B-128

STATE OF NEW JERSEY

In the Matter of Thomas Caraccio,
Hudson County

CSC Docket No. 2015-3045

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

Request for Enforcement

ISSUED: OCT 24 2016 (JET)

Thomas Caraccio, a County Correction Officer with Hudson County, represented by Charles J. Sciarra, Esq., seeks enforcement of the attached Civil Service Commission (Commission) decision rendered on December 17, 2014, awarding counsel fees.

By way of background, the appointing authority issued a PNDA dated April 1, 2014, charging the appellant with insubordination, conduct unbecoming a public employee, neglect of duty, and other sufficient cause. Specifically, the appointing authority alleged that the appellant failed to provide a note from his treating psychiatrist agreeing that he was fit for duty. As such, the appellant was suspended effective April 1, 2014, and was removed from employment. The appellant subsequently appealed to the Commission, and the matter was referred for a hearing to the Office of Administrative Law. Following a hearing, the Administrative Law Judge (ALJ) determined that the charges stemming from the appellant's failure to submit a note pertaining to his fitness for duty were not sustained and recommended reversing the removal. The Commission adopted the recommendation, reinstated the appellant, and awarded back pay, benefits, and counsel fees.

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 his request, the appellant's attorney filed an application for counsel fees and provided a certification of services requesting $3,900 for 9.75 hours of work at a rate of $400 an hour for Sciarra, and $7,460 for

37.30 hours of work at a rate of $200 an hour, for a total of $7,460 for Christopher Gray, Esq., and $1,356.25 for 7.75 hours of work at a rate of $175 for Debra Masker Edwards, Esq. The appellant provides an itemized statement of services performed by these attorneys. Mr. Sciarra is a partner in a law firm and public records indicate that he was admitted to the New Jersey Bar in 1996 and Mr. Gray is an associate in a law firm and public records indicate that he was admitted to the New Jersey Bar in 2007. 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. Therefore, the appellant requests a total of $12,737.70 for counsel fees and costs.

The appointing authority, represented by Chanima K. Odoms, Esq., maintains that the appellant's request for enhanced counsel fees is excessive and outside the scope of *N.J.A.C.* 4A:2-2.12. Specifically, the appointing authority asserts that appellant's counsel is attempting to overbill it despite the fact that the Commission previously determined that Mr. Sciarra is not entitled to $400 an hour and Ms. Edwards is not entitled to $175 an hour. As such, they should be aware at this point that they are not entitled to enhanced counsel fees. The appointing authority adds that Mr. Gray is not entitled to $200 an hour since he is not a partner in a law firm. In addition, it states that appellant's attorney did not attempt to settle this matter in good faith prior to filing the instant request for counsel fees. In this regard, the appointing authority contends that, when it notified the appellant's attorney that the bill for services was excessive, the appellant's attorney merely offered to reduce the bill by 20%. The appointing authority explains that when it did not accept the appellant's offer to reduce the bill, the appellant's attorney did not continue to negotiate in good faith. The appointing authority avers that it should not be forced to pay for the appellant's request to be reimbursed for counsel fees since the appellant's attorney did not continue to negotiate. In this regard, it claims that the application for attorney's fees in the instant matter is being used as a way for appellant's counsel to request additional fees that would not otherwise be awarded had the matter been settled. Moreover, the appointing authority states that the appellant has provided documentation from a prior matter, *In the Matter of Thalia Mendoza* (CSC, decided June 3, 2015), in an attempt to combine the request for fees in this matter with fees that have already been awarded.

Additionally, the appointing authority asserts that *N.J.A.C.* 4A:2-2.12(d) mandates that an attorney having a specific fee agreement with the employee or employee's negotiations representative is required to disclose that agreement to the appointing authority as a pre-requisite to filing for the award of counsel fees. Further, the appellant's attorney was advised in prior Commission decisions that the fee agreement is required in order for it to render a decision. As such, counsel's failure to provide the fee agreement now constitutes a "willful non-compliance" with prior Commission decisions and, therefore, the request for counsel fees should be denied. Further, the appointing authority contends that the appellant participates

in a Police Benevolent Association (PBA) Legal Defense Plan (LPP) for Correction Officers. In this regard, the appellant's attorney was previously advised in prior Commission decisions that such plans constitute a specific fee agreement of $125 an hour. The appointing authority states that the appellant's attorney would benefit from unjust enrichment if an amount in excess of $125 an hour is awarded. Given that *N.J.A.C.* 4A:2-2.12 establishes that an attorney is not entitled to a greater rate than as set forth in the fee agreement, the Commission should only award an hourly rate of $125 an hour. Accordingly, the appointing authority requests that the appellant be awarded 44.30 hours at a rate of $125 an hour for total of $5,537.50. Moreover, the appointing authority asserts that appellant's request for $21.45 for photocopying costs should be denied since it represents normal overhead costs. *See N.J.A.C.* 4A:2-2.12(g).

In response, the appellant asserts that the instant request was not simultaneously prepared with the *Mendoza* matter. The appellant explains that the appointing authority's claim of double billing is incorrect as that matter is separate and distinct from the instant matter. The appellant adds that the appointing authority failed to properly review his attorney's bill for services and the supporting documentation that was provided. In this regard, the appellant notes that the information from the separate *Mendoza* matter is provided only for the sake of efficiency since that it was recently decided by the Commission. In addition, the appellant contends that there is no fee agreement to provide. Further, the appellant states that his attorney attempted to settle the matter in good faith and an agreement could not be reached. As such, the appellant appropriately filed the instant request for fees. The appellant adds that his attorney's request for the rates listed in the certification for services is appropriate based on their level of experience and the work they performed. Moreover, the request for additional fees in support of the application for counsel fees would not have occurred if the appointing authority had settled the matter when it had the opportunity.

Notwithstanding his initial assertion that there was no fee agreement to provide, in a subsequent submission, the appellant's attorney provides a copy of an unsigned LPP which he claims covers the appellant. The appellant's attorney asserts that the LPP provides for payment of a $125 hourly rate. Further, the appellant's attorney argues that there is no "willful violation" of any prior Civil Service decisions since he provided the LPP for review. In addition, the appellant's attorney argues that the LPP allows attorneys to recover their customary rates from the appointing authority when employees are successful in their defense of the administrative charges. In this regard, he states that the LPP is an excess plan only and participating attorneys are free to seek reimbursement of their customary rates from their employers in appropriate cases. Accordingly, appellant's counsel maintains that they are entitled to the enhanced counsel fees.

It is noted that the LPP 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).

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 argues that the appellant's attorney willfully failed to provide a copy of the specific fee agreement as required by *N.J.A.C.* 4A:2-12(d). The appointing authority correctly argues that *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. A review of the record reflects that Mr. Sciarra initially argued that there was no specific fee agreement. However, the record reflects that Mr. Sciarra subsequently provided a copy of the LPP in a response dated June 11, 2015, which the appointing authority does not dispute. Although the LPP is unsigned, it is consistent with similar LPPs that have been submitted by the appellant's attorney in prior matters. Further, Mr. Sciarra admits that he provided the LPP in light of the *Mendoza* decision. As such, the Commission does not find that Mr. Sciarra's actions in this matter constitute a willful non-compliance with any prior Commission decisions. Moreover, the Commission finds that the appointing authority was provided with a sufficient opportunity to review the LPP. However, it did not provide any further arguments pertaining to the LPP after it was provided in the appellant's June 11, 2015 response. Accordingly, the appointing authority's arguments pertaining to the failure to provide the fee agreement are of no moment.

In regard to the argument that the appellant's attorney failed to negotiate the matter in good faith, the appeal, appellant's counsel explains that an attempt was made to settle the request for counsel fees, which the appointing authority does not dispute. Further, the appointing authority admits that the appellant offered to reduce the bill by 20%. The fact that an agreement could not be reached does not evidence that the appellant did not attempt to negotiate the matter in good faith. Accordingly, the Commission finds that the appellant's attorney attempted to negotiate the request for fees with the appointing authority and an agreement could not be reached. When settlement cannot be reached, the Commission can review the matter and the appellant acted appropriately since a settlement could not be reached.

In this matter, Mr. Sciarra, confirms 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 "It is an excess plan only. Participating attorneys are free to seek reimbursement of their customary rates from their employers in appropriate cases." While this may be the case, the provision from the plan the appellant's attorney 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." 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). *See also, Mendoza, supra.* 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 him from pursuing counsel fees in this matter. As noted above, *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. Although the LPP is not signed, the Commission will award counsel fees of $125 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.

Regarding the appointing authority's argument that the appellant submitted documentation from the separate *Mendoza* matter in an attempt to double bill the appointing authority, the record does not evidence that the appellant's attorney is requesting to be reimbursed for fees pertaining to that matter. The Commission is satisfied that the appellant's attorney submitted documentation from the *Mendoza* matter *only* for the sake of efficiency. Moreover, the Commission is not persuaded that the appellant's request for additional fees pursuant to the application for attorney's fees is an attempt to overbill the appointing authority. With respect to his request for counsel fees for pursuing this matter before the Commission, generally, an appellant is entitled to counsel fees regarding his enforcement request for his 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 $12,737.70 in counsel fees and costs for 54.08 hours of legal work at a rate of $400 an hour for Mr. Sciarra, $200 an hour for Mr. Gray, 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. Therefore, 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: 9.75 hours x 125 = $1,218.75

Mr. Gray: 37.3 hours x 125 = $4,662.50

Ms. Edwards: 7.75 hours x 125 = $968.75

Total: $6,850

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 in the amount of $21.45. Therefore, the Commission finds that the appellant is entitled to reimbursement for $6,850 in counsel fees.

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 the appointing authority pay counsel fees in the amount of $6,850 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 19th DAY OF OCTOBER, 2016

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: Thomas Caraccio
Charles J. Sciarra, Esq.
Chanima K. Odoms
Joseph Gambino

A-4

STATE OF NEW JERSEY

In the Matter of
Thomas Caraccio
Hudson County
Department of Corrections

CSC DKT. NO. 2014-3193
OAL DKT. NO. CSR 07879-14

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: December 17, 2014 PM

The appeal of Thomas Caraccio, a County Correction Officer with Hudson County, Department of Corrections, of his removal effective June 16, 2014, on charges, was heard by Administrative Law Judge Barry E. Moscowitz, who rendered his initial decision on November 3, 2014, reversing the removal. Exceptions were filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on December 17, 2014, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

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,* unpublished, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay and counsel fees 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 his permanent position.

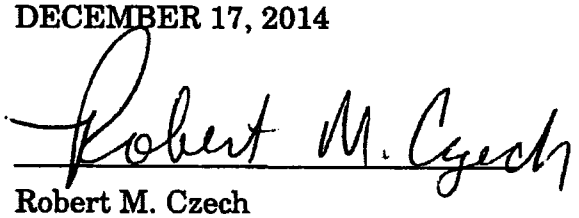
ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Thomas Caraccio. The Commission further orders that appellant be granted benefits and seniority for the period of separation to the actual date of reinstatement. However, the amount of back pay awarded is to commence on January 11, 2014, the date in which the ALJ determined the appellant submitted his return to work paperwork and 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.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees 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 and *N.J.A.C.* 4A:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and counsel fees 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 shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
DECEMBER 17, 2014



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 07879-14
2014-3193

IN THE MATTER OF THOMAS CARACCIO, HUDSON COUNTY (CORRECTIONS).

Christopher A. Gray, Esq., for petitioner (Sciarra & Catrambone, attorneys)

Chanima K. Odoms, Assistant County Counsel, for respondent (Donato J. Battista, County Counsel)

Record Closed: September 22, 2014 Decided: November 3, 2014

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

On June 16, 2014, Hudson County removed Caraccio from his position as a county correction officer for not providing a note on and then returning to duty in a timely manner. No timetable, however, was ever established to provide the note or return to duty. Was Caraccio insubordinate? Did he neglect his duty? No. One cannot be insubordinate or neglect a duty in the absence of an order or a duty.

PROCEDURAL HISTORY

I.

On October 10, 2013, Hudson County serviced Caraccio with a Final Notice of Disciplinary Action. In its notice, Hudson County charged Caraccio with insubordination in violation of N.J.A.C. 4A:2-2.3(a)(2), conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7), and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11). Hudson County specified that on August 15, 2013, Caraccio was arrested for driving while intoxicated in violation of N.J.S.A. 39:4-50, and careless driving in violation of N.J.S.A. 39:4-97. In addition, Hudson County specified that on the same date, Caraccio had struck multiple vehicles and was observed urinating in public. Moreover, Hudson County demoted Caraccio from his position as sergeant to correction officer and suspended him for 120 days.

Caraccio immediately appealed the determination to the Office of Administrative Law and the hearing was held by another administrative law judge whose decision is still pending.

II.

On April 1, 2014, Hudson County served Caraccio with another Preliminary Notice of Disciplinary Action. In its notice, Hudson County charged Caraccio with insubordination in violation of N.J.A.C. 4A:2-2.3(a)(2), conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7), and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11). Hudson County specified that on December 12, 2013, Caraccio was evaluated by William B. Head, Jr., M.D. to assess his fitness for duty; that Head concluded in his report that Caraccio was fit for duty—provided he obtained a note from his treating psychiatrist agreeing that he was fit for duty; and that Caraccio had failed to provide the note and return to duty in a timely manner. As such, Hudson County suspended Caraccio effective April 1, 2014, and sought his removal.

On June 16, 2014, Hudson County served Caraccio with a Final Notice of Disciplinary Action. In its notice, Hudson County sustained its charges and specifications, except for the charge of other sufficient cause. As a result, Caraccio was removed from his position as a correction officer, effective June 16, 2014.

On June 24, 2014, Caraccio filed an appeal directly with the Office of Administrative Law. An initial prehearing conference call was held on July 15, 2014, during which time immediate hearing dates were offered. The parties estimated that two hearing dates would be required and agreed to two hearing dates in September 2014. The hearing was scheduled for hearing on September 22, 2014, and September 26, 2014. On September 22, 2014, I held the hearing and closed the record. The second hearing date was not needed.

DISCUSSION AND FINDINGS OF FACT

I.

Kalimah Ahmad is the legal advisor to the Hudson County Correctional Facility where Caraccio worked and the one who drafted the Final Notice of Disciplinary Action in this case.

Ahmad testified that the psychiatrist who performed the fitness for duty exam in this case, William Head, Jr., M.D., concluded in his fitness for duty report that Caraccio was fit for duty but wanted a note from his treating psychiatrist, Edward Farkas, M.D., agreeing that Caraccio was fit for duty before Caraccio would be returned for duty.

Ahmad further testified that on December 13, 2013, she advised Caraccio that she needed the note from Farkas before he could return to duty, but that she did not receive the note from Farkas until March 20, 2014, at which time she reported its receipt to county counsel, who drafted the Preliminary Notice of Disciplinary Action seeking removal of Caraccio from his position as a county correction officer.

Ahmad testified on cross-examination that she was not privy to any conversation between Caraccio and county counsel before this date or why county counsel drafted the preliminary notice when he did.

Significantly, Ahmad further testified on cross-examination that she is not familiar with the fitness for duty policy in Hudson County or the procedure in Hudson County for returning someone to duty.

A.

The relevant portion of the fitness for duty report is reproduced below. The report clearly states that no objective clinical evidence of any psychiatric condition existed that would have prevented Caraccio from returning to work. It also provides no timetable for Caraccio or Farkas to submit the note:

> COMMENTS & CONCLUSIONS
>
> The following conclusions have been made within a reasonable degree of medical certainty.
>
> I found no objective clinical evidence of any psychiatric condition that would prevent Sgt. Caraccio from returning to full duty as a Corrections Sgt. at this time.
>
> However, for the sake of completeness, I would add that, prior to his return to duty, his treating psychiatrist, Dr. Farkas, should write a note regarding his opinion regarding the Sergeant returning to duty. So long as Dr. Farkas agrees, I would conclude that Sgt. Caraccio should now be cleared for return to duty, as his clinical psychiatric examination is normal.
>
> [C-2 at page 10.]

B.

The letter Ahmad then sent to Caraccio also provides no timetable for Caraccio or Farkas to submit the note:

Dear. Mr. Caraccio:

Enclosed for your review is a copy of the report of your examination on December 2, 2013 with Dr. William B. Head, Jr. I direct your attention to page 10 of the report under the section "COMMENTS & CONCLUSIONS" where Dr. Head concludes that **your treating psychiatrist, Dr. Farkas[,] provide us with a note regarding his opinion of returning to work prior to returning to duty.** Please be guided accordingly.

Once my office receives the note from your psychiatrist you will be contacted to report back to work. In efforts to expedite this process, feel to provide your doctor with my email address (kahmad@hcnj.us). If you have any questions, contact me at my extension below.

Very truly yours,

Kalimah H. Ahmad
Human Resources, HCDOC

[C-3 (emphasis in the original).]

II.

Ahmad testified that on March 20, 2013, she received the note. But the note had previously been sent to county counsel between January 11, 2014, when Farkas wrote the note, and March 20, 2013, when Ahmad received it. Like the report, the note clearly states that Caraccio was fit for duty:

January 11, 2014

RE: Thomas Caraccio

To Whom It May Concern:

As the treating psychiatrist of the above individual I see no reason not to concur with the report and conclusions of Dr. Head. I have in fact now [seen] Tom on three separate visits to my office finding him a personable, bright person without psychiatric contraindications to his return to his former position. This is of course provided he remains in control of his drinking and continues his work with AA.

Sincerely,

Edward Farkas, M.D.
Board-Certified Psychiatrist

[C-5.]

A.

Although this note from Farkas had not been forwarded to Ahmad or Head before March 20, 2013, Ahmad had no qualms about receiving it when she did. Evidence of this is the fact that Ahmad provided no timetable for the submission of the note; the fact that Ahmad never contacted Caraccio, Head, or county counsel between December 13, 2013, and March 20, 2014, to learn the status of the note; and the fact that Head alerted Ahmad that he had not yet received the note. In other words, Ahmad did not alert Head or county counsel that she had not yet received the note.

Additional evidence of the fact that Ahmad had no qualms about receiving the note when she did is the fact that that county counsel (not Ahmad) then advised Caraccio that Ahmad and Head had not received the note; the fact that Caraccio emailed another copy of the note to county counsel (not Ahmad); and the fact that county counsel (not Ahmad) drafted the Preliminary Notice of Disciplinary Action.

In fact, Ahmad simply returned Caraccio to work on April 9, 2014, when Head cleared Caraccio for his return, and had absolutely no part in the preliminary discipline.

As far as Ahmad was concerned, Caraccio had simply been suspended without pay since October 2013, with no timetable set for his return.

B.

More egregiously, Ahmad could provide no good reason for her assertion that Caraccio was insubordinate in March 2014 when she and Head received the note from county counsel but would not have been insubordinate in January 2014 had she or Head had received the note from Farkas or county counsel then.

Indeed her explanation that Caraccio was "absent without leave" between December 2013 and April 2014 was especially damning because she readily admitted that Caraccio was never charged with having been absent without leave and had simply been recorded as having been suspended without pay.

To make matters worse, Ahmad admitted that his personnel record was later changed from having been suspended without pay to "did not report."

C.

To repeat, Head cleared Caraccio to return to work on April 9, 2014, and Ahmad returned Caraccio to return to work on April 9, 2014, but county counsel sought his removal before then, and drafted the Preliminary Notice of Disciplinary Action on April 1, 2014, without discussing it with Ahmad, or even making her aware of it.

Then Ahmad changed tack and drafted the Final Notice of Disciplinary Action on June 16, 2014.

As such, these circumstances lend credence to the notion Caraccio raised during his testimony that Hudson County seized upon miscommunication between and among Ahmad, county counsel, and Caraccio, as an opportunity to remove Caraccio from his position as a county correction officer.

III.

Although Caraccio has self-interest in preserving his job and preventing his removal, I detected no such self-interest in his testimony. I only sensed straightforward statements of fact. And in doing so, I found Caraccio to be a more credible witness than Ahmad.

Caraccio testified that he saw Head on December 2, 2013, that he received his report on December 13, 2013, and that he contacted Farkas that day. Caraccio further

testified that he was informed Farkas was on vacation and that the soonest he could see Farkas was sometime before January 11, 2014. Caraccio then testified that he saw Farkas in early January 2014, that he received the note from Farkas by email on January 11, 2014, and that he forwarded the note by email to his attorney and Ahmad that day. As Caraccio testified, he forwarded it "immediately" and used the email address Ahmad had provided in her letter.

Meanwhile, Ahmad had admitted during her cross-examination that she sometimes does not receive emails that are sent to her.

In addition, Caraccio verified that he received the Preliminary Notice of Disciplinary Action from county counsel on April 1, 2014, before Ahmad returned him to work on April 9, 2014, and that he later saw his records had been changed from having been suspended without pay to "did not report."

Parenthetically, Caraccio explained that he no longer had a copy of the email forwarding the note from Farkas to his attorney and Ahmad because his email settings delete all emails older than thirty days and that it did not occur to him to keep a hard copy of that email.

Finally, Caraccio asserted that he never contacted Ahmad about his return to work because he had retained an attorney to represent him on his appeal of his 120-day suspension for driving while intoxicated, that he understood all communication was to have been through his attorney, and the he knew his attorney had already been working with county counsel on his return to duty.

Once more, I found this testimony by Caraccio to be straightforward, believable, and without artifice.

IV.

Given this discussion of the facts, I **FIND** that Caraccio saw Head on December 2, 2013; that Ahmad forwarded the fitness for duty report from Head to Caraccio on

December 13, 2013; and that Caraccio contacted Farkas to schedule an appointment regarding his fitness for duty that very same day.

I also **FIND** that Caraccio was informed Farkas was on vacation and that the soonest he could see Farkas was sometime before January 11, 2014; that he saw Farkas in early January 2014; that he received the note from Farkas by email on January 11, 2014; and that he forwarded the note by email to his attorney and Ahmad that very same day too.

Indeed I **FIND** that Caraccio forwarded the note to Ahmad by email "immediately" and that he used the email address Ahmad had provided in her letter.

More important, I **FIND** that Hudson County had not established a timetable for Caraccio or Farkas to provide the note regarding Caraccio and his fitness for duty; that Hudson County had not established a timetable for Caraccio to return to duty, either before or after it received the note; and that Ahmad had no concern whatsoever about when she even received the note from Caraccio or Farkas about his fitness for duty, let alone when Caraccio returned to duty.

V.

In short, I **FIND** that Hudson County has failed to prove by a preponderance of the evidence any of the specifications contained in its Final Notice of Disciplinary Action.

DISCUSSION AND CONCLUSIONS OF LAW

In appeals concerning major disciplinary action, the appointing authority bears the burden of proof. N.J.A.C. 4A:2-1.4(a). The burden of proof is by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), and the hearing is de novo, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980). On such appeals, the Civil Service Commission may increase or decrease the penalty, N.J.S.A. 11A:2-19, and the concept of progressive discipline guides that determination, In re Carter, 191 N.J. 474, 483-86 (2007).

Since I found that Hudson County has failed to prove by a preponderance of the evidence any of the specifications contained in its Final Notice of Disciplinary Action, I **CONCLUDE** that Hudson County has failed to prove by a preponderance of the evidence any of the charges in its Final Notice of Disciplinary Action and that this case against Caraccio should be dismissed.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that this case against Caraccio be **DISMISSED**; that Caraccio be returned to his position of correction officer and be awarded back pay from the effective date of his removal pending the outcome of the previous case against him; and that Caraccio be awarded full counsel fees and all costs related to this case.

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