such, the Commission properly determined the request for counsel fees pursuant to *N.J.C.A.* 4A:2-2.12. Although the appointing authority argues that Mr. Sciarra willfully failed to submit the LPP for review, other than its allegations, it has not established its contentions. As indicated in the prior decision, Mr. Sciarra's non-compliance appeared to be based on his argument, albeit incorrect, that the plan did not apply. As such, the Commission was left with the task of determining the fee without the benefit of the rate outlined in the plan. Moreover, based on a review of the plan submitted in this matter, it is clear that $125 an hour was the correct rate. Additionally, the Commission is perplexed regarding the appointing authority's arguments regarding an LPP that may have been in effect in 2011. As noted in the prior decision, the $125 an hour rate is consistent with other plans provided by Mr. Sciarra and the appointing authority does not provide any substantive information to dispute that rate. As such, the appointing authority has not provided any substantive information that would warrant reconsideration of the $125 an hour rate.

Accordingly, the petitioner and the appointing authority have failed to present a sufficient basis for reconsideration of the Commission's prior decision.

## ORDER

Therefore, it is ordered that the requests for reconsideration be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15th DAY OF DECEMBER, 2015

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries and Correspondence

Henry Maurer
Director
Division of Appeals
& Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

c: Thalia Mendoza
Charles J. Sciarra, Esq.
John A. Smith, III, Esq.
Elinor M. Gibney
Joseph Gambino

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STATE OF NEW JERSEY

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| In the Matter of Thalia Mendoza, Hudson County | FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION |
| CSC Docket No. 2015-141 | Request for Counsel Fees |

ISSUED: JUN 05 2015 (JET)

Thalia Mendoza, a County Correction Officer with Hudson County, represented by Charles J. Sciarra, Esq., requests counsel fees in light of the recent Appellate Division decision that reversed her six-month suspension. *See In the Matter of Thalia Mendoza, Hudson County,* Docket No. A-2656-11T1 (App. Div. August 18, 2013).

By way of background, the appellant was removed effective February 4, 2011 on charges of neglect of duty, insubordination, conduct unbecoming an employee, and other sufficient cause. Specifically, the appointing authority alleged that she was arrested and she failed to report the incident within 24 hours after it occurred as required in violation of departmental policy. The appellant appealed her removal to the Civil Service Commission (Commission). After a hearing was conducted at the Office of Administrative Law (OAL), the Commission modified the removal to a six-month suspension and counsel fees were denied pursuant to *N.J.A.C.* 4A:2-2.12. Subsequently, the appellant appealed the Commission's final administrative decision to the Appellate Division of the Superior Court. Upon its review, the Appellate Division reversed the six-month suspension. However, it did not address the issue of an award of counsel fees. In light of the fact that her six-month suspension was reversed, the appellant now requests counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

The record reflects that the parties were unable to reach an agreement regarding the amount of counsel fees due. Thus, the appellant requested Commission review. In support of her request, the appellant's attorney filed an

application for counsel fees and provided a certification of services dated July 9, 2014 requesting $32,920 for 82.30 hours of work at a rate of $400 an hour, $113.75 for .65 hours of work at a rate of $175 an hour, and $4,312.50 for 28.75 hours of work at a rate of $150 an hour, for a total of $37,346.25. The appellant provides an itemized statement for services performed by Charles J. Sciarra, Esq., from June 21, 2010 to September 21, 2011, for Matthew R. Curran, Esq., from July 16, 2010 to September 12, 2011, and Deborah Masker Edwards, Esq., from May 25, 2011 to July 7, 2011. These records indicate that Mr. Sciarra dedicated a total of 82.30 hours to the appellant's appeal, Mr. Curran dedicated a total of .65 hours to the appellant's appeal, and Ms. Edwards dedicated a total of 28.75 hours to the appellant's appeal. Mr. Sciarra is a partner in a law firm and public records indicate that he was admitted to the New Jersey Bar in 1996, Mr. Curran is a partner in a law firm and public records indicate that he was admitted to the New Jersey Bar in 2005, and Ms. Edwards is an "of counsel" attorney in a law firm and public records indicate that she was admitted to the New Jersey Bar in 1992. The appellant's attorney also filed for additional counsel fees for pursuing the instant matter before the Commission. In this regard, the appellant provides an itemized statement of services performed by Mr. Sciarra from July 7, 2014 to July 8, 2014, for Mr. Curran from March 26, 2014 to July 7, 2014, and for Ms. Edwards from June 12, 2014 to July 9, 2014. These records indicate that Mr. Sciarra dedicated a total of 1 hour to the appellant's appeal, Mr. Curran dedicated a total of 1.25 hours to the appellant's appeal, and Ms. Edwards dedicated a total of 13.25 hours to the appellant's appeal, for a total of $2,606.25 and $1,366.90 in costs, for a grand total of $41,319.40.

In response, the appointing authority, represented by John A. Smith, III, Assistant County Counsel, asserts that counsel fees were denied in the Commission's final administrative decision as the appellant's removal was modified to a six-month suspension, despite the fact that she was represented by counsel, pursuant to *N.J.A.C.* 4A:2-2.12. The appointing authority explains that the appellant's *pro se* representation of herself at the Appellate Division does not entitle her to counsel fees. Further, the appointing authority contends that counsel is inappropriately seeking counsel fees due to the appellant's success at the Appellate Division.[1] In this regard, the appellant's *pro se* work cannot be attributed to her attorney since counsel did not successfully pursue the matter on the appellant's behalf at the Appellate Division. Thus, counsel should not be entitled to counsel fees for the appellant's *pro se* representation. In addition, the appointing authority states that the Appellate Division did not award counsel fees and it did not remand

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[1] The appointing authority also claims that the appellant apparently filed a *pro se* appeal because she was not satisfied with the work performed by her former counsel. This point is referred to in the Appellate Division's decision at page 9 which indicates "plaintiff should have been permitted to call her witness . . . and should not be penalized for the actions of her attorney."

To the contrary, the certification of Charles Sciarra alleges counsel fees are to be paid to the firm, not the employee.

the matter to the Commission for a determination on this issue. Thus, since the Appellate Division did not award counsel fees, the appointing authority questions if the Commission can now address the request for counsel fees in this matter. Under these circumstances, the appointing authority asserts that the application for legal fees is moot.

Further, the appointing authority avers that the request for counsel fees is untimely, given that counsel did not file the request in this matter until 10 months after the Appellate Division decision was issued in August 2013. The appointing authority adds that it was not notified of the appellant's request for counsel fees until approximately seven months after the Appellate Division decision was issued. In this regard, the Commission routinely limits the timeframe to request counsel fees to a maximum of 60 days to settle any such dispute. The appointing authority adds that counsel fees should be denied under the doctrine of laches. Additionally, the appointing authority asserts that the appellant was entitled to a legal defense fund for Correction Officers. As such, she should not have incurred any legal expenses in this matter. The appointing authority adds that counsel did not provide any evidence of a specific fee agreement in conjunction with the legal defense fund. In this regard, the appointing authority asserts that it is "entitled" to know about the specific fee agreement pursuant to applicable Civil Service law and rules[2] and the appellant's failure to provide this information is a basis to dismiss this request.

Moreover, the appointing authority asserts that the request for enhanced counsel fees is inappropriate as the information provided by counsel in the affidavits and certification of services does not support that an enhanced fee should be awarded for Mr. Sciarra's legal services. In this regard, this case was not novel or difficult[3] and there is nothing in the record that would suggest that Mr. Sciarra should receive a fee higher than what is prescribed in *N.J.A.C.* 4A:2-2.12(e). The appointing authority explains that, pursuant to *N.J.A.C.* 4A:2-2.12 (e), if any fees are to be awarded, they must be limited to the itemized services listed in the certification. However, the certification lists several dates where work was performed after the Commission's November 3, 2011 decision was issued. The appointing authority contends that the Commission should not award counsel fees for any legal work performed after the Commission's initial decision was issued since the appellant was not represented at that time.

In response, the appellant asserts that the Appellate Division did not foreclose on her ability to request counsel fees. Further, the appointing authority

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[2] The appointing authority maintains that counsel did not comply with *N.J.A.C.* 4A:2-2.12(d) since evidence of a specific fee agreement was not submitted. Further, *N.J.A.C.* 4A:2-2.12(h) provides that the attorney shall submit an affidavit and any other documentation to the appointing authority.

