



STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Terence Smith,
Department of Corrections

CSC Docket No. 2017-1864

Request for Counsel Fees

ISSUED: MARCH 29, 2018 (DASV)

Terence Smith, a Principal Investigator, Parole and Secured Facilities, with the Department of Corrections (DOC), represented by Brian M. Cige, Esq., seeks resolution of a dispute concerning counsel fees arising from the attached decision of the Civil Service Commission (Commission), *In the Matter of Christopher Birardi and Terence Smith* (CSC, decided August 16, 2017), denying DOC's request for reconsideration of the deemed adopted final decision of the Commission which reversed the 30 working day suspension of the petitioner.

As background, the petitioner was suspended for 30 working days and charged with conduct unbecoming a public employee, other sufficient cause, and a violation of internal policies regarding rules. Specifically, the appointing authority asserted that the petitioner failed to recognize multiple improprieties in the investigative techniques used by his subordinate, Christopher Birardi, a Senior Investigator, Parole and Secured Facilities. An appropriate review would have revealed that Birardi's conduct and written report regarding his investigation violated internal procedure and demonstrated a lack of professional objectivity for a Senior Investigator, Parole and Secured Facilities. It is noted that Birardi had been demoted to Correction Lieutenant and suspended for 15 working days based on the incident. Upon the appeals of the petitioner and Birardi, the matters were transmitted to the Office of Administrative Law (OAL), consolidated, and assigned to an Administrative Law Judge (ALJ) for a hearing. Based on the findings of fact, the ALJ determined that although Birardi's interrogation of an employee was aggressive, the ALJ concluded that Birardi's conduct was not unbecoming nor lacked professional objectivity. His behavior and report also did not violate

procedures or policies regarding investigations, as the manner in which one conducts an interview and/or interrogation of a witness is entirely subjective. Regarding the petitioner, the ALJ concluded that the appointing authority did not demonstrate by a preponderance of the credible evidence that he violated any rules or was guilty of unbecoming conduct in relation to his supervision of Birardi's investigation, interview, or report. Therefore, the ALJ recommended that the petitioner's suspension and Birardi's demotion and suspension be reversed. The ALJ's recommended decision was thereafter deemed adopted as the final decision per *N.J.S.A.* 52:14B-10(c). In that regard, neither party provided consent for an additional extension for the Commission to render a final decision. See *N.J.A.C.* 1:1-18.8. The appointing authority then sought reconsideration of the deemed adopted decision. Upon review, the Commission found sufficient evidence in the record to support the ALJ's credibility determinations and that the petitioner and Birardi did not violate procedures or policies regarding investigations. The Commission noted that, apart from disagreeing with the ALJ's conclusions in the matter, the appointing authority did not present a clear material error. Therefore, the Commission found no grounds on which to grant reconsideration of the prior decision. See *In the Matter of Birardi and Smith, supra*. Accordingly, since the petitioner's 30 working day suspension was reversed, he was entitled to receive back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10 and reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12. However, the parties were unable to agree on the amount of counsel fees due to the petitioner. Therefore, the petitioner has requested Commission review.

In the instant matter, the petitioner submits the certification of Brian M. Cige, Esq., who states that he has been licensed to practice law for over 30 years and is admitted to practice in New Jersey, Pennsylvania, and various federal courts. He has been actively representing individuals in employment cases for the last 28 years. He charges a rate of \$475 per hour for legal services rendered, which is "a fair and reasonable hourly rate" based on his experience. Cige certifies that he has spent 187.7 hours representing the petitioner, which amounts to \$89,157.50 in counsel fees, plus the cost of \$600 for transcripts. The invoice reflects the date that services were rendered, a description of such services, hours worked, amount billed for each entry, and the lawyer who worked on the entry. Cige performed all the work listed. It is noted that numerous entries reflect a review of emails received and sent to the petitioner and various individuals throughout the departmental hearing and disciplinary appeal.

