A-7

STATE OF NEW JERSEY

In the Matter of Migdoel Rivera
Hudson County,
Department of Corrections

CSC DKT. NO. 2016-3747
OAL DKT. NO. CSR 06456-16

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 28, 2105 BW

The appeal of Migdoel Rivera, County Correction Officer, Hudson County, Department of Corrections, removal effective April 13, 2016, on charges, was heard by Administrative Law Judge John B. Scollo, who rendered his initial decision on October 24, 2016 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 November 23, 2016, 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*, 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 or 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 Migdoel Rivera. The Commission further orders that appellant be granted back pay, benefits, and seniority for the period of separation to the actual date of 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 and an affidavit of mitigation 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
NOVEMBER 23, 2016

Robert M. Czech
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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 06456-16
AGENCY DKT. NO. N/A 2016-3747

MIGDOEL RIVERA,

Appellant,

v.

HUDSON COUNTY DEPARTMENT OF CORRECTIONS,

Respondent.

Robert A. Fagella, Esq., for appellant (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Daniel W. Sexton, Esq., for respondent (Donato J. Battista, Hudson County Counsel)

Record Closed: August 29, 2016 Decided: October 24, 2016

BEFORE **JOHN P. SCOLLO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent, Hudson County Department of Corrections (DOC), brought a major disciplinary action against appellant, Migdoel Rivera (Rivera), a correction officer, removing him effective April 13, 2016.

The event that gave rise to the charges brought against Rivera occurred on January 10, 2016, when Rivera called DOC at 1:05 p.m. to report that he was ill and unable to report to work for his 2-p.m.-to-10-p.m. shift. DOC rules require correction officers to call, when unable to report to work, at least sixty minutes before the start of their shift. (This was alternately referred -to as "call-in" or "call-out".)

In its Disciplinary Action (R-2) and in its Preliminary Notice of Disciplinary Action (PNDA) (R-1) DOC alleged that Rivera violated Regulation 3:6.2 (Absenteeism). DOC alleged that Rivera's conduct was actionable under five different sections of the New Jersey Administrative Code:

(1) N.J.A.C. 4A:2-2.3(a)(1) (Incompetency, Inefficiency, Failure to Perform Duties);

(2) N.J.A.C. 4A:2-2.3(a)(2) (Insubordination);

(3) N.J.A.C. 4A:2-2.3(a)(3) (Inability to Perform Duty);

(4) N.J.A.C. 4A:2-2.3(a)(6) (Conduct Unbecoming a Public Employee); and

(5) N.J.A.C. 4A:2-2.3(a)(7) (Neglect of Duty); termed "Excessive Absenteeism."

The PNDA dated February 17, 2016, was served on Rivera on February 26, 2016, at which time Rivera wrote "Not in agreement" on the PNDA. After a departmental hearing on April 5, 2016, DOC served a Final Notice of Disciplinary Action (FNDA) on April 16, 2016, removing Rivera effective April 13, 2016. On April 19, 2016, Rivera requested a hearing and forwarded simultaneous appeals to the Civil Service Commission and the Office of Administrative Law (OAL), pursuant to N.J.S.A. 40A:14-200 et seq. This matter was filed with the OAL on April 20, 2016, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The tribunal heard the matter on August 5 and 6, 2016, and the record closed on August 29, 2016, after receipt of written summations from both parties.

FACTUAL DISCUSSION

Testimony of Lt. Eric Taylor (Ret.)

Lieutenant Taylor was the Unit One commander, and Rivera's unit manager, when the subject event occurred on Sunday, January 10, 2016. He was not on duty at the time of Rivera's call-out. Taylor stated that the policy of the jail, as set forth in the DOC's Regulations, required any officer wishing to call out from work to do so at least sixty minutes before the start of his or her shift. Taylor explained the meaning and the purpose of the subject regulation. He referred to and identified the Regulations. He also referred to and identified the DOC policy entitled "Requesting Days Off" (hereinafter "the Policy"). Section III of the Policy is captioned "Procedures." Section (B)(3) of Procedures states:

> In any case, a doctor's note or other proper documentation substantiating the medical or family emergency must be provided upon return to duty.
>
> [R-3.]

Because of this Policy, Taylor expected Rivera to submit appropriate documentation explaining why he called in at 1:05 p.m. on January 10, 2016, to notify the DOC that he would not be reporting for his scheduled 2-p.m.-to-10-p.m. shift.

Taylor explained that if an officer were going to call out, he had to promptly notify the DOC, because DOC needed to ensure adequate staffing. Thus, an officer was required to call the jail at least sixty minutes before the start of his shift in order to allow supervisory personnel time to contact replacements. Taylor further explained that although a shift began at the top of the hour, an officer was required to attend muster fifteen minutes before the start of his official shift. The practical effect of this was that an officer was really required to call in sixty minutes before the start of muster, not sixty minutes before the start of his shift.

Taylor described the process involved in an officer's call. The call would be taken by an officer in Central Control (in this instance it was handled by Sergeant Queiros), who would ask the caller for the reason why he/she was calling out. The reason would be placed in narrative form in a "Reason text" box on a form called "View Activity Report". (R-2.) Taylor pointed out that the contents of the "Reason text" box read, "called @1:10 p.m. requesting an I/M day, (per Sgt. Aherns it would be ANP & the officer was informed to contact his Unit manager)." An "I/M day" stands for an intermittent medical leave day under the Federal Family and Medical Leave Act (29 U.S.C.A. § 2601 et seq.). Taylor explained that "ANP" meant "Absent No Pay."

Taylor testified that as manager of Unit One, he was responsible for handling discipline issues. He testified that since he did not receive an explanation from Rivera regarding his late call-out on January 10, 2016, he decided to initiate disciplinary action. He prepared a Disciplinary Action Form, dated it January 13, 2016, and signed it on January 14, 2016. (R-2.) This form advised Division/Bureau chief Tish Castillo that charges would be brought against Rivera due to the late call-in on January 10, 2016, and that he recommended that Rivera be terminated. Castillo signed this form on January 22, 2016. The same charges set forth on R-2 were later formalized in the PNDA (R-1) and in the FNDA (J-2).