[3] The appointing authority states that it must be rhetorically asked if a *pro se* employee such as the appellant could obtain a reversal of her discipline, how much extraordinary legal skill has been demonstrated by Mr. Sciarra to justify the application for an enhanced fee.

does not dispute that she ultimately prevailed on all of her issues. In this regard, the Appellate Division reversed the six-month suspension and essentially placed the parties in the position where counsel fees are to be awarded given that the six-month suspension was reversed. Additionally, the request in the instant matter does not apply to her *pro se* matter at the Appellate Division. Rather, the request for counsel fees only pertains to the legal work performed for the appellant's appeal to the Commission. As such, she argues that the fact that the suspension was reversed by the Appellate Division, and not the Commission, does not invalidate counsel's representation of the appellant in her appeal to the Commission. In addition, the appointing authority's argument regarding the timeliness of counsel's request for counsel fees in this matter is without merit. In this regard, Civil Service rules and law do not establish time limitations for an application of counsel fees. The appellant adds that the appointing authority should have been aware of her *pro se* matter in the Appellate Division and it should have received notice of her appeal. The appellant also continued to pursue the matter of obtaining back pay from the appointing authority while her appeal in the Appellate Division was pending. Moreover, it is clear that the appointing authority is not willing to settle the appellant's request for counsel fees without Commission intervention. In this regard, counsel underscores that it attempted to resolve the matter and the appointing authority did not respond. Thus, it is appropriate to include the additional billing for the time counsel attempted to resolve the matter in the instant request for counsel fees.

Additionally, counsel asserts that the request for counsel fees is supported by the certifications that were submitted on appeal. The appellant also states that she is under no burden to present a fee agreement in this matter and her entitlement to a legal protection plan cannot be used to circumvent an award of attorneys' fees where she was vindicated of the charges. In this regard, she notes that the legal protection plan does not apply in this matter given that her suspension was reversed and by regulation she is entitled to make a claim for counsel fees. Moreover, counsel contends that, pursuant to *N.J.A.C.* 4A:2-2.12, the fee ranges can be adjusted based on the circumstances of the matter. Further, counsel explains that the appellant's matter raised difficult questions as to the unjustified removal of the appellant and her right to defend herself based on the facts of this case. Therefore, counsel maintains that the defense of the appellant involving the circumstances presented in this matter warrants higher counsel fees.

It is noted that staff from the Division of Appeals and Regulatory Affairs (DARA) requested that the parties produce a copy of the fee agreement that was signed with the appellant's attorney pursuant to the legal defense fund for Correction Officers. In response, the counsel for the appellant argues that the legal defense fund does not apply in this matter since the appellant prevailed on substantially all of the issues. In this regard, the legal defense fund only applies when the appellant is unsuccessful in challenging the charges against her. As such,

he contends that there is no specific agreement to provide. However, counsel provides a section of the plan, which states:

> B. The LPP Program provides reimbursement for "Legal Defense Costs" which arise from a matter occurring while the member is enrolled in the LPP Program, and only applies to claims that are first made during the Policy Period. **It is an excess plan only. Participating attorneys are free to seek reimbursement of their customary rates from the employers in appropriate cases.** However, if they are unable to do so, they agree to accept reimbursement in accordance with the rates established by the plan. The action or proceeding resulting in "Legal Defense Costs" must have occurred on or after the member's Retroactive Date, if any, and must arise out of the performance of the participant's law enforcement duties during the term of the member's policy period. (emphasis added).

The appointing authority states that *N.J.A.C.* 4A:2-12(d) mandates that an attorney having a specific fee agreement with the employee or employee's negotiations representative disclose that agreement to the appointing authority as a pre-requisite to filing for the award of counsel fees. Therefore, since the appellant's counsel never complied with this requirement or disclosed any such specifics, it was inappropriate for the Commission to solicit this information and the matter should be decided on the merits of the documentation initially filed by the appellant.

## CONCLUSION

*N.J.A.C.* 4A:2-2.12(c) provides as follows: an associate in a law firm is to be awarded an hourly rate between $100 and $150; a partner in a law firm with fewer than 15 years of experience in the practice of law is to be awarded an hourly rate between $150 and $175; and a partner in a law firm with 15 or more years of experience practicing law, or notwithstanding the number of years of experience, with practice concentrated in employment or labor law, is to be awarded an hourly rate between $175 and $200. *N.J.A.C.* 4A:2-2.12(e) provides a fee amount may also be determined or the fee ranges in (c) above adjusted based on the circumstances of a particular matter, in which case the following factors (see the Rules of Professional Conduct of the New Jersey Court Rules, at RPC 1.5(a)) shall be considered: the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; the fee customarily charged in the locality for similar legal services, applicable at the time the fee is calculated; the nature and length of the professional relationship with the employee; and the experience, reputation and ability of the attorney performing the services. *N.J.A.C.* 4A:2-2.12(g) provides that reasonable out-of-pocket costs, such as costs associated with expert witnesses, subpoena fees and out-of-state travel, shall

be awarded. However, costs associated with normal office overhead shall not be awarded. *N.J.A.C.* 4A:2-2.12(d) provides that, if an attorney has signed a specific fee agreement with the employee or the employee's negotiations representative, the fee ranges set forth above may be adjusted. *N.J.A.C.* 4A:2-2.12(e) provides that the fee amount or fee ranges may be adjusted based on the circumstances of the particular matter, and in consideration of the time and labor required, the customary fee in the locality for similar services, the nature of length of the relationship between the attorney and client and the experience, reputation and ability of the attorney.

Initially, the appointing authority contends that the appellant's request for counsel fees in the instant matter is untimely. Specifically, the appointing authority argues that the Appellate Division decision was issued in August 2013 and the request in the instant matter was not filed until some 10 months after that time. The Commission is not persuaded. On appeal, counsel explains that an attempt was made to settle the request for attorney fees, which the appointing authority does not dispute. The appointing authority does not provide any substantive information to refute that the appellant's attorneys attempted to settle the matter pertaining to the request for counsel fees after the Appellate Division issued its decision and prior to filing the request in the instant matter. When settlement cannot be reached, the Commission can review the matter and the appellant acted appropriately since a settlement could not be reached. In addition, the record is clear that the appellant did not sit on her rights with regard to her request for counsel fees in this matter and filed the request for counsel fees within a reasonable amount of time.

The appointing authority also argues that the Commission does not have jurisdiction to address the request for counsel fees based on the Appellate Division's decision. However, the Commission does have the authority to award counsel fees and the Appellate Division decision did not preclude an award of counsel fees in this forum. Although the Appellate Division did not specifically discuss the issue of counsel fees, this does not evidence that it is inappropriate for a prevailing party to seek enforcement for an award of counsel fees by the Commission. Given that the Appellate Division was silent about the issue of counsel fees, the Commission must now address that issue pursuant to *N.J.S.A.* 4A:2-2.12. In this matter, the appellant is essentially arguing that she has been placed in the position where she has substantially prevailed on all the issues regarding her disciplinary appeal which would entitle her to counsel fees. The Commission agrees. Given that her suspension was reversed, the appellant is now entitled to counsel fees pursuant to *N.J.A.C.* 4A:2-2.12. In this regard, the Commission has awarded counsel fees when the Appellate Division reversed a disciplinary action that had been sustained by the Commission. *See In the Matter of Donna Jackson, Hudson County* (CSC, decided December 4, 2013) (Counsel fees awarded where Appellate Division reversed and disciplinary action sustained by the Commission). With respect to the appointing

authority's arguments that the appellant's attorneys are not entitled to counsel fees for the appellant's *pro se* work at the Appellate Division, there is no evidence that the appellant's attorneys have made such a request. In fact, the certifications provided by counsel and the itemized listing of fees clearly indicate that counsel is requesting to be compensated for the legal work performed for the appellant's appeal and disciplinary matter before the Commission. Here, the Commission must award counsel fees for work performed during departmental level proceedings and preliminary work performed before OAL, prior the appellant's *pro se* matter at the Appellate Division. Accordingly, the appointing authority's arguments that the appellant is not entitled to counsel fees because she was not successful in the Commission's initial October 9, 2011 decision is of no moment.