In response, the appointing authority acknowledges that reasonable counsel fees may be awarded where an employee prevails on all or substantially all of the primary issues in an appeal. However, it objects to the hourly rate of Cige, arguing that it is "completely unjustified as it exceeds" the range of \$175 to \$200 set forth in *N.J.A.C.* 4A:2-2.1(c). Additionally, it maintains that Cige's certification provides no basis for an increase of the hourly rate. Cige fails to indicate the subject of the

cases he actually handled wherein he received the \$475 hourly rate. Moreover, the appointing authority emphasizes that after a two-day hearing during which the petitioner presented no witnesses,¹ the ALJ reversed the petitioner's 30 working day suspension. While the appointing authority filed exceptions to the ALJ's initial decision, the petitioner did not file any exceptions. It notes that that the petitioner did not submit a retainer agreement for the Commission's review, and although the petitioner spent \$600 for transcripts, he does not submit receipts. Moreover, the appointing authority asserts that there may be duplicate entries in Cige's invoice as follows:

<u>Date</u>	<u>Description</u>	<u>Hours</u>	<u>Amount</u>
Jan-12-15	Preparation for telephone conference with the Judge	.10	\$47.50
Jan-13-15	Preparation for and telephone conference with Judge and adverse counsel	.50	\$237.50
Aug-03-16	Receipt and review of Judge Crowley's favorable decision	.50	\$237.50
Aug-13-16	Receipt and review of email from Maria Lugo [a Judicial Assistant 1, OAL] with Decision	.40	\$190

Furthermore, the appointing authority argues that although Cige is admitted to practice in multiple State and federal courts, the petitioner's appeal did not involve any particularly novel set of circumstances, time, or difficulty to justify Cige's hourly rate. In that regard, the appointing authority states that Cige characterized the petitioner's case "as simply a matter of his supervision of another employee" and reiterates that Cige did not call any witnesses at the OAL. Thus, the appointing authority requests that the Commission reduce the hourly rate to \$175 per hour and require the petitioner to submit a more detailed invoice to ensure that there are no duplicate entries.

In reply, the petitioner indicates that he does not have a specific fee agreement with Cige, but maintains that the \$475 hourly rate is what is customarily charged in the central New Jersey area for legal representation by an attorney with more than 30 years of experience. Thus, the petitioner submits that the counsel fees sought should be awarded. It is noted that the petitioner resubmits the initial invoice that was presented to the Commission and does not provide a receipt for the transcripts.

CONCLUSION

N.J.S.A. 11A:2-22 provides that reasonable counsel fees may be awarded to an employee as provided by rule. *N.J.A.C.* 4A:2-2.12(a) indicates that the

¹ In the initial decision, the ALJ listed three dates of hearings.

Commission shall award partial or full reasonable counsel fees incurred in proceedings before it and incurred in major disciplinary proceedings at the departmental level where an employee has prevailed on all or substantially all of the primary issues in an appeal of major disciplinary action before the Commission.

N.J.A.C. 4A:2-2.12(c) provides fee ranges for different categories of attorneys, based on the attorney's experience. Specifically, it 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 a 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(d) states that if an attorney has signed a specific fee agreement with the employee or employee's negotiations representative, the attorney shall disclose the agreement to the appointing authority. The fee ranges set forth in (c) above may be adjusted if the attorney has signed such an agreement, provided that the attorney shall not be entitled to a greater rate than that set forth in the agreement. *N.J.A.C.* 4A:2-2.12(e) indicates that the recommended fee ranges may be adjusted, based on the circumstances of a particular matter, taking into account the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to performing the legal service properly, the fee customarily charged in the locality for similar legal services, the nature and length of the professional relationship with the employee, and the experience, reputation and ability of the attorney performing the services.

Further, *N.J.A.C.* 4A:2-2.12(g) provides that reasonable out-of-pocket costs shall be awarded, including, but not limited to, costs associated with expert and subpoena fees and out-of-State travel expenses. Costs associated with normal office overhead shall not be awarded. 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).

In the instant matter, the petitioner requests \$89,157.50 in counsel fees and \$600 for the cost of transcripts. In response, the appointing authority objects to Cige's hourly rate as it exceeds the range set forth in *N.J.A.C.* 4A:2-2.12(c). It contends that no basis has been presented for an upward increase of the hourly rate and lists possible duplicative entries from Cige's invoice. The appointing authority also argues that the petitioner failed to submit a receipt for the transcripts.