On cross-examination, Taylor testified that the text of the one-hour call-in Regulation did not contain any exceptions, but he said that, in practice, DOC management would apply the rule in a flexible fashion, foregoing disciplinary charges if there was a reasonable explanation for an officer calling in inside the sixty-minute time period. Taylor stated that an officer's explanation of having a flat tire on his way to work would be a sufficient reason not to bring disciplinary charges. Taylor added that it was also necessary for the officer to provide that explanation directly to him. Taylor stated that he had an "inbox" where anyone could leave him messages. When asked if he would have accepted a late-calling officer's explanation that he, while on his way to work, suffered a sudden onset of severe gastric pain, which caused him to seek medical help that day, Taylor replied that that would have been an acceptable reason not to bring charges. However, Taylor added that he did not get such an explanation from Rivera, and denied receiving a note from Dr. Richard Maggio in his inbox. Taylor

identified A-2, a note from Dr. Maggio, which bore no date on it, and A-5, Rivera's Application for Family and Medical Leave, which he had not seen previously, but which he knew about. Taylor stated that although he saw Dr. Maggio's note at the departmental hearing, he never saw the note in his inbox. Importantly, Taylor acknowledged that there was no way that anyone who left a message in Taylor's inbox could be sure that the message was received by Taylor. He testified that the charges against Rivera may not have been brought if he had received Dr. Maggio's note, but added that since the note was undated, he likely would have rejected it, or perhaps would have asked the officer for more information.

In regard to the Application for Intermittent Leave under the FMLA, Taylor testified that he was aware that Rivera had filed the application, but said that he had never seen it. Taylor testified that he told Rivera to check with the Personnel Department because he had been told that more information was needed, and thus it was still considered as pending.

In regard to the call-in procedure, Taylor testified that the Control Center's officer on duty (here Sergeant Queiros) would have told Rivera at the time he called in his request for an I/M day that he would have to follow up and explain his request to Lieutenant Taylor. However, upon further questioning, Taylor admitted that he did not know for a fact that anyone had actually explained this to Rivera.

On cross-examination, Taylor was asked about the timing of the charges. He admitted that he drafted the Disciplinary Action Form (R-2) on January 13, 2016 (three days after the late call-out), he signed it on January 14, 2016, and Castillo signed it on January 22, 2016. However, he did not draft the PNDA until February 17, 2016, and did not serve it on Rivera until February 26, 2016. He admitted that between January 13 and February 26 Rivera had no idea that charges were being prepared against him. Taylor presented no coherent explanation for the delay and did not offer any explanation for not contacting Rivera in the interim.

During the course of his testimony, Taylor stated that Rivera had presented several types of attendance or lateness issues and had been previously disciplined for

calling in late. The DOC attempted to introduce further evidence of past discipline for attendance and lateness for the purpose of proving the current charges and for the purpose of justifying the validity of the penalty it imposed—removal—in the case at bar. Counsel for Rivera objected to evidence of past violations to prove the current charges, referring indirectly to Evidence Rule 404(b).

The tribunal cautioned the DOC's counsel that he could not proceed to prove his case in chief on a "bad-man" theory, but must restrict himself to presenting evidence supporting violation of the current charges. The tribunal found the use of prior bad acts to prove the DOC's case in chief objectionable under a plain reading of Evidence Rule 404(b), which says:

> Other crimes, wrongs or acts. Except as otherwise provided by Rule 608(b), evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

Evidence Rule 608(b) is inapplicable since it deals with attacking the credibility of a witness who has made a prior false accusation against another. That is not the case here. Likewise, motive, intent, opportunity, etc., are not at issue here. The heart of Evidence Rule 404(b) is the prohibition against using a person's prior bad acts to prove that he is guilty of a charge currently pending against him. In New Jersey Rules of Evidence 2010 edition, Gann Law Books, at page 192, the comment reads:

> Application and policy of exclusionary rule. In general, other crimes, wrongs, or acts (i.e. other "bad conduct") evidence may not be introduced to show that a person is in general disposed toward criminal or tortious behavior, or to any specific conduct, and therefore guilty of committing the crime, tort or act which is the subject of the action. See State v. Reddish, 181 N.J. 553, 608 (2004).

Sexton responded by arguing that the Rules of Evidence did not apply in administrative hearings, and even if they did, the testimony was relevant and non-prejudicial, citing Evidence Rules 401 and 402. Moreover, Sexton argued that under Evidence Rules 404(c) and 608 character evidence was admissible. This missed the point of what the tribunal found objectionable. The issue was not character. The issue was about the propriety of using prior bad acts to prove the case in chief. The tribunal considered the DOC's arguments relevant only on the issue of the appropriateness of the penalty, rather than on the issue of guilt or innocence on the current charges.

The tribunal's ruling, in essence, was that Evidence Rule 404(b) should be followed and that it barred the introduction of past wrongs as proof of the violations charged here. The Employee Profile (R-4), which contains Rivera's disciplinary history, was accepted into evidence in the event that the tribunal found in favor of the DOC and needed to consider evidence relating to the employee's disciplinary history for determining the appropriateness of a penalty.

Testimony of Ronald Edwards, Deputy Director, Hudson County Correctional Facility

Ronald Edwards was appointed as the deputy director of the Hudson County Correctional Institution in January 2016. He testified that he had no direct knowledge of the circumstances of this case. Having previously served in the Office of Professional Standards and as a unit manager he was familiar with the Regulations and the application of the jail's policies. He confirmed Taylor's explanation of the one-hour-call-in rule, saying that it was necessary to ensure sufficient staffing of the jail. He confirmed that the one-hour call-in rule is referred to as the "golden-hour rule."