In regard to the argument that the appellant is entitled to a legal protection plan for Correction Officers, Mr. Sciarra states that the appellant is a member of the PBA which has a Legal Defense Plan. In citing the relevant portions of the plan, Mr. Sciarra highlights the section which indicates that **"It is an excess plan only. Participating attorneys are free to seek reimbursement of their customary rates from the employers in appropriate cases."** While this may be the case, the provision from the plan Mr. Sciarra cites also specifies, in the following sentence, "However, if they are unable to do so, they agree to accept reimbursement in accordance with the rates established by this plan." As such, while Mr. Sciarra argues that there is no specific fee agreement, the Commission has consistently determined that participation in a legal protection plan constitutes a specific fee agreement. *See In the Matter of Francesco Grupico and Roy McLeod* (CSC, decided September 16, 2009) (Commission determined that attorney who agreed to participate in the New Jersey State Policemen's Benevolent Association's Legal Protection Plan constituted a specific fee agreement and he was only entitled to the hourly rate agreed to in the Plan). In this regard, the Commission has found in prior matters that if an attorney for an appellant agrees to accept a specific hourly rate identified in the legal protection plan, the attorney is not entitled to a higher hourly rate than specified in the plan if he or she ultimately prevails in their appeal. *See In the Matter of Scott Seliga* (CSC, decided March 4, 2015). As such, participation in a legal protection plan for law enforcement officers does not prevent her from pursuing counsel fees in this matter. However, *N.J.A.C.* 4A:2-2.12(d) specifically requires that an attorney who signs a specific fee agreement to disclose that agreement to the appointing authority. Despite the request by the appointing authority and being offered the opportunity by the Commission to disclose the hourly rate he agreed to accept from the Legal Defense Plan, Mr. Sciarra has failed to provide this information, arguing instead its inapplicability. While the Commission is within its authority to deny counsel fees based on Mr. Sciarra's non-compliance, it declines to do so in this instance, only due to the fact that Mr. Sciarra's non-compliance appears to be based on his argument, albeit incorrect, that the plan did not apply. Had his non-compliance been deemed by the Commission to be willful, it would have denied counsel fees. With that said, the Commission is left

on its own to determine the fee without the benefit of the rate outlined in the plan. Therefore, the Commission will award counsel fees of $125.00 an hour, which is the rate Mr. Sciarra indicated he would accept in other fee dispute matters where he participated in a legal defense plan. *See Grupico, supra.*

With respect to her request for counsel fees for pursuing this matter before the Commission, generally, an appellant is entitled to counsel fees regarding her enforcement request for her counsel fee award since New Jersey courts have recognized that attorneys should be reimbursed for the work performed in support of a fee application. *See H.I.P. (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc.*, 291 *N.J. Super.* 144, 163 (Law Div. 1996) [quoting *Robb v. Ridgewood Board of Education,* 269 *N.J. Super.* 394, 411 (Ch. Div. 1993]).

Further, the appellant requests $41,319.40 in counsel fees and costs for 127.20 hours of legal work at a rate of $400 an hour for Mr. Sciarra, $175 an hour for Mr. Curran, and $150 an hour for Mr. Edwards. The Commission finds that Mr. Sciarra is not entitled to the hourly rates that he requested. Initially, the fees of $400 an hour as requested for Mr. Sciarra fall outside the established rates in *N.J.A.C.* 4A:2-2.12 for a partner attorney. Moreover, Mr. Sciarra has not established his entitlement to reimbursement at a higher rate because of his participation in the legal defense plan. Regardless, even assuming that he did not participate in a legal defense plan, Mr. Sciarra has not established that the legal issues were novel or that he expended extraordinary time and labor in this matter. The underlying disciplinary matter was clearly not novel in any way and was no more complex than any of the thousands of disciplinary appeals involving removals decided over the years by the Commission. In this regard, an appeal of a removal from employment inherently lacks the legal complexity necessary to justify the hourly rate requested and no unique legal experience was required by counsel. In addition, petitioner did not supply statements regarding the rates customarily charged in the locality by other attorneys who perform similar services, or show that such rates normally accompany more complex litigation in State and federal courts. In light of these factors, the Commission finds it reasonable to award Mr. Sciarra and his associates the hourly rate of $125 an hour. Therefore, counsel fees are awarded as follows:

Mr. Sciarra: 83.3 hours x 125 = $10,412.50

Mr. Curran: 1.85 hours x 125 = $231.25

Ms. Edwards: 42 hours x 125 = $5,250.00

Total: $15,893.75

In addition, as indicated above, the costs that represent normal office overhead will not be awarded. *See N.J.A.C.* 4A:2-2.12(g). These costs include photocopying expenses and expenses associated with the transmittal of documents through use of Federal Express or a messenger service. *See e.g., In the Matter of Monica Malone,* 381 *N.J. Super.* 344 (App. Div. 2005). Further, fees or costs associated with telephone or facsimile equipment are considered normal office overhead. Moreover, parking fees and mileage fees that are not associated with out-of-state travel expenses are not compensable. Accordingly, the appellant will not be reimbursed for the photocopying costs and Federal Express charges. However, the filing fees and transcript costs are considered reasonable. Thus, the appellant should be reimbursed for $855 in costs.

Therefore, the Commission finds that the appellant is entitled to reimbursement for $15,893.75 in counsel fees and $855 in costs.

Accordingly, since the outstanding issues concerning the amount of counsel fees have been resolved, if the issue of back pay has been resolved by the parties, the decision will be final. *See Dolores Phillips v. Department of Corrections,* Docket No. A-5581-01T2F (App. Div. February 26, 2003) (A decision of the Commission is a final administrative decision when all issues of back pay and/or counsel fees are resolved).

## ORDER

Therefore, it is ordered that this appeal be granted in part and the appointing authority pay Charles J. Sciarra and his firm counsel fees with an hourly rate of $125 an hour for a total amount of $15,893.75 and costs in the amount of $855 within 30 days of receipt of this decision.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 3rd DAY OF JUNE, 2015

Richard E. Williams
Member
Civil Service Commission

Inquiries and Correspondence

Henry Maurer
Director
Division of Appeals
& Regulator Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

c: Thalia Mendoza
Charles J. Sciarra, Esq.
John A. Smith, III, Esq.
Elinor M. Gibney
Joseph Gambino

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2656-11T1

IN THE MATTER OF THALIA
MENDOZA, HUDSON COUNTY.

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Submitted June 5, 2013 – Decided August 28, 2013

Before Judges Sapp-Peterson and Haas.

On appeal from the Civil Service Commission, Docket No. 2011-3152.

Thalia Mendoza, appellant pro se.

Chasan, Leyner & Lamparello, attorneys for respondent Hudson County (Cindy Nan Vogelman, of counsel and on the brief; Robert E. Finn, on the brief).

Jeffrey S. Chiesa, Attorney General, attorney for respondent Civil Service Commission (Todd A. Widger, Deputy Attorney General, on the statement in lieu of brief).

PER CURIAM

Appellant, Thalia Mendoza, is a corrections officer employed by the Hudson County Department of Corrections (HCDOC), who appeals from the final administrative agency decision of the Civil Service Commission (Commission) imposing a six-month suspension without pay for neglect of duty and insubordination due to her failure to provide HCDOC with a timely written report

of her arrest and supporting documentation regarding the disposition of the criminal charges against her. We reverse.

On February 7, 2010, Jersey City Police arrested Mendoza and charged her with aggravated assault, N.J.S.A. 2C:12-1b, and possession of a weapon for unlawful purpose, N.J.S.A. 2C:39-4d. The charges stemmed from Mendoza's alleged attack upon her live-in boyfriend, Robert Hernandez, during a domestic altercation. When police arrived, Hernandez was bleeding from lacerations to the back of his head but refused medical attention.

The next day, HCDOC served a Preliminary Notice of Disciplinary Action (PNDA) upon Mendoza, charging her with neglect of duty, N.J.A.C. 4A:2-23a(7); conduct unbecoming a public employee, N.J.A.C. 4A:2-23a(6); insubordination, N.J.A.C. 4A:2-2.3(a); and "other sufficient cause," in violation of N.J.A.C. 4A:2-2.3(a)(11). The incident giving rise to the charges was described in the PNDA as follows:

> On February 8, 2010, at about 2353 hours, Officer Thalia S. Mendoza was arrested by Jersey City Police[] for assaulting her live[-]in boyfriend, Mr. Roberto Hernandez. Mr. Hernandez stated his girlfriend struck him in the back of his head with a[n] air freshener can. According to the [p]olice [r]eport submitted by Jersey City Police Officers Hickey and Burroughs[,] Officer Mendoza stated she struck her boyfriend (Mr. Hernandez) in the back of his head with a can of air freshener because he would not let her go to the store to buy cigarettes.