Upon review, the Commission finds that the petitioner is entitled to counsel fees pursuant to the deemed adopted decision and the Commission's August 16, 2017 determination. However, the Commission finds that the petitioner has

provided insufficient information to justify awarding him counsel fees at the requested hourly rate of \$475. Initially, there is no fee agreement. Cige's certification also does not elaborate as to the specific nature or subject matter of the cases he handled wherein he received the requested rate. While the petitioner attempts to justify the requested rate by noting that it is consistent with what other attorneys with similar experience charged in Cige's practice area, he provides no details regarding the subject matter of the cases for which these attorneys were reimbursed at the requested rate. Moreover, this type of appeal inherently lacks the legal complexity necessary to justify the hourly rate requested. In addition, unique legal experience was not required by counsel in order to establish that the charges against the petitioner were not warranted. *Compare, In the Matter of Monica Malone*, 381 N.J. Super. 344 (App. Div. 2005) (Attorney who had a Master's degree and Ph.D. degree in Clinical Psychology and experience in psychology made him uniquely qualified to address psychological diagnostic issues that were raised during the hearing). Indeed, much of the invoice lists charges for review and receipt of emails. The petitioner also does not dispute that he did not specifically present witnesses on his behalf. Rather, the case was consolidated with the appeal of Birardi. The petitioner's case was contingent upon the guilt of Birardi. Therefore, based on the information provided by Cige regarding his experience in employment and labor law and years of experience in the practice of law, he should be reimbursed at the rate of \$200 per hour. *See N.J.A.C. 4A:2-2.12(c) and (e)*.

With respect to the itemized listing of services, the appointing authority contends that a more detailed invoice should be submitted to ensure that there are no duplicate entries. However, but for what the appointing authority lists as discrepancies, other items do not appear duplicative. Cige also includes sufficient amount of detail in his invoice. In that regard, the invoice reflects the date that services were rendered, a description of such services, hours worked, amount billed for each entry, and the lawyer who worked on the entry. Nonetheless, as to the challenged entries, Cige does not clarify that his preparation for the telephone conference with the ALJ on January 12, 2015 was different from his preparation for the telephone conference with the ALJ and adverse counsel on January 13, 2015. Thus, the January 12, 2015 entry of .10 hours worked in the amount shall not be reimbursed. Likewise, Cige does not defend his entries on August 3, 2016 and August 13, 2016, in which he listed that he received and reviewed the initial decision. The only difference was that there was an email from Maria Lugo with the decision on August 13, 2016. Given that there was an email to be reviewed, the Commission will reduce the hours worked from .40 to .10 hours. Therefore, .40 hours (.10 hours from January 12, 2015 and .30 hours from August 13, 2016) shall be deducted from the total hours worked. Accordingly, the petitioner is entitled to counsel fees of 187.30 hours (187.70 less .40 hours) billed at an hourly rate of \$200 or \$37,460 in counsel fees.

As to the cost of transcripts, it is undisputed that this expense is reimbursable pursuant to *N.J.A.C. 4A:2-2.12(g)*. See *In the Matter of Tracey Andino* (MSB, decided August 21, 2003); *In the Matter of Gail Murray* (MSB, decided June 25, 2003). There is no requirement that the petitioner submit a receipt for the cost. The Commission is satisfied with Cige's certification that the \$600 for the transcripts were in fact incurred.

ORDER

Therefore, it is ordered that this request be granted in part and the appointing authority pay Terence Smith **\$37,460** in counsel fees and **\$600** for costs within 30 days of receipt of this decision.

In the event that the appointing authority fails to make a good faith effort to fully comply with this decision within 30 days of receipt of this decision, the Commission orders a fine be assessed against the appointing authority in the amount of \$100 per day beginning on the 31st day from receipt of this decision, continuing for each day of continued violation up to a maximum of \$10,000.

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 27TH DAY OF MARCH, 2018



Deirdre L. Webster Cobb
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Attachment

c: Terence Smith
Brian M. Cige, Esq.
Tamara L. Rudow
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Records Center



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Christopher Birardi
and Terrence Smith, Department of
Corrections

Request for Reconsideration

CSC Docket Nos. 2017-1751 and
2017-1752

ISSUED: AUG 17 2017 (DASV)

The Department of Corrections (DOC) requests reconsideration of the attached initial decision of the Administrative Law Judge (ALJ) which was deemed adopted as the final decision on November 1, 2016, reversing the demotion and 15 working day suspension of Christopher Birardi, a Senior Investigator, Parole and Secured Facilities, and the 30 working day suspension of Terrence Smith, a Principal Investigator, Parole and Secured Facilities.