Edwards confirmed that the rule itself contained no exceptions to the one-hour call-in mandate; however, he confirmed that disciplinary charges would not be brought if the officer who called in late had a satisfactory explanation for doing so. He stated that he knew of at least a dozen instances where officers who called in late (and thus were in violation of the rule) were not disciplined because of extenuating circumstances that were subsequently sufficiently documented. He cited an instance where an officer had an accident on the N.J. Turnpike, called in late, but presented paperwork proving that

he was in an accident and unable to call in until inside the one-hour window. He testified that an officer had a family emergency (i.e., a child getting sick at home) and the officer was excused from calling in late because he presented a note from the child's doctor.

On cross-examination, Edwards was questioned about whether disciplinary charges would be brought if an officer called in late and later submitted documentation that he had suddenly suffered from a kidney stone. Edwards responded that this would be a valid excuse as long as documentation was submitted showing that he was treated for this condition. The critical element, according to Edwards, was the presentation of sufficient documentation proving the existence of the emergency and the exigency of the situation (e.g., a doctor's note showing that he needed to be seen immediately) to show that the officer had a legitimate excuse for not strictly adhering to the one-hour time limit.

When asked about the process for determining whether a call-out was excusable or not, Edwards testified that if there were extenuating circumstances and proper supporting documentation were submitted, there would be no disciplinary action taken. The officer would simply take sick time or, if no sick time were available, he would be docked pay.

On the issue of who was obligated to contact whom, Edwards testified that each unit manager has his own management style. By this he meant that some unit managers would contact the officer, while others preferred to wait for the officer to contact them.

Finally, on the issue of the FMLA, Edwards expressed his belief that the DOC's rules were compliant with the FMLA because the DOC's Rules and Regulations allowed the unit managers discretion in allowing the officers to take time off as intermittent leave. He added, however, that even if an officer were granted intermittent leave (as opposed to consecutive leave) under the FMLA, he would still have to comply with the requirement of calling in at least one hour prior to the start of his shift in case of a

sudden medical emergency and would still have to present sufficient medical documentation showing that there was an emergency.

Testimony of Richard Maggio, M.D.

Dr. Maggio testified by way of a de bene esse videotape and transcript of same (A-6) taken on July 14, 2016. Dr. Maggio is a board-certified urologist and a personal friend of Migdoel Rivera.

After identifying Exhibit A-2, an undated, handwritten note written by Dr. Maggio, he testified that on January 10, 2016, a Sunday, he received a telephone call on his cell phone from Rivera. Rivera told him that he had had a sudden onset of pain in his back, moving towards the front, accompanied by nausea. Dr. Maggio characterized Rivera's condition as an emergency. Rivera went to Dr. Maggio's home, where Dr. Maggio continued to question him and performed an examination. Based on Rivera's answers to questions and on his symptoms, Dr. Maggio diagnosed him as having renal colic, which he explained was due to a kidney stone. Dr. Maggio told Rivera that he could not report to work that day because he would not be able to work in his condition, that he needed to increase his drinking of water, and that he should take pain medications. Then Rivera went home. Dr. Maggio recalled speaking with Rivera again later that day and learned that he had passed the kidney stone.

Dr. Maggio identified Exhibit A-4, an article about a drug called Norvir-boosted Reyataz, a protease inhibitor, which had a side effect of causing kidney stones. Dr. Maggio had no knowledge of whether Rivera had taken this medication.

Dr. Maggio also identified Exhibit A-3, a typed note by Dr. Maggio to "to whom it may concern" stating that Rivera was diagnosed on January 3, 2016, with a condition that could have flare-ups during treatment that would make it difficult to perform his regular work duties. The note also invited the reader to direct any questions to him.

On cross-examination, Dr. Maggio reiterated that when Rivera arrived at his home in the early afternoon he was in a lot of discomfort, was unable to urinate, was

pale, and exhibited "classic" tenderness in his back that was consistent with kidney stones. He recalled telling Rivera that he could not go to work that day.

Dr. Maggio confirmed that on January 3, 2016, he diagnosed Rivera with prostatitis (see A-3), but did not recall whether he wrote his note of that date for the purpose of supporting Rivera's application for intermittent leave. Dr. Maggio added that prostatitis could cause low-back pain and urinary symptoms. He recalled writing a note on January 10, 2016, because Rivera mentioned that he needed a note for work. Dr. Maggio reiterated that he diagnosed Rivera with a kidney stone (see A-2), commenting that the prostatitis and the kidney stone occurred "almost at the same time."

Testimony of Migdoel Rivera

Migdoel Rivera testified that he had been a correction officer for more than nine years when he was removed in April 2016. He testified that on Sunday, January 10, 2016, he left his home in downtown Jersey City at 12:55 p.m. His destination was his place of employment, the jail located at 35 Hackensack Avenue in South Kearney, N.J. He planned to take his usual route to work, walking one-and-a-half blocks to board a bus for a twenty-minute ride to a bus stop located one block from the jail. That day, he was supposed to work the 2-p.m.-to-10-p.m.-shift, with muster starting at 1:45 p.m.

Before reaching the bus stop he felt a sharp pain, which caused him to kneel down. After suffering two to three minutes of severe pain and vomiting, he called the jail at 1:05 p.m. (as shown on A-1, which he identified as his cell-phone records) and advised Sergeant Queiros that he needed to take an intermittent-leave day. Queiros told Rivera that it was "past time," and then he transferred Rivera to a lieutenant (whose name he could not recall), who told Rivera that he would need to bring in documentation of his illness. Rivera testified that no one ever told him that he needed to go to Lieutenant Taylor and personally explain the reasons for his late call-out.