> At that time, Officer Mendoza was placed under arrest and removed from the residence.
>
> . . . .
>
> According to the report (10-003464) submitted by Jersey City Police Officers[] Hickey and Burroughs[,] a]t approximately 2353 hours, they responded to a domestic violence dispute in a basement apartment at 31-33 High Street[] in Jersey City. Once they arrived at the location, the[y] witnessed Mr. Roberto Hernandez suffering from bleeding lacerations to the back of his head. Mr. Hernandez was questioned and stated, after a loud argument with his [c]orrection [o]fficer girlfriend (Thalia Mendoza)[,] she struck him in the back of his head with a can of air freshener. According to the [p]olice report, Officer Mendoza stated[] she struck Mr. Hernandez with a can of air freshener because he would not let her go to the store to buy cigarettes. At that time, the can was placed into evidence (Bag #JM024042). Officer Mendoza['s] firearms identification card was also confiscated and Mendoza was placed under arrest.
>
> Officer Thalia Mendoza was charged with [a]ggravated [a]ssault, [d]omestic [v]iolence, [and p]ossession of a [w]eapon for [u]nlawful [purposes,] in violation of N.J.S. 2C:51-2 ([f]orfeiture of [p]osition). As well as, Hudson County Correctional Center Policy & Procedures and Rules and Regulations. (See attached [p]olice [r]eport).

Mendoza was immediately suspended and a departmental hearing scheduled for February 16, 2010. A revised PNDA, listing the same charges and description of the range of penalties was issued to Mendoza on February 12, 2010. A

Loudermill[1] hearing was held on February 17, 2010, after which Mendoza's suspension was continued pending disposition of the criminal charges and a final hearing on the merits of the administrative charges. On March 17, 2010, the original criminal charges were downgraded to simple assault, and that charge was dismissed on May 20, 2010.

On July 1, 2010, Mendoza was reinstated to her position. However, one week and one day later, HCDOC served a PNDA upon Mendoza, once again charging her with neglect of duty, conduct unbecoming an employee, insubordination, and other sufficient cause. The incident giving rise to these new charges was described as follows:

> On 2/7/10, Thalia Mendoza was arrested by Jersey City Police Department and charged with [a]ggravated [a]ssault (2C:12-1b) and [p]ossession of a [w]eapon for [u]nlawful [p]urpose (2C:39-4d). Thalia Mendoza failed to notify the Hudson County Department of Corrections of her arrest in a timely manner, in violation of department rules and regulations. On 6/25/10, Thalia Mendoza admitted[,] during a subsequent administrative investigation, that she assaulted Mr. Robert Hernandez specifically,

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[1] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546, 105 S. Ct. 1487, 1495, 84 L. Ed. 2d 494, 506 (1985) (holding that prior to termination, a tenured public employee is entitled to notice of the charges, an explanation of the employer's evidence and an "opportunity to present reasons, either in person or in writing," why the proposed disciplinary action should not be taken).

by hitting him in the head with a Febreze can causing him to sustain injuries.

. . . .

On 2/7/10, Thalia Mendoza was arrested by Jersey City Police and [c]harged with [a]ggravated [a]ssault (2C:12-1b) and [p]ossession of a weapon for [u]nlawful [p]urpose (2C:39-4d). Thalia Mendoza also failed to notify the Hudson County Department of Corrections of her arrest in a timely manner in violation of the Custody Rules and Regulations Manu[a]l dated December 2009 Section H (A8)[,] which indicates any arrest or receipt of any summons received from a law enforcement agency or court[] should be reported by the next scheduled work day and no later than twenty-four hours after receiving the summons.

During the investigation, Thalia Mendoza admitted that she failed to submit a report. When asked why, she stated "they didn't ask me for one." Thalia Mendoza's conduct in the assault of Mr. Roberto Hernandez is in violation of the following General Rules and Regulations, Chapter One[,] 1.3 Conduct Unbecoming a Custody Staff member[;] 1.4 Respect of Constitutional Rights[;] 1.5 Integrity[;] 1.6 Courtesy[;] 1.10 Discipline[;] Chapter One A1. Unethical Behavior[;] A2. Conduct Unbecoming an Officer[;] A4. Incompetent Performance of Duty.

[Emphasis added.]

HCDOC conducted a departmental hearing, at which Mendoza appeared with counsel, over two non-consecutive days in September 2010 and January 2011. The hearing officer sustained the charges contained in the July 9, 2010 PNDA, and Mendoza was

removed from her position, effective February 4, 2011. Mendoza appealed her termination to the Office of Administrative Law (OAL) pursuant to N.J.S.A. 40A:14-202d. The matter was treated as a contested case and assigned to an Administrative Law Judge (ALJ).

At the hearing, Sergeant Ariestides Lambos, the Internal Affairs (IA) supervisor, Officer Tyrone Hickey, the arresting officer on the criminal charges, and Mendoza testified. In addition, a transcript of the IA interview conducted of Mendoza on June 25, 2010 was introduced as an exhibit, as well as HCDOC rules and regulations.

Officer Hickey, who testified on behalf of HCDOC, stated that when he arrived at Mendoza's home on February 7, 2010, he observed Hernandez bleeding from a head wound. He spoke with Mendoza and she did not accuse Hernandez of slamming her head into a door, nor did he observe damage to the bedroom door. He explained that while he did not witness the altercation, based on his observations at the scene and Mendoza's admission that she struck Hernandez with the aerosol can, he concluded she was the aggressor and arrested her.

Sergeant Lambos, HCDOC's other witness, testified that on January 9, 2010, Mendoza submitted a Receipt of Acknowledgment form certifying that she was given a copy of the Department of

Corrections' rules and regulations. He stated Mendoza did not submit a written report of her arrest or the disposition of her criminal charges. He admitted that HCDOC was aware of her arrest before she reported it, as Jersey City Police notified HCDOC of the domestic violence incident and her arrest "within hours" of her arrest. He also acknowledged that although Mendoza never filed a written report of her arrest or the disposition of the charges, she kept HCDOC apprised of the status of her case orally.

In her testimony, Mendoza described Hernandez as drunk and aggressive at the time of the incident. She testified that he attacked her as she was attempting to leave their apartment and that she struck him with the can in an effort to defend herself. At her arraignment the next day, she saw two members of HCDOC's IA and was served with suspension papers at that time. She testified that she called her supervisor and inquired whether she needed to submit a report and was told that she did not need to do so. She stated that she then contacted Sergeant Aviles of IA and advised him of her arrest and the incident. According to Mendoza, she asked the sergeant whether she needed to give him anything else and he responded, "No, I have everything I need."

The ALJ issued an initial decision on September 7, 2011. He concluded that Hernandez was the aggressor in the domestic

violence incident and determined that Mendoza struck him with the aerosol can in self-defense. He found that while Mendoza orally informed her superiors of her arrest and the development of her criminal charges, she failed to submit a written report of her arrest or supporting documents pertaining to the subsequent disposition of her criminal charges as required by the HCDOC rules and regulations, of which she was properly apprised. He determined that even though IA learned of her arrest through independent sources before her verbal report, it was "clear and unambiguous" that she was required to augment her verbal report with a written one within twenty-four hours. He found Mendoza failed to establish a good cause for violating the requirement.

The ALJ sustained the administrative charges of neglect of duty and insubordination, but found there was insufficient evidence to sustain the charge of conduct unbecoming a public employee. Addressing the penalty, the ALJ reasoned that removal was "unduly harsh" given Mendoza's unblemished prior record and the nature of her violations. Consequently, he reduced her punishment to a six-month suspension without pay, which he deemed "sufficient to impress upon [Mendoza] that her conduct fell below that expected of a correction officer and cannot be countenanced."

Both parties filed exceptions with the Commission, which issued a decision on November 3, 2011, after an independent review of the record. The Commission adopted the ALJ's initial decision in its entirety, including the recommended six-month suspension without pay. The Commission found that Mendoza's removal was unjustified and that the ALJ's reduction of the penalty was in accord with the "concept of progressive discipline." Finally, the Commissioner rejected Mendoza's contention that HCDOC's reporting requirement is vague as well as her request for counsel fees. This appeal followed.