Initially, it is noted that the ALJ's initial decision was rendered on August 3, 2016, and the time frame for the Civil Service Commission (Commission) to make its final decision was to expire on September 17, 2016. See *N.J.S.A. 52:14B-10(c)* and *N.J.A.C. 1:1-18.6*. Prior to that date, the Commission secured a 45-day extension of time to render its final decision no later than November 1, 2016. See *N.J.A.C. 1:1-18.8*. Since the Commission's next scheduled meeting was November 10, 2016, it sought consent from the parties, as required, to secure a second 45-day extension. However, neither party provided consent for an additional extension. Therefore, the ALJ's recommended decision was deemed adopted as the final decision per *N.J.S.A. 52:14B-10(c)*.

By way of background, Birardi was served with a Final Notice of Disciplinary Action (FNDA), demoting him to Correction Lieutenant and suspending him for 15 working days on charges of conduct unbecoming a public employee, other sufficient cause, and violations of internal policies regarding conduct and rules. Specifically, the appointing authority asserted that Birardi was the lead investigator in a matter involving Senior Correction Officer Rajecyah Johnson and acted in a manner which

violated procedure and demonstrated a lack of professional objectivity. Additionally, it was alleged that Birardi ignored relevant and material facts and corroborated statements, substituting his own opinion in the matter, and demeaned witnesses. As a result, Johnson withdrew her complaint. Smith was also served with a FNDA, which stemmed from this incident. He was suspended for 30 working days and similarly charged with conduct unbecoming a public employee, other sufficient cause, and a violation of internal policies regarding rules. The appointing authority asserted that Smith failed to recognize multiple improprieties in the investigative techniques used by Birardi upon Smith's review of Birardi's report. An appropriate review would have revealed that Birardi's conduct and written report violated internal procedure and demonstrated a lack of professional objectivity for a Senior Investigator, Parole and Secured Facilities. Upon the appeal of Birardi and Smith to the Commission, the matters were transmitted to the Office of Administrative Law (OAL) for a hearing and were consolidated.

As set forth in the initial decision, the ALJ found that Johnson sustained a significant injury to her eye on May 31, 2013, due to falling ice that either fell from an upper tier of the facility or had been thrown. As a result, she was on workers' compensation leave until May 6, 2014. In her initial report after the incident, Johnson did not identify who was responsible for the falling ice, nor did she allege that it was intentional. Reports from other officers also did not indicate that the falling ice had been thrown intentionally. When Johnson returned to work after her leave, she requested that her shift be changed due to a "hostile work environment." Johnson alleged that she did not feel safe working with the officers who she now claimed threw the ice at her. Birardi was then assigned to conduct an investigation into the "very serious charge," which included interviewing Johnson and other witnesses. The ALJ found that all interviews were videotaped, and Birardi's interview of Johnson "was very aggressive." In that regard, Manuel Alfonso, the current Chief Investigator, who viewed the recordings of Johnson as well as other witnesses to the investigation, testified at the OAL that Birardi treated Johnson as the target of the investigation rather than the victim during her interview. He also commented that Birardi was very friendly toward other witnesses, in contrast with Birardi's "attack" of Johnson, and was investigating the ice incident as opposed to Johnson's current claim of feeling threatened. Moreover, Birardi and Smith presented the testimony of Michael Cerame, a former Police Officer who teaches interrogation techniques. He reviewed the videotape interviews of the witnesses and opined that Birardi was very demeaning. However, Birardi's technique was in compliance with generally accepted standards for interviews. Furthermore, the ALJ found that Birardi had concerns with the inconsistencies of Johnson's initial report from June 2013 with her May 6, 2014 report and the timing of her allegations with a request for a shift change. All witnesses, including Johnson, were informed of their Weingarten Rights¹ at their interviews.