Rivera testified that after he called in he proceeded to walk home. While doing so, he sent a text to his brother, who lives in the same building. He told his brother about his illness. His brother tried to find a doctor on the Internet, but then they decided

to go to the emergency room at Jersey City Medical Center. However, when they saw how busy the emergency room was they decided to send a text to Dr. Maggio at his cell-phone number. By now it was 3:16 p.m. Dr. Maggio responded within twenty minutes and instructed Rivera to come to his home in Jersey City.

At Dr. Maggio's home, Rivera told Dr. Maggio about the sudden onset of pain, its anatomical location, and the fact that he could not urinate, etc., and Dr. Maggio diagnosed him as having a kidney stone. Dr. Maggio sent him home at around 4 p.m. with instructions to strain his urine so as to catch the stone when it passed. At 5:13 p.m. he called Dr. Maggio to say that he had blood in his urine, but that the pain had subsided. Dr. Maggio advised him that he had passed the stone, but was dismayed that Rivera had not caught it in the strainer.

While at Dr. Maggio's home, Rivera asked him to write a note to excuse him from work. Dr. Maggio wrote A-2, which Rivera claims to have submitted to Lt. Eric Taylor by dropping it in his inbox in the muster room, where the officers meet and line up before their shifts. Rivera testified that he, using his cell phone, photographed the note lying in Taylor's inbox because he wanted to have proof that he delivered the note.

Rivera testified that he had no idea that the DOC was going to pursue disciplinary charges against him arising out of the January 10, 2016, call-out until Sergeant Moreno served him with the charges on February 26, 2016.

At a certain point in the testimony Rivera offered a "screen shot" downloaded from the Internet, which he purported to be proof that he took the aforementioned photograph at 12:01 p.m. on Monday January 11, 2016, at the jail (showing the latitude and longitude of where the photograph was made and the time of its making). The actual cell phone he used to take the photograph had been damaged and discarded in the interim. Rivera explained how anyone conversant with the features available on his cell phone could download this information. However, this information was only given to respondent's counsel the day before the hearing. The tribunal refused to allow it into evidence because it was not provided in discovery in a timely manner.

Rivera further testified that his doctor had faxed forms containing medical information in support of his FMLA Intermittent Leave Application (A-5) to the jail's personnel administrators on October 14, 2015. The doctor, Andrew Petelin, M.D., stated in these forms that he was Rivera's current treating physician; that Rivera's condition was expected to continue throughout his lifetime; and that flare-ups of Rivera's condition were possible and may necessitate his absence from work. Rivera hand-carried a copy of these forms to the personnel administrators the next day. Having heard nothing from the personnel administrators, he believed that intermittent leave had been granted.

Rivera testified that when he called the jail on January 10, 2016, he had no reason to believe that his intermittent leave was not in effect, as he had followed the DOC's Policy by supplying his unit manager with a doctor's note (A-2). Rivera testified that he was served with disciplinary charges on February 26, 2016. He also testified that it was not until March 2016 that Lieutenant Taylor told him that his intermittent-leave application was still in pending status.

On cross-examination, Rivera agreed that when he called the jail to say that he needed an I/M day, the lieutenant he spoke to told him that he needed to bring in documentation of the illness. He was questioned about why the note he provided did not contain more specificity about the nature of the illness underlying his request for an I/M day. Rivera responded by saying that he presented a doctor's note, and that he specifically told Sergeant Queiros that he was requesting an I/M day.

Rivera was questioned about the fact that he did not mention during the departmental hearing that he had a kidney stone on January 10, 2016. He replied that during that hearing he did not give testimony involving any details of his medical condition. (The tribunal would not allow other questions that disputed Rivera's testimony at the April 5, 2016, departmental hearing, because there was no transcript available from that hearing.)

Rivera was asked about how he had felt earlier in the day on January 10, 2016, and about the suddenness of his illness. He responded that he had felt fine and that the

symptoms came on suddenly. When asked whether Dr. Maggio had prescribed any medications, Rivera stated that Maggio advised him to take Tylenol for pain relief.

FINDINGS OF FACT

After carefully considering the testimonial and documentary evidence presented, and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I **FIND** the following **FACTS**:

1. On January 10, 2016, Migdoel Rivera was employed by the Hudson County Department of Corrections as a correction officer and was scheduled to work the 2-p.m.-to-10-p.m. shift. He was subject to the DOC's "Custody Staff Rules and Regulations Manual," which among other things required that an officer who wanted to give notice to the DOC that he would not be appearing for his scheduled shift (known alternately as a "call-in" or "call-out"), due to illness or some other reason, do so at least sixty minutes before the start of his shift, and actually sixty minutes before the start of muster, which started fifteen minutes before the start of the shift.

2. Regulation 3:6.2 requires a DOC officer who is calling out to contact the jail's Central Control and identify himself, give his contact information, and give the reason why he was calling out. The Policy requires an officer to submit "a doctor's note or other appropriate documentation substantiating the medical or family emergency." On January 10, 2016, Rivera called in to the jail at 1:05 p.m., fifty-five minutes before the start of his shift; identified himself; gave his contact information; and stated the reason why he was calling out. On January 11, 2016, Rivera placed a note from Dr. Maggio (A-2) in Taylor's inbox pertaining to his absence on January 10, 2016.