Mendoza raises the following points for our consideration:

> POINT I
>
> PLAINTIFF WAS NOT REQUIRED BY HUDSON COUNTY POLICY TO SUBMIT A WRITTEN REPORT TO INTERNAL AFFAIRS.
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> POINT II
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> SINCE 2004 DEFENDANT HUDSON COUNTY HAS NOT REQUIRED THE WRITTEN SUBMISSION OF REPORTS TO INTERNAL AFFAIRS.
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> POINT III
>
> DEFENDANT HUDSON COUNTY DID NOT SUPPLY ANY DIRECT TESTIMONY IN SUPPORT OF THEIR CASE.
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> POINT IV
>
> PLAINTIFF SHOULD HAVE BEEN PERMITTED TO CALL HER WITNESS, SGT. JOSHUA FELDMAN[,] AND SHOULD NOT BE PENALIZED FOR THE ACTIONS OF HER ATTORNEY.

POINT V

SHOULD THE CHARGE OF FAILURE TO REPORT BE UPHELD[,] THE PENALTY IS TOO SEVERE AND NOT IN KEEPING WITH PROGRESSIVE DISCIPLINE.

POINT VI

THE DEPARTMENT HAD FULL NOTIFICATION REGARDING OFFICER MENDOZA'S ARREST, AND THE PROCEEDINGS TO FOLLOW, THUS THE CHARGES REGARDING FAILURE TO NOTIFY WERE MADE IN BAD FAITH AND SHOULD BE DISMISSED.

We agree with Mendoza that the regulation at issue did not clearly state that she was required to submit a written report of her arrest. Therefore, we need not address the remaining points raised in her brief.

Our scope of review of an administrative agency's final determination is limited. In re Carter, 191 N.J. 474, 482 (2007). We accord to the agency's exercise of its statutorily delegated responsibilities a "strong presumption of reasonableness." City of Newark v. Natural Res. Council, 82 N.J. 530, 539, cert. denied, 449 U.S. 983, 101 S. Ct. 400, 66 L. Ed. 2d 245 (1980). The burden is upon the appellant to demonstrate grounds for reversal. McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002); see also Bowden v. Bayside State Prison, 268 N.J. Super. 301, 304 (App. Div. 1993) (holding that "[t]he burden of showing the agency's action

was arbitrary, unreasonable, or capricious rests upon the appellant"), certif. denied, 135 N.J. 469 (1994).

To that end, we will "not disturb an administrative agency's determinations or findings unless there is a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence." In re Application of Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008); see also Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 9-10 (2009). We are not, however, in any way "bound by the agency's interpretation of a statute or its determination of a strictly legal issue[,]" Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973), if substantial evidence supports the agency's decision, "a court may not substitute its own judgment for the agency's even though the court might have reached a different result." Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992).

Correction officers employed by HCDOC are subject to the "Custody Staff Rules and Regulations Manual" (Manual). Section H of the Manual, captioned "Standards of Conduct," subsection A8 requires a custody staff employee such as Mendoza to

> [r]eport any arrest, or receipt of any summons received from a law enforcement

> agency or court, and subsequent disposition, including conviction, to the Internal Affairs Unit on or by the next scheduled work day following the disposition, but no later than twenty-four (24) hours after the disposition or receiving the summons. This requirement shall not apply to a summons received for minor traffic violations. A custody staff member shall submit supporting documentation of arrest, receipt of summons or disposition, including conviction, to the HCDOC Internal Affairs Unit within twenty-four (24) hours.
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> [Emphasis added.]

The ALJ found that Mendoza orally notified both her supervisor and IA of her arrest within twenty-four hours and that she kept HCDOC apprised of all developments in her case thereafter, to include submitting a copy of the downgraded charges to IA. Subsection A8 does not clearly and unambiguously state that the report of an arrest must be in writing. The Manual defines "report" as: "A written or oral communication that relates to [HCDOC] matters." Neither the ALJ nor the Commission addressed the clear and unambiguous definition of "report" contained in the Manual. Having reported her arrest within the meaning of the word "report" set forth in the Manual, the charge of failing to timely report her arrest cannot be sustained as a matter of law. Accordingly, the Commission's decision to suspend Mendoza based upon her failure to report in writing that the incident occurred within twenty-four hours of

her arrest was clearly mistaken and erroneous and must be set aside.

We make one further observation. Subsection A8 under the Standards of Conduct requires submission of "supporting documentation of arrest . . . to the HCDOC Internal Affairs Unit within twenty-four (24) hours." Both the ALJ, in his initial decision, and the Commission, in its final decision, reference this requirement. However, the PNDA dated July 9, 2010 describes the actual incident giving rise to the charges against Mendoza as her "fail[ure] to notify the Hudson County Department of Corrections of her arrest in a timely manner[.]" There is no charge in the PNDA that she failed to provide written documentation of her arrest within the required twenty-four hours, which, under the regulation, is a duty imposed upon custody staff employees separate from the duty to "report" an arrest within twenty-four hours. It is undisputed that IA was present at Mendoza's arraignment the morning following her arrest and served her with the suspension notice, which contained the factual allegations supporting the "Notice of Immediate Suspension":

> On February 8, 2010, at approximately 2353 hours[,] Officer Thalia Mendoza[] was arrested by Jersey City Police[] on a domestic violen[ce] dispute[] for assaulting her live[-]in boyfriend[,] Mr. Roberto Hernandez. According to a report submitted

> by Jersey City Police, Mr. Hernandez stated his girlfriend (Officer Mendoza) struck him in the back of his head with a can of air freshener. Officer Mendoza was charged with [a]ggravated [a]ssault, [d]omestic [v]iolence and [p]ossession of a [w]eapon for [u]nlawful [purposes,] in violation of N.J.S. 2C:12-1b & 2C:39-4d.

Absence of the charge that she failed to submit written documentation of her arrest, doubtless, was because HCDOC was in possession of the documentation. It utilized that documentation to lodge the initial disciplinary charges against her, which also did not include an allegation that she failed to report her arrest, a charge which only surfaced four months later after the criminal charges were dismissed and Mendoza was reinstated to her position.

As we noted earlier, our role in reviewing a final administrative agency decision is limited. In re Taylor, 158 N.J. 644, 656 (1999); Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988). We must defer to a final agency decision unless it is arbitrary, capricious, unsupported by substantial credible evidence in the record, or in violation of express or implicit legislative policy. Taylor, supra, 158 N.J. at 656-57.

If, however, our review of the record satisfies us that the agency's finding is clearly mistaken or erroneous, the decision is not entitled to judicial deference and must be set aside. L.M. v. State of N.J., Div. of Med. Assist. & Health Servs., 140

N.J. 480, 490 (1995). We may not simply rubber-stamp an agency's decision. Taylor, supra, 158 N.J. at 657.

"An employee must be served with a Preliminary Notice of Disciplinary Action setting forth the charges and statement of facts supporting the charges (specifications), and afforded the opportunity for a hearing prior to imposition of major discipline. . . ." N.J.A.C. 4A:2-2.5(a). In other words,

> [p]roperly stated charges are a sine qua non of a valid disciplinary proceeding. It is elementary that an employee cannot legally be tried or found guilty on charges of which he has not been given plain notice by the appointing authority. The de novo hearing on the administrative appeal is limited to the charges made below.
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> [W. New York v. Bock, 38 N.J. 500, 522 (1962).]

Because Mendoza was never given notice that, in addition to failing to report her arrest, the disciplinary charges were also based upon her failure to "submit supporting documentation of [an] arrest, receipt of summons or disposition, including conviction, to the HCDOC Internal Affairs Unit within twenty-four (24) hours," the agency decision may not be sustained based upon her violation of this additional HCDOC regulatory requirement.

Reversed.

H-6

STATE OF NEW JERSEY

In the Matter of Thalia Mendoza,
Hudson County

CSC Docket No. 2011-3152
OAL Docket No. CSR 1824-11

DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: NOV 03 2011 (JET)

The appeal of Thalia Mendoza, a County Correction Officer with Hudson County, of her removal, effective February 4, 2011, on charges, was heard by Administrative Law Judge Michael Antoniewicz (ALJ), who rendered his initial decision on September 7, 2011. Exceptions were filed on behalf of the appointing authority and on behalf of the appellant.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on October 19, 2011, accepted and adopted the Findings of Facts and Conclusions as contained in the ALJ's initial decision and the recommendation to modify the removal to a six-month suspension.

## DISCUSSION

The appellant was removed on charges of neglect of duty, insubordination, conduct unbecoming a public employee, and other sufficient cause. Specifically, the appointing authority alleged that she was arrested and charged with aggravated assault and possession of a weapon for an unlawful purpose on February 8, 2010, and she failed to report the incident within 24 hours after it occurred in violation of departmental policy. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

As set forth in the ALJ's decision, on February 7, 2010, the appellant was involved in a domestic violence incident at her home with her live-in boyfriend,

Roberto Hernandez, who is the father of her child, and she was arrested on February 8, 2010 by the Jersey City Police Department. The ALJ found that the appellant credibly testified that she was not the aggressor in the incident, and all of her actions were in self-defense. In this regard, the appellant testified that Hernandez was the aggressor in the domestic violence incident on February 7, 2010, and his actions required the appellant to defend herself when he returned to their home intoxicated and acted aggressively toward her. The appellant attempted to exit the apartment, but Hernandez prevented her from leaving and pushed her around the apartment and pushed her face into the door. The appellant eventually struck Hernandez in the head with an aerosol can in order to get him off of her, causing a small wound for which Hernandez did not request any medical attention.

Police Officer Tyrone Hickey testified that he responded to the incident on February 7, 2010, and he arrested the appellant. Hickey also testified that the appellant stated that she struck Hernandez on the head during the incident, and he assessed the appellant as the aggressor. However, Hickey could not say with any certainty what had occurred at the time of the incident in the appellant's apartment, since he was not present at the time it occurred.

The ALJ further found that, pursuant to the appointing authority's rules and regulations, the appellant was required to report any arrest or receipt of any summons from a law enforcement agency or a court, and subsequent disposition, including conviction, to the Internal Affairs Unit on or by the next scheduled workday following the disposition, but no later than 24 hours after the disposition or receiving a summons. Additionally, a custody staff member was required to submit supporting documentation of an arrest, receipt of summons or disposition, including conviction, to the Internal Affairs Unit within 24 hours. The appellant acknowledged receipt of the rules and regulations on January 9, 2010. Nevertheless, the appellant did not submit a report to Internal Affairs advising of her arrest, nor did she submit a report to Internal Affairs regarding the outcome of the charges. Within hours after the domestic violence incident occurred, the appointing authority was notified by an independent source that the appellant had been arrested. On February 8, 2010, the appellant orally reported the domestic violence incident to her supervisor, and she telephoned Internal Affairs and advised of the incident and her arrest. In addition, the appellant orally notified the appointing authority with regard to the progress of her criminal matter, including the downgrading of her charges, when she supplied Internal Affairs with a copy, and she orally advised Internal Affairs of her Municipal Court appearance and the disposition. The appellant provided Internal Affairs with a copy of the police reports regarding the incident, and she stipulated to probable cause for the arrest as part of the dismissal of the charges in Municipal Court. The Hudson County Prosecutor's Office downgraded the charges against her, and all charges were dismissed.

Based on the testimony, the ALJ concluded that the appellant did not submit a written report of the arrest to Internal Affairs as required within 24 hours. Thus, due to the appellant's failure to report the domestic violence incident and her arrest, the ALJ recommended upholding the charges of neglect of duty and insubordination. The ALJ also concluded that during the domestic violence incident, the appellant merely took steps to protect herself when her live-in boyfriend physically assaulted her, and as a result, the evidence fell short of demonstrating conduct unbecoming a public employee. The ALJ noted that the appellant was appointed to her position in 2007, and she did not have any prior disciplinary history. Thus, the ALJ recommended that the penalty of removal be modified to a six-month suspension.

In its exceptions, the appointing authority argues that the ALJ erred when he found that the appellant was not the aggressor in the domestic violence incident. In this regard, the appointing authority asserts that it was not corroborated that all action taken by the appellant, including striking Hernandez with a can, was done for the purpose of self-defense. The appointing authority adds that the appellant's conduct on the night of the incident, and Hickey's testimony, support the conclusion that the appellant was not acting in self-defense when she grasped the can and used it as a weapon to strike Hernandez. In this regard, the appointing authority avers that the appellant did not exhibit any sign of physical injury consistent with a physical struggle which warranted a violent defensive response. In addition, the appointing authority argues that the ALJ erred in finding that removal is an unduly harsh penalty because the totality of the circumstances warrants the appellant's removal. In this regard, the appointing authority asserts that the appellant's use of force on Hernandez was not consistent with her theory of self-defense and represented conduct of an egregious nature that warrants removal. The appointing authority adds that combining the egregious conduct with the finding that the appellant failed to report her arrest justifies her removal under a totality of the circumstances analysis. Further, the appointing authority contends that the appellant was responsible for knowing the rules and regulations, and she was required to undergo training in the use of force and self-defense. The appointing authority states that the photographic evidence presented at trial and the testimony of the responding officers is inconsistent with the appellant's claim of self-defense and is thus further evidence of egregious conduct that properly warrants removal. Moreover, the appointing authority avers that it is well established that when the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate.

In her exceptions, the appellant argues that the ALJ's findings with regard to her actions on the night of February 7, 2010 were appropriate. Specifically, the appellant argues that the only charge the ALJ sustained against her was that she failed to report the arrest within 24 hours. In addition, the appellant maintains that the rule is vague and does not indicate that the report must be in writing. In

this regard, the appellant argues that she orally reported the matter within 24 hours to her immediate supervisor and to Internal Affairs on February 8, 2010. Thus, the appellant contends that there was no violation of the rule. Even assuming that she violated this rule, the appellant argues that it was a "hyper-technical" violation which does not warrant a six-month suspension.

Upon its *de novo* review of the record, including the exceptions filed by the parties, the Commission agrees with the ALJ's recommendation to modify the removal to a six-month suspension. The Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.,* 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See In re Taylor,* 158 *N.J.* 644 (1999) (quoting *State v. Locurto,* 157 *N.J.* 463, 474 (1999) ). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (*citing Locurto, supra).* The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System,* 368 *N.J. Super.* 527 (App. Div. 2004). Nevertheless, upon review, the Commission finds that the ALJ's credibility determinations in this respect are proper and that this strict standard has not been met. Specifically, the appellant credibly testified that she was not the aggressor during the incident that occurred, and she was acting in self-defense. The appointing authority has not persuaded the Commission that there was any credible evidence to the contrary. Moreover, the evidence supports that the appellant failed to report in writing that the incident occurred within 24 hours of her arrest. Accordingly, after its independent review, the Commission finds nothing to indicate that the ALJ's credibility determinations were arbitrary, unreasonable or not based on the credible evidence in the record, and it upholds the charges of neglect of duty and insubordination.

In determining the proper penalty, the Commission's review is *de novo.* In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock,* 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. Moreover, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry*

*v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007).

A review of the record evidences that the appellant has received no disciplinary action since commencing her employment in 2007. Nevertheless, the appellant's offenses are sufficiently egregious to warrant a six-month suspension. Her argument that the rule is vague and does not require the report to be in writing is not persuasive, given that it requires submission of supporting documentation within 24 hours of the arrest. Thus, a six-month suspension is appropriate given the appellant's failure to submit a report of her arrest in writing within the 24-hour period. Moreover, the Commission is mindful that a County Correction Officer is a special kind of public employee. County Correction Officers hold highly visible and sensitive positions within the community and the standard for such an employee includes good character and an image of utmost confidence and trust. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied*, 47 *N.J.* 80 (1966). *See also, In re Phillips*, 117 *N.J.* 567 (1990). Accordingly, given that the more serious charges against the appellant were dismissed, the Commission concludes that the foregoing circumstances provide a sufficient basis to modify the penalty to a six-month suspension on the charges of neglect of duty and insubordination. Finally, a six-month suspension clearly indicates to the appellant the severity of her failure to properly report her arrest and serves as an important reminder that any future transgressions may lead to her removal.

Since the removal has been modified, the appellant is entitled to mitigated back pay, benefits and seniority for the period following her six-month suspension to the date of actual reinstatement pursuant to *N.J.A.C.* 4A:2-2.10.

*N.J.A.C.* 4A:2-2.12(a) provides for the award of reasonable counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty imposed against the appellant was modified by the Commission, certain charges were sustained and major discipline has been imposed. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips, supra,* if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to her position.

## ORDER

The Civil Service Commission finds that the action of the appointing authority in imposing a removal was not justified. Therefore, the Commission modifies the removal to a six-month suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority for the period following her six-month suspension to the date of her actual reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 19th DAY OF OCTOBER, 2011

Robert E. Brenner
Presiding Member
Civil Service Commission

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. CSR 01824-11

**IN THE MATTER OF THALIA MENDOZA, HUDSON COUNTY CORRECTIONAL FACILITY.**

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**Charles J. Sciarra**, Esq., for appellant Thalia Mendoza (Sciarra & Catrambone, attorneys)

**John A. Smith, III**, Assistant County Counsel, for respondent Hudson County Correctional Facility (Donato J. Battista, County Counsel)

Record Closed: July 22, 2011 Decided: September 7, 2011

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant Thalia Mendoza, a correction officer at Hudson County Correctional Facility since 2007, appeals her removal by the Department of Corrections. The Department contended that appellant was arrested by the Jersey City Police Department in Jersey City, New Jersey on February 8, 2010, due to a domestic violence event for aggravated assault (N.J.S.A. 2C:12-1b); domestic violence and possession of a weapon for an unlawful purpose (N.J.S.A. 2C:39-4d); and that appellant did not report

the incident to the Office of Internal Affairs within twenty-four hours, in violation of departmental policy.

On July 9, 2010, appellant was served with a Preliminary Notice of Disciplinary Action charging her with neglect of duty, insubordination, and conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6), and other sufficient cause, in violation of N.J.A.C. 4A:2-2.3(a)(11) and Human Resources Bulletin (HRB) 84-17, as amended, section C11 (conduct unbecoming an employee) and section E1 (violation of a rule, regulation, policy, procedure, order, or administrative decision).

The Department served a Final Notice of Disciplinary Action on February 4, 2011, sustaining the charges of neglect of duty, conduct unbecoming a public employee, insubordination, and other sufficient cause violation of N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause, namely, violation of HRB 84-17, as amended, C11 (conduct unbecoming an employee), and HRB 84-17, as amended, E1 (violation of a rule, regulation, policy, procedure, order or administrative decision)—thus removing appellant, effective February 4, 2011.

Mendoza filed her appeal with the Office of Administrative Law (OAL), pursuant to N.J.S.A. 40A:14-202d, where it was filed on February 11, 2011, as a contested case. A hearing took place on June 7, 2011, and the parties had until July 22, 2011, to file post-hearing written submissions at which time the record was closed.

## FACTUAL DISCUSSION

### Sgt. Ariestides Lambos

Sgt. Ariestides Lambos (Lambos) works in Internal Affairs with the Hudson County Correctional Facility and served as the supervisor as of 2006. Lambos testified that when a person becomes a correctional officer, they receive and acknowledge receipt of the applicable rules and regulations, which apply to all officers. The rules and regulations were acknowledged by Mendoza by way of her signature on January 9, 2010. (R-4a.) Part of the rules and regulations requires a correction officer to:

> Report any arrest, or receipt of any summons received from a law enforcement agency or court, and sub-sequent disposition, including conviction, to the Internal Affairs Unit on or by the next scheduled work day following the disposition, but no later than twenty-four (24) hours after the disposition or receiving the summons . . . . A custody staff member shall submit supporting documentation of arrest, receipt of summons or disposition including conviction, to the HCDOC Internal Affairs Unit within twenty-four (24) hours.

Lambos testified that he never received a report from Mendoza regarding her arrest nor did he receive a report as to the outcome of the charges.

In addition, Lambos stated that Chapter 1.3 of the general rules and regulations deal with conduct unbecoming a custody staff member, which is applicable to correction officers whether on or off duty. Lambos further stated that Mendoza received a 31-A (Preliminary Notice of Disciplinary Action) (R-1) citing the following charges: 1) neglect of duty; 2) conduct unbecoming an employee; 3) insubordination and 4) other sufficient cause. These charges were related to the incident of February 7, 2010, whereby Mendoza was arrested by the Jersey City Police and charged with aggravated assault and possession of a weapon for an unlawful purpose. Mendoza failed to notify the Hudson County Department of Corrections of her arrest.

On February 4, 2011, Mendoza received a Final Notice of Disciplinary Action (R-2) where none of the charges set forth in the Preliminary Notice of Disciplinary Action were dismissed and the result was Mendoza's removal, effective February 4, 2011.

Lambos further testified that correction officers receive training in the use of force and self-defense at the Training Academy. Part of that training includes not using a stick or other weapon when dealing with a prisoner until it is needed as a last resort.

Exhibit R-5 was the transcript of the interview of Mendoza conducted by Internal Affairs. This interview was done after dismissal of the criminal charges in May 2010. On page five of the interview, Mendoza admitted that she did not submit a report

regarding her arrest. Mendoza also admitted that she was aware that she was obligated to submit such a report in her interview.

Internal Affairs received a copy of the Jersey City Police Department investigation report. (R-3a.) In addition, they received a copy of the transcript of the Jersey City Municipal Court proceedings wherein all of the downgraded charges against Mendoza were dismissed. In those proceedings, Mendoza acknowledged that probable cause was present for her arrest.

During cross-examination, Lambos acknowledged that Mendoza kept the Department apprised of the progress of her case, but never filed a written report regarding same. In the interview Mendoza stated that the reason she did not submit a report was because no one requested such a report. Lambos also admitted that the rules and regulations do not specify a requirement of a written report. However, Mendoza was required to advise the Department that she was arrested. He admitted that Internal Affairs did receive a copy of the police reports regarding Mendoza's incident.

Lambos also admitted that Mendoza had no prior charges issued against her and that the only charges against her were related to the domestic violence incident, which took place on February 7, 2010.

**Police Officer Tyrone Hickey**

Police Officer Hickey (Hickey) testified that on February 7, 2010, he responded to Mendoza's apartment in Jersey City in response to a phone call received from Roberto Hernandez (Hernandez), who was the father of Mendoza's baby and her live-in boyfriend, due to a domestic violence dispute. Hickey was aware that the female in the dispute was a correction officer. Hernandez was struck by Mendoza on his head with a can during a physical conflict between the two parties.

When Hickey saw Hernandez, he had blood all over him, blood on his shirt and blood on the floor. When Hickey saw Mendoza she was sitting on the bed with their

child on her lap. Mendoza stated that she struck Hernandez on the head after a struggle whereby Hernandez attempted to prevent her from leaving the apartment. Mendoza had no sign of injury. After questioning both parties, Hickey placed Mendoza under arrest. Pictures of the victim and the scene were taken by Hickey's partner, Officer Russo. (R-6.) Hernandez declined any medical treatment for the cut to his head or for any other reason.

Mendoza was taken to the precinct. Hickey was aware that the charges were downgraded and then dismissed; however, he did not consent to dismissal, nor did he speak with the Prosecutor. After speaking with the parties and inspecting the scene, Hickey assessed Mendoza as the aggressor and that was why she was arrested. Candidly he stated that since he was not present at the time of the incident, he could not say with certainty what occurred in Mendoza's apartment on February 7, 2010.

**Thalia Mendoza**

Thalia Mendoza (Mendoza) was hired as a correction officer in September 2007. She received training to protect and secure the Hudson County Corrections Facility. She testified that she had no previous disciplinary issues before the incident in February 2010. Hernandez, her daughter's father, who she lived with, returned home from a Super Bowl party and was extremely intoxicated. Hernandez began to argue with Mendoza. She described Hernandez as very drunk and aggressive. Mendoza was attempting to leave the apartment and Hernandez attempted to push her away from the front door. Hernandez began to shove Mendoza around, stating to her that "You are not going anywhere." Hernandez mushed her face into the inside door leading to the boiler room. She hit the door so hard that the door went off its hinges. Mendoza ran toward her daughter who was sleeping in Mendoza's room. Hernandez kept pushing her and then pinned her down on the floor. Mendoza became scared and she saw the can to her side and hit Hernandez on his head. Mendoza testified that Hernandez stated: "I am going to call the cops on you. I am going to take your job and take your baby away."

Mendoza stated that when the cops arrived, she was sitting on the bed and she told the officer what had occurred. She gave the officer her ID and she was arrested.

She had seen Hernandez bleeding and became very upset because she realized that she could lose her job. She did not press charges against Hernandez because she stated that she was afraid that the State would take away her baby if there were charges against both the child's mother and father.

On February 8, 2010, appellant was arrested in Jersey City, New Jersey for aggravated assault, domestic violence and possession of a weapon for an unlawful purpose. She was fully aware of her obligation to report this arrest, having received the policy and procedures of respondent while in the police academy and failed to file a written report. (R-4.) She appeared in Hudson County Court and was subsequently released. While she was there she saw two members of Internal Affairs and was served with suspension papers with the charges set forth therein. Mendoza stated that she called her supervisor and inquired as to whether she needed to give a report and was told that she didn't need to write a report. She then called Sergeant Aviles of Internal Affairs and advised him of arrest and the incident.

The Hudson County Prosecutor's Office downgraded the charges against her to the Jersey City Municipal Court. Thereafter all charges were dismissed. On July 1, 2010, Mendoza returned to work and continued to work until she was terminated in February 2011.

## FINDINGS OF FACTS

Based upon consideration of the testimonial and documentary evidence presented at the hearing and having had the opportunity to observe the witnesses' demeanor and assess their credibility I **FIND** the following **FACTS:**

1. On February 7, 2010, Mendoza was involved in a domestic violence incident at her home with her live-in boyfriend who was the father of her child. On February 8, 2010, appellant was arrested by Jersey City Police Department for aggravated assault, domestic violence and possession of a weapon for an unlawful purpose. Mendoza was not the aggressor in the domestic violence incident and all action

taken by her, including striking Hernandez with a can, was done for purposes of self-defense.

2. Mendoza was hired in September 2007 as a correction officer and she had no prior disciplinary action taken against her prior to the incident of February 7, 2010.

3. Pursuant to the rules and regulations, Mendoza was required to report any arrest or receipt of any summons from a law enforcement agency or a court and subsequent disposition, including conviction, to the Internal Affairs Unit on or by the next-scheduled workday following the disposition, but no later than twenty-four hours after the disposition or receiving a summons. A custody staff member was required to submit supporting documentation of an arrest, receipt of summons or disposition, including conviction, to the Hudson County Department of Corrections Internal Affairs Unit within twenty-four hours.

4. Mendoza did not submit a report to Internal Affairs advising of her arrest even though it was required by the Hudson County Department of Corrections rules and regulations. Mendoza acknowledged receipt of the rules and regulations on January 9, 2010. Nor did Mendoza submit a report to Internal Affairs regarding the outcome of the charges against her. However, on February 8, 2010, Mendoza reported the domestic violence incident and her subsequent arrest to her supervisor, Sergeant Feldman. In addition, on February 8, 2010, Mendoza called Internal Affairs and advised Sergeant Aviles of the incident and her arrest.

5. Mendoza keep Hudson County orally apprised of all developments with regard to her criminal matter, including the downgrading of her charges, where she supplied Internal Affairs with a copy. Mendoza also orally advised Internal Affairs of her Municipal Court appearance and the results of same.

6. Hernandez was the aggressor in the domestic violence incident, even though only he sustained a visible injury on February 7, 2010. Hernandez's actions required Mendoza to defend herself when he returned to their home intoxicated and acted aggressively toward her. Mendoza attempted to exit the apartment in order to permit

both parties to cool off; however, Hernandez prevented her from leaving and pushed her around the apartment and mushed her head into the door. Eventually Mendoza struck Hernandez in the head with a can in order to get him off of her, causing a small wound which Hernandez did not request any medical attention.

7. Mendoza provided Internal Affairs with a copy of the police reports regarding the incident. Mendoza further stipulated to probable cause for the arrest as part of the dismissal in Municipal Court.

8. Hudson County first learned of the domestic violence incident and Mendoza's arrest of February 7 and 8, 2010, within hours of its occurrence from an independent source. Mendoza was served with suspension papers with charges levied against her on February 8, 2010. These papers were served upon her by Internal Affairs.

## LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1, et seq. A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against her and, if so, the appropriate penalty, if any, that should be imposed. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940). Precisely what is needed to satisfy this

burden necessarily must be judged on a case-by-case basis. The general causes for major discipline of public employees are enumerated in N.J.A.C. 4A:2-2.3(a).

The sustained charges in the Final Notice of Disciplinary Action were insubordination, neglect of duty, conduct unbecoming a public employee and other sufficient cause. N.J.A.C. 4A:2-2.3(a)(1), (6), (7), and (11). Although the term "conduct unbecoming a public employee" is not defined in the New Jersey Administrative Code, it has been described as an "elastic" phrase that includes "conduct which adversely affects the morale or efficiency" of the public entity or "which has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

Appellant was arrested on February 7, 2010, but did not submit a written report of the arrest to Internal Affairs as required. Under departmental rules, she was required to report her arrest immediately, but no later than twenty-four hours after the arrest. The Department's regulations state that "[a]ny employee who is arrested, incarcerated or issued a summons as a result of a crime or an offense shall advise his/her superior immediately, if possible, but no later than twenty-four hours from the time of the summons, arrest or incarceration."

The requirement is clear and unambiguous. Appellant's arrest should have been reported immediately, unless there was good cause or some impediment that prevented reporting the arrest. No sufficient cause or impediment was established. Appellant failed to do so within the required twenty-four hours. It was clear to Mendoza that Internal Affairs was aware of her arrest as they served her with a suspension notice upon her release from the Jersey City Police Department. In addition, Mendoza advised her immediate supervisor and orally advised Internal Affairs regarding the arrest and all progress regarding the criminal charges and ultimate resolution.

Based upon the facts adduced and the legal principles set forth above, I **CONCLUDE** that the appointing authority has met its burden of proof by a preponderance of the evidence with reference to failure to report her arrest, thus neglect of duty and insubordination. The charges are sustained with regard to Mendoza's

failure to submit a report regarding the incident and her arrest and the proceedings thereafter.

Conduct unbecoming a correction officer need not be predicated upon a violation of the employer's rules or polices. See City of Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955). Rather, it "may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." In re Tuch, 159 N.J. Super. 219, 224 (App. Div. 1978). Conduct by a correction officer that indicated "an attitude of mind and approach to the obligations of his office fundamentally at variance with his sworn duty" is a violation of the required standard of behavior inherent in the position. Asbury Park, supra, 17 N.J. at 429-30. Adherence to this high standard of conduct is an obligation that a law enforcement officer voluntarily assumes when he enters public. Emmons, supra, 63 N.J. Super. at 142. However, the evidence in this case shows that Mendoza merely took approach and measured steps to protect herself when her live-in boyfriend physically assaulted her. In support of this assessment is the fact that the charges were downgraded and ultimately dismissed in their entirety. Based upon the **FACTS** as hereinbefore found, I **CONCLUDE** that the evidence falls short of demonstrating a violation of the charge of conduct unbecoming a public employee.

## PENALTY

Considering the nature of the appellant's infractions and her lack of any adjudicated prior discipline, I **CONCLUDE** that removal is an unduly harsh penalty. Based upon consideration of the totality of the circumstances, I **CONCLUDE** that a six-month suspension is sufficient to impress upon appellant that her conduct fell below that expected of a correction officer and cannot be countenanced.

An employee's past record may be considered in determining the appropriate penalty. Available service ratings, a history of promotions, commendations, etc., and informally and formally adjudicated disciplinary actions are relevant to penalty determinations. Bock, supra, 38 N.J. 500. Given the totality of the surrounding circumstances, termination of a heretofore employee with an unblemished disciplinary

record (even for her short work history) is unduly harsh. Therefore, I further **CONCLUDE** that under all the facts presented here, appellant's removal is inappropriate and the penalty must be reduced to a six-month suspension.

## ORDER

Based upon the foregoing, I **ORDER** that the charges of insubordination and neglect of duty as set forth in the Final Notice of Disciplinary Action, dated February 4, 2011, be and hereby are **SUSTAINED**. I further **ORDER** that appellant be and hereby is suspended for six (6) months without pay.

I further **ORDER** that the remaining charges against appellant be and hereby are **DISMISSED WITH PREJUDICE**.

I further **ORDER** that appellant be reinstated to her position as a correction officer (subject to the earlier imposed suspension and/or any later disciplinary action that may have been taken as to the pending charges), and that back pay and other benefits be issued to appellant as may be dictated by N.J.A.C. 4A:2-2.10.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/7/11
DATE

**MICHAEL ANTONIEWICZ**, ALJ

Date Received at Agency: Sept 7, 2011

Date Mailed to Parties: SEP - 8 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

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