¹ In *N.L.R.B. v. Weingarten, Inc.*, 420 U.S. 251 (1975), the United States Supreme Court stated that it is an unfair labor practice to require employees covered under a collective bargaining agreement to

Based on the foregoing, the ALJ determined that the allegation of a hostile work environment is "a very serious charge" and there were several inconsistencies in Johnson's allegations. Although Birardi's interrogation of Johnson was aggressive, the ALJ indicated that Johnson's allegations were "overstated, if not entirely fabricated and were subsequently withdrawn by her." Thus, the ALJ concluded that Birardi's conduct was not unbecoming nor lacked professional objectivity. His behavior and report also did not violate procedures or policies regarding investigations, as the manner in which one conducts an interview and/or interrogation of a witness is entirely subjective. As for Smith, the ALJ concluded that the appointing authority did not demonstrate by a preponderance of the credible evidence that he violated any rules or was guilty of unbecoming conduct in relation to his supervision of Birardi's investigation, interview, or report on Johnson. Therefore, the ALJ recommended that Birardi's demotion and suspension and Smith's suspension be reversed.

In its request, the appointing authority maintains that the job of an investigator is so sensitive that it merits substantive review of this case by the Commission. The appointing authority argues that its exceptions to the ALJ's initial decision identified material errors which were not presented to the Commission but would have resulted in the Commission not adopting the ALJ's recommendation. Thus, it submits that good cause exists for the Commission to reconsider the decision and perform its essential function of review.

As to the merits of the case, the appointing authority indicates that Birardi is in a position of special trust and he conducted an "inaccurate and incomplete investigation" which "reflected his pre-conceived notion of a case." The appointing authority asserts that Birardi "sought to bully the victim" and Smith failed to supervise Birardi. Additionally, it contends that the ALJ erred in finding the witnesses "honest and sincere which is palpably incorrect." The appointing authority emphasizes that Johnson's 2013 injury was never investigated, and Johnson requested a shift change to any other available shift so she did not have to work with the officers who caused the injuries. Further, it maintains that rather than questioning Johnson on her allegations, Birardi "castigated" Johnson for failing to include the names of the officers who were allegedly at fault and how she sustained the injury. The appointing authority states that Birardi's conduct is clearly evident in the video recordings of the interviews, which demonstrate his disparate treatment of Johnson. As a result of Birardi's abusive treatment, the appointing authority submits that Johnson retracted her complaint. Moreover, one of the appointing authority's witnesses testified that Birardi told one of the accused that he was being investigated and then provided the person with "unnecessary derogatory details of the complaint." As such, Birardi violated the internal

participate in an investigatory interview with management without union representation if the employee requests representation and reasonably believes that discipline could arise from the interview.

procedure which provides that investigations should be conducted professionally. Furthermore, the appointing authority claims that Birardi was friendlier in his questioning of officers who supported his pre-conceived notion that Johnson was not injured by ice, despite that an officer had admitted to throwing the ice which injured Johnson and she had medical documentation in that regard. In addition, the video recording of the interviews reveals Birardi's "tone" as "congratulatory" when the witnesses provided the "correct answer." Regarding Smith, the appointing authority reiterates that he failed to supervise Birardi. In reviewing the interview of Johnson, Smith had apparently said that Birardi's abusive conduct toward Johnson needed to be addressed.

In addition, the appointing authority states that Birardi had recommended that Johnson be removed from employment and a Preliminary Notice of Disciplinary Action (PNDA) was issued against her. However, the charges were rescinded by the Special Investigations Chief Investigator once he reviewed the recording of Birardi's interview of Johnson. Thus, the appointing authority maintains that the ALJ's finding that no administrative charges were ever brought against Johnson is incorrect. Moreover, it argues that if the ALJ correctly characterized Johnson's allegations as a workplace violence complaint rather than a hostile work environment complaint, the ALJ would not have reached the conclusion that there was no policy violation. Further, the appointing authority contends that the ALJ failed to consider all of the evidence. In that regard, the ALJ did not rely on the five video recordings of the interviews which clearly show Birardi's disparate treatment of Johnson. The ALJ also did not provide an analysis as to the credibility of the witnesses. The appointing authority notes that it is unclear as to what weight was given to the testimony of Birardi and Smith's expert, who it emphasizes was completely unfamiliar with department rules and regulations. Lastly, the appointing authority asserts that Birardi's treatment of Johnson and Smith's failure to supervise his subordinate investigator undermines the trust it places on its investigators. Such conduct also undermines the Special Investigations Division, which encourages individuals to report claims, and encroaches upon the standard of good behavior. Thus, the appointing authority maintains that Birardi cannot be trusted to conduct investigations. Accordingly, it submits that the penalties imposed on Birardi and Smith were appropriate.