3. I **FIND** the following testimony offered by Rivera to be credible. On Sunday January 10, 2016, Migdoel Rivera was scheduled to work the 2:00 p.m. to 10:00 p.m. shift. He left his residence in downtown Jersey City at about 12:55 p.m. intending to take public transit to his place of employment. This was

normally a twenty-minute ride. At about 1:02 or 1:03 p.m. while walking to the bus stop, Rivera suddenly felt strong pain in his abdomen and back, which caused him to kneel down. He vomited. At 1:05 p.m., using his cell phone, Rivera called in and stated that he needed to take an Intermittent Leave (I/M) day because of sudden illness. The call was received by Sergeant Queiros, who informed Rivera that he was calling in "past time" and transferred him to a lieutenant, who told Rivera that he needed to submit documentation. I **FIND** that Rivera was confronted with a sudden medical emergency, which he could not anticipate. I **FIND** that the emergency occurred while Rivera was already on his way to work and at a time that was already less than the sixty minutes allowed for Rivera to call-in. I **FIND** that Rivera called his employer within two or three minutes from the onset of his painful and debilitating attack, which I **FIND** was certainly reasonable under the circumstances. I **FIND** that the evidence submitted supports the proposition that Rivera suffered from a sudden, painful and debilitating condition brought on by an having developed a kidney stone. I **FIND** per Dr. Maggio's testimony that Rivera was unable to work on January 10, 2016.

4. I **FIND** the following testimony offered by Rivera to be credible. After calling in to the jail, Rivera walked home and texted his brother about his sudden onset of pain. Soon thereafter his brother took him to Jersey City Medical Center's emergency room. Anticipating a long wait, Rivera at 3:16 p.m. sent a text message to the cell phone of a friend named Richard Maggio, a medical doctor, who specialized in urology. Dr. Maggio had diagnosed Rivera with prostatitis on January 3, 2016. Dr. Maggio responded by text twenty minutes later inviting Rivera to his home in Jersey City. Once there Rivera explained his symptoms and Maggio diagnosed him as having a kidney stone, advised him to take Tylenol, increase his fluids intake, and strain his urine to catch the stone when it passed. Once home, several hours later Rivera passed the stone. Based on Rivera's account of his symptoms and Dr. Maggio's diagnosis, I **FIND** that Rivera suffered an attack of "renal colic" (otherwise known as a kidney stone) on January 10, 2016.

5. While at Dr. Maggio's home, Rivera obtained an undated note from Dr. Maggio, written on one of his prescription pads for Rivera to submit to his employer. The note said: "Please excuse Migdoel Rivera from work on 1/10/16 with return to work on 1/11/16"; and he signed it. (A-2.) I **FIND** that there is nothing in the text of any Regulation cited or in the text of the Policy that mandates the amount of detail about an officer's medical condition that must be disclosed when he submits a doctor's note to his employer. I **FIND** that Rivera submitted A-2, and this in itself was all that the Regulations and the Policy required him to do.

6. Both Lieutenant Taylor and Deputy Director Edwards testified that the Regulations mandated that an officer who fails to adhere to the one-hour call-in requirement is subject to discipline. However, they also candidly testified that the Regulations were applied with flexibility, so that charges would not be brought against an officer who had a good reason for his late call-in and who provided appropriate documentation to verify his story. Their testimonies agreed that such reasons would include road accidents, flat tires occurring during travel, and medical emergencies. They both agreed that a medical emergency such as a kidney stone would be a sufficient reason for a late call-in as long as it was supported with a doctor's note verifying the medical emergency. I **FIND** that DOC's established practice was and is to excuse violations of the one-hour call-in rule when an officer has a legitimate reason for calling in late and when he is able to produce corroborating, supportive evidence for his reason. I further **FIND** that both Taylor and Edwards agreed that the reason presented by Rivera for his late call-in would be considered a legitimate reason for calling in late. I further **FIND** that the medical note of Dr. Maggio (A-2) would, from his testimony, have satisfied Edwards's requirement for corroborating, supporting evidence. I further **FIND** that Taylor admitted that he might not have brought charges had he seen A-2. I **FIND** that Taylor's testimony means – now that there is no question that he has seen A-2 - that he considers Dr. Maggio's note (A-2) to be the type of corroborating, supportive evidence that would be sufficient to excuse Rivera from calling in late on January 10, 2016.

7. R-2 is a "Disciplinary Action" form dated January 13, 2016, filled out and signed by Lt. Eric Taylor. It lists the five charges that later appeared in the PNDA dated February 17, 2016, (R-1) and in the FNDA dated April 15, 2016 (J-2). Also attached as part of R-1 is a document called a "View Activity Report," which contains a place on the form—called the "Reason Text" box—showing the reason for the phone call. The message placed in the Reason/Text box states: "called @1:10 p.m. requesting an I/M day (per Sgt. Aherns it would be ANP & the officer was informed to contact his Unit manager)". I **FIND** that Taylor relied on the information in the "View Activity Report" when he filed charges against Rivera.

8. Taylor was Rivera's unit manager, but was not present on January 10, 2016. Among Taylor's duties was the discipline of officers.

9. Rivera testified that when he returned to work on Monday, January 11, 2016, he placed, per procedure, the original of Dr. Maggio's note (A-2) into Taylor's "inbox" (a device used by Taylor to receive correspondence) to fulfill the requirement of producing documentation explaining his late call-in. Taylor testified that he did not receive A-2 in his inbox and never saw it until the departmental hearing on April 5, 2016. Moreover, Taylor testified that had he received A-2, he would have rejected it as incomplete because it was undated. The tribunal notes that in R-5, Regulation 10.3, captioned "Forward Official Communications," page 67, it says, "A supervisor, who receives a written communication from a subordinate and directed to a higher authority, shall indicate approval, disapproval, or notation as to acknowledgment of content and forward to the next person concerned." I **FIND** that this means that correspondence from subordinates must, at the very least, be acknowledged. A system for assuring the sender of correspondence should certainly have been in place when A-2 was deposited in Taylor's "inbox." However, the "inbox" system did not allow for this. This certainly cannot be deemed the fault of the officer. Accordingly, after considering the above-cited Regulation and all of the documentary and testimonial evidence presented, I **FIND** that Rivera placed A-2 into Taylor's inbox and photographed it. Moreover, I **FIND** that on or about

January 11, 2016, Taylor accepted A-2, did not contest its contents, did not request additional information from Rivera, and did not raise a question about the lack of a date on it.

10. Rivera testified that on October 14, 2015, he completed his portion of an application for intermittent leave under the federal "Family Medical Leave Act" and that his physician, Dr. Andrew Petelin, M.D., completed his portion of said application. Rivera testified that Dr. Petelin faxed the completed form to DOC's administrative personnel so that Rivera would obtain approval for intermittent leave. Rivera testified that he immediately thereafter hand-carried a copy of the application to the DOC administrative personnel. Rivera's last testimony about his FMLA application was that Taylor told him in March 2016 that the FMLA application was incomplete. Taylor testified that, although he never saw the FMLA application, he told Rivera on multiple occasions that the application was incomplete and that he should speak with the administrative personnel about it. The testimony at the hearing indicates that there was no communication from the administrative personnel to Rivera about deficiencies in his FMLA application. The tribunal notes that the application itself (A-5) contains the crucial information from Dr. Petelin that would allow the administrative personnel to decide whether or not to approve intermittent leave. I **FIND** that Rivera was credible when he testified about submitting his intermittent-leave application. It would defy logic if Rivera did not take every step necessary for procuring approval of his FMLA application. I **FIND** that there would be no reason for Dr. Petelin not to submit a completed FMLA application to the employer. I **FIND** that the FMLA application was submitted to the DOC's administrative personnel in October 2015. I **FIND** that if there was any deficiency in the FMLA application, the administrative personnel would in the normal course of their duties have sent written notification to Rivera in an attempt to cure the deficiencies. I **FIND** that between October 14, 2015, and January 10, 2016, there was sufficient time for the administrative personnel to process Rivera's FMLA application and to make a decision to approve or deny it. I **FIND** that the lack of a denial and the passage of significant time would induce a reasonable person in Rivera's position to believe that the application for intermittent leave had been granted. In light of the fact that the

"Reason Text" box on the Activity Report (R-2) clearly indicated that Rivera was seeking "intermittent leave," I **FIND** it highly suspect (therefore adversely affecting Taylor's credibility) that Taylor would not immediately (on January 13, 2016) advise Rivera that his application for intermittent leave was not yet approved. The fact that Taylor wrote up the "Disciplinary Action" (R-2) on January 13, 2016, and then sat on these charges for over a month (until the issuance of the PNDA dated February 17, 2016) leads the tribunal to **FIND** that the FMLA application was a non-issue on January 10, 2016. I **FIND** Taylor's testimony about telling Rivera that there were deficiencies in his FMLA application and that he should speak with the administrative personnel about the status of the application to be unreliable, unpersuasive, and untrue. Thus, I further **FIND** that Rivera's application for intermittent leave under the federal FMLA had been approved before January 10, 2016, and I **FIND** that Rivera was entitled to take intermittent leave when he requested it on January 10, 2016.

11. I **FIND**, from his testimony, that Dr. Maggio recalled signing A-2 on the same day that he saw Rivera at his home, January 10, 2016. I therefore **FIND** that the date of creation of A-2 is January 10, 2016.

12. I **FIND** that A-1 contains a true and accurate record of Rivera's cell-phone calls and texts. I **FIND** from Rivera's testimony and from a review of A-1 that Rivera called the jail at 1:05 p.m. on Sunday, January 10, 2016.

13. I **FIND**, from both Rivera's testimony and from Taylor's admission that he had no basis in fact to dispute Rivera's testimony, that there is no proof that anyone informed or advised Rivera on January 10, 2016, that he was supposed to see Taylor personally in connection with Rivera's request to take an I/M day.

14. Because Rivera was conscious of the requirement to deliver A-2 to Taylor and expressed his fear that he could suffer adverse consequences if he failed to do so, I **FIND** his testimony credible that he did, in fact, deliver A-2 to Taylor's inbox and did, in fact, photograph it lying in the inbox.

ANALYSIS AND CONCLUSIONS OF LAW

Applicable Standard

The Civil Service Act and the implementing regulations govern the rights and duties of public employees. N.J.S.A. 11A:1-1 to 12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. An employee who commits a wrongful act related to his or her duties or who gives other just cause may be subject to major discipline. N.J.S.A. 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). In a civil-service disciplinary case, the employer bears the burden of proving sufficient, competent and credible evidence of facts essential to the charge. N.J.S.A. 11A:2-6(a)(2), -21; N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-2.1, "burden of proof"; N.J.A.C. 4A:2-1.4. That burden is to establish by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982).

An appointing authority may discipline an employee on various grounds, including inability to perform duties, conduct unbecoming a public employee, insubordination, and other sufficient cause. N.J.A.C. 4A:2-2.3(a). Such action is subject to review by the Civil Service Commission, which after a de novo hearing makes an independent determination as to both guilt and the "propriety of the penalty imposed below." W. New York v. Bock, 38 N.J. 500, 519 (1962). In an administrative proceeding concerning a major disciplinary action, the appointing authority must prove its case by a "fair preponderance of the believable evidence." N.J.A.C. 4A:2-1.4(a); Polk, supra, 90 N.J. at 560; Atkinson, supra, 37 N.J. at 149.

The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Greater weight of credible evidence in the case—preponderance—depends not only on the number of witnesses, but "greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975) (citation omitted). Similarly, credible testimony "must not only proceed from the mouth of a credible witness but must be credible in itself." In re Estate of Perrone, 5 N.J. 514, 522 (1950).

N.J.A.C. 4A:2-2.3(a)(6), Conduct Unbecoming a Public Employee

Under N.J.A.C. 4A:2-2.3(a)(6), an employee may be subject to major discipline for conduct unbecoming a public employee. Although not strictly defined by the Administrative Code, "conduct unbecoming" has been described as that conduct "which affects the morale or efficiency of the [governmental unit] [or] which adversely affects the morale or efficiency" of the public entity or tends "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); see Karins v. City of Atl. City, 152 N.J. 532, 554 (1998) (citation omitted). The conduct need not be "predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye." In re Emmons, Supra, 63 N.J. Super. at 140 (citation omitted).

N.J.A.C. 4A:2-2.3(a)(2), Insubordination (or Disobedience of Orders)

"Insubordination" is also not defined in the regulations. Assuming that its presence is implicit, courts generally apply its ordinary definition since it is not a technical term or term of art, and because there are no circumstances indicating that a different meaning is intended. Ricci v. Corp. Exp. of the East, Inc., 344 N.J. Super. 39, 45–46 (App. Div. 2001). Black's Law Dictionary 802 (7th Ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority."

Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. Insubordination is always a serious matter, especially in a paramilitary context. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

N.J.A.C. 4A:2-2.3(a)(7), Neglect of Duty

Neglect of duty has been interpreted to mean that "an employee . . . neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009) (citation omitted), adopted, Civil Service Commission (March 27, 2009), < http://njlaw.rutgers.edu/collections/oal/>. The term "neglect" means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" means conformance to "the legal standard of reasonable conduct in light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing, Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job.

N.J.A.C. 4A:2-2.3(a)(1), Incompetence, Inefficiency or Failure to Perform Duties

In this type of breach, an employee performs his or her duties, but in a manner that exhibits insufficient quality of performance, inefficiency in the results produced, or untimeliness of performance, such that his or her performance is sub-standard. See Clark v. N.J. Dep't of Agric., 1 N.J.A.R. 315.

Incompetence means that an individual lacks the ability or the qualifications to perform the duties required of him or her. Steinel v. City of Jersey City, 7 N.J.A.R. 91, modified, 193 N.J. Super. 629 (App. Div. 1984), aff'd, 99 N.J. 1 (1985).

N.J.A.C. 4A:2-2.3(a)(3), Inability to Perform Duties

An employee must be able to physically, intellectually, and psychologically perform his or her duties. Where an employer brings a charge under N.J.A.C. 4A:2-2.3(a)(3) it is challenging the employee's ability to perform the duties associated with the position, and is seeking to remove the employee or demote him or her to a different position, but is bringing a charge that is not, strictly speaking, disciplinary in nature.

However, from the employee's point of view, the outcome may be just as severe as if it were a disciplinary charge. Obviously, the outcome of this type of charge will turn on the medical evidence presented.

Legal Issues Presented

(1) Does a call-out made fifty-five minutes before a correction officer's scheduled commencement of his shift and forty minutes before the time scheduled for the start of muster, while the officer is on his way to work, constitute conduct unbecoming a correction officer?

(2) Does the aforementioned call-out constitute insubordination under N.J.A.C. 4A:2-2.3(a)(2)?

(3) Does the aforementioned call-out constitute neglect of duty under N.J.A.C. 4A:2-2.3(a)(6)?

(4) Does the aforementioned call-out constitute failure to perform duty under N.J.A.C. 4A:2-2.3(a)(1)?

(5) Does the aforementioned call-out constitute an inability to perform duty under N.J.A.C. 4A:2-2.3(a)(3) and/or does it prove "excessive absenteeism"?

In regard to the first legal issue, in the definition of "conduct unbecoming an officer," the emphasis is placed on the effect that the officer's alleged unbecoming conduct has on the morale or efficiency of the governmental entity involved. In the case at bar, it appeared that it was not uncommon for correction officers to take leave and to call in with requests for leave due to exigent circumstances. Rivera called in, albeit a few minutes "past time," but did so because he was beset with a sudden, painful and debilitating attack of renal colic. A medical doctor determined that Rivera was unable to work until the kidney stone was passed. There could be no reasonable accusation of malingering, which is something that could hurt morale. Rivera's sudden illness was perfectly comprehensible. Therefore his failure to call in within the sixty-minute window

would not be likely to injure the morale or efficiency of the governmental entity. It was totally excusable, since he promptly called in (within two or three minutes of the onset of pain) and he promptly provided a doctor's note in accordance with his employer's "policy."

Based on the foregoing facts and applicable law, I **CONCLUDE** that respondent has not proven, by a preponderance of the competent, credible evidence, the charge of conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6).

In regard to the second legal issue, in the ordinary definition of "insubordination" the emphasis is placed on the willfulness and deliberation that accompanies the act of disobedience. It emphasizes the actor's refusal to obey a lawful order. In the case at bar, there is no question that Rivera was beset with a sudden attack of renal colic, that is, a kidney stone, the symptoms and effects of which have been described above. His failure to call within the sixty-minute window was due to the fact that sixty minutes before the time he was due at muster he was feeling well and was on his way to work. He had no idea that he would need to call in, because no symptoms appeared until he was inside the sixty-minute window. Upon feeling the onset on his painful symptoms, Rivera immediately called in to report the problem, giving his employer the most time that he could provide under the circumstances, to replace him with another officer. His actions bespeak obedience to the Regulations and the Policy, rather than willful disobedience. Moreover, his prompt submission of a doctor's note shows compliance with the Policy, not non-compliance. Rivera reasonably believed that he had already been granted intermittent leave under the FMLA and was entitled to request an I/M day under federal law.

Based on the facts and applicable law, I **CONCLUDE** that respondent has not proven, by a preponderance of the competent, credible evidence, the charge of insubordination, N.J.A.C. 4A:2-2.3(a)(2).

In regard to the third legal issue, in the definition of "neglect of duty" the emphasis is placed on the negligent performance of one's duty or on the actor's neglect to perform an act required by his job duties. In the case at bar, Rivera suddenly

became extremely sick on his way to work, when he was not yet on duty. DOC Regulations required a call-in if an officer could not report for duty. Just after Rivera's pain struck, and before he turned around to go home or sought medical help, he called in to the jail to report that he would not be able to appear for his shift. The next day he supplied a doctor's note that corroborated his call the day before. He could not have called in more than one hour before the start of his shift, because prior to the onset of his pain he had not been experiencing any problems, and was on his way to work.

Based on the foregoing facts and applicable law, I **CONCLUDE** that respondent has not proven, by a preponderance of the competent, credible evidence, the charge of neglect of duty, N.J.A.C. 4A:2-2.3(a)(7).

In regard to the fourth legal issue, in the definition of "incompetence, inefficiency or failure to perform duties" the emphasis is on the employee's failure to produce the necessary quantity or quality of results that a person in his position should be expected to produce. Emphasis is also put on the employee's knowledge or skill level (i.e., competence) needed to perform the types of work for which he was hired. In the case at bar, the evidence presented went to the issue of whether Rivera's calling in when he did was a dereliction of duty. As discussed above, Rivera called in just after the incapacitating problem arose. He was aware of the requirement that he call in, and he did.

I **CONCLUDE** that respondent has not proven, by a preponderance of the competent, credible evidence, the charge of incompetency, inefficiency or failure to perform duties, N.J.A.C. 4A:2-2.3(a)(1).

In regard to the fifth legal issue, the tribunal notes that N.J.A.C. 4A:2-2.3(a)(3) encompasses the charge of "inability to perform duties." The charge appearing on R-2 (the Disciplinary Action Form dated January 13–14, 2016) is stated as "excessive absenteeism." The same language appears on the PNDA and the FNDA. "Excessive absenteeism" and "inability to perform duties" are two different types of charges. I **CONCLUDE** that their appearance together in the same charge renders the charge vague and perhaps self-contradictory.

"Inability to perform duties" is a non-disciplinary type of charge under N.J.A.C. 4A:2-2.3(a)(3), where the employer seeks to prove that an employee should be demoted or removed due to his physical, intellectual, or psychological inability to perform his duties. I **CONCLUDE** that no evidence was presented that Rivera was physically, intellectually, or psychologically unable to perform his job duties.

The Regulations presented to the tribunal did not contain, much less provide, a definition of the term "Excessive absenteeism."

Neither the accused nor the tribunal should be left to guess at what the combination of these charges means. The testimony presented concerned the timing of Rivera's call-in on January 10, 2016, and whether or not he submitted documentation that would excuse the lateness of his call-in. That was the essence of the DOC's case. I **CONCLUDE** that in the absence of a definition of "excessive absenteeism," the charge of being absent—to whatever extent—cannot be maintained.

I **CONCLUDE** that the respondent has not proven, by a preponderance of the competent, credible evidence, the charge of inability to perform duties under N.J.A.C. 4A:2-2.3(a)(3).

ORDER

It is **ORDERED** that the determination of guilt of the charge of insubordination, specifically, N.J.A.C. 4A:2-2.3(a)(2), involving violation of Hudson County Department of Corrections Regulation 3:6.2, must be and hereby is **REVERSED**.

It is **ORDERED** that the determination of guilt of the charge of conduct unbecoming a public employee, specifically, N.J.A.C. 4A:2-2.3(a)(6), involving violation of Regulation 3:6.2, must be and hereby is **REVERSED**.

It is further **ORDERED** that the determination of guilt of the charge of neglect of duty, specifically, N.J.A.C. 4A:2-2.3(a)(7), involving the violation of Regulation 3:6.2, must be and hereby is **REVERSED**.

It is further **ORDERED** that the determination of guilt of the charge of incompetency, inefficiency or failure to perform duties, specifically, N.J.A.C. 4A:2-2.3(a)(1), involving the violation of Regulation 3:6.2, must be and hereby is **REVERSED**.

It is further **ORDERED** that the determination of guilt of the charge of inability to perform duties, specifically, N.J.A.C. 4A:2-2.3(a)(3), involving violation of Regulation 3:6.2, must be and hereby is **REVERSED**.

It is further **ORDERED** that the determination of guilt of the charge of "excessive absenteeism" has no basis in the Regulations, and must be and hereby is **REVERSED**.

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. 40A:14-204.

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, DIVISION OF APPEALS AND REGULATORY AFFAIRS, 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.

October 24, 2016
DATE

John P. Scollo
JOHN P. SCOLLO, ALJ

Date Received at Agency: October 24, 2016

Date Mailed to Parties: October 24, 2016

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APPENDIX

LIST OF WITNESSES

For Appellant:

Migdoel Rivera

Richard Maggio, M.D. (by videotaped deposition)

For Respondent:

Lt. Eric Taylor, Unit Commander, Hudson County DOC

Ronald Edwards, Deputy Director, Hudson County DOC

LIST OF EXHIBITS IN EVIDENCE

Joint Exhibits:

J-1 Joint Stipulation of Facts

J-2 FNDA dated April 15, 2016

For Appellant:

A-1 T-Mobile phone record of appellant for January 10, 2016

A-2 Medical note for appellant (undated) from Dr. Richard Maggio for January 10, 2016

A-3 Medical note from Dr. Richard Maggio dated April 4, 2016

A-4 Summary of Report of Clinical Infectious Diseases, re: Norvir-boosted Reyataz dated September 4, 2012

A-5 Application on behalf of appellant for intermittent family leave dated October 14, 2015

A-6 DVD and transcript of de bene esse deposition testimony of Dr. Richard Maggio

A-7 Appellant's Interrogatories to DOC and DOC's answers thereto

A-8 [Marked, but not in evidence] Appellant's cell phone information and map

For Respondent:

R-1 PNDA dated February 17, 2016

R-2 Disciplinary Action Form dated January 13, 2016, containing Lt. Eric Taylor's Recommendations for Charges and Request for Disciplinary Hearing; Activity Report; and Rivera's work schedule for January 2016

R-3 DOC's (partial) Policies and Procedures with additional records concerning Rivera's training records

R-4 Rivera's Employee Profile

R-5 DOC's entire Staff Rules and Regulations manual