In response, Birardi, represented by Matthew C. Dorsi, Esq., claims that the appointing authority has not met the standard for reconsideration. He argues that the appointing authority "simply disagree[s]" with the ALJ's initial decision "to certain and immaterial" findings of fact. Additionally, Birardi asserts that the appointing authority has failed to present new evidence or additional information not present in the original proceeding which would change the outcome of the case. As to credibility, Birardi emphasizes that the ALJ found the witnesses to be credible and did in fact analyze their credibility. All evidence was also considered and accorded the proper weight by the ALJ. Birardi contends that the appointing authority should not be afforded another "bite of the apple" as this matter has been

ongoing since 2014. He notes that the Superior Court of New Jersey has also ruled in his favor. As such, the appointing authority's assertion that the ALJ erred is "completely misplaced." In that regard, Birardi filed an Order to Show Cause with the Superior Court of New Jersey, Chancery Division, to enforce the Commission's final decision. On December 22, 2016, the court granted injunctive relief and enjoined the Department of Corrections from disregarding the Commission's final decision and ordered that Birardi be reinstated to his former position and be provided with 15 days of back pay, benefits, and seniority and reasonable counsel fees.²

Although provided with an opportunity, Smith, represented by Brian M. Cige, Esq., did not provide a response in this matter.³

CONCLUSION

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

The parties did not consent to an additional extension of time for the Commission to review the record in this matter. As such, the ALJ's recommended decision was deemed adopted as the Commission's final decision pursuant to *N.J.S.A. 52:14B-10(c)*. Notably, the appointing authority did not consent,⁴ but now seeks reconsideration. Nonetheless, the appointing authority has not shown that a clear material error has occurred. Moreover, although the Commission did not have an opportunity to review the matter in the first instance, the appointing

² In addition to its request for reconsideration, the appointing authority requested a stay of the Commission's final decision. However, the order of the Superior Court rendered the stay request pertaining to Birardi moot. The parties were informed that since the Order to Show Cause was properly filed with the Superior Court pursuant to *N.J.S.A. 11A:10-1* Action for Enforcement, the Commission is without jurisdiction to review the order. Further, the parties were advised that there is not a sufficient basis to stay the Commission's final decision as it pertains to Smith. If the appointing authority is successful in the within request for reconsideration, an order will be issued to amend Smith's record to reflect the 30 working day suspension and he will be required to return any back pay received.

³ It is noted that since Smith's 30 working day suspension was reversed, he was entitled to reasonable counsel fees. His attorney is requesting \$89,757.50, which includes the cost of \$600 for transcripts. However, the parties have not been able to resolve the issue and has sought the Commission's intervention. The matter has been accepted as an appeal (CSC Docket No. 2017-1864).

⁴ The appointing authority advises that it erred in not consenting. However, unanimous consent must be obtained to secure a second 45-day extension. Birardi and Smith did not provide their consent. Thus, the ALJ's decision would have been deemed adopted regardless of whether the appointing authority consented.

authority has not presented additional information which would change the outcome of the case.

Initially, the Commission agrees with the ALJ's credibility determinations. In that regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 N.J. 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto*, *supra*). The Commission appropriately gives due deference to such determinations.

In the present case, there is sufficient evidence in the record to support the ALJ's determination that the "witnesses were all honest and sincere." For instance, witnesses for both parties arrived at a similar conclusion that Birardi attacked Johnson and he was very demeaning in interviewing her. The ALJ also concluded that Birardi had been aggressive. However, the ALJ found that Birardi did not violate procedures or policies regarding investigations. The ALJ also determined that Smith did not violate any rules or was guilty of unbecoming conduct in relation to his supervision of Birardi. Apart from disagreeing with the ALJ's conclusions in this matter, the appointing authority has not presented a clear material error.

Specifically, in its request, the appointing authority argues that the ALJ erred in finding that Birardi and Smith's actions did not result in administrative charges against Johnson. However, there is no PNDA in the record charging Johnson and the appointing authority has not specified where in the transcripts that any of the witnesses stated that Johnson was actually served a PNDA as a result of the Birardi and Smith's actions. Thus, while Johnson may have been served with a PNDA, it does not appear that this was in the record before the ALJ. Regarding the appointing authority's assertion that the ALJ inappropriately framed Johnson's allegations as a hostile work environment, the May 6, 2014 e-mail from Assistant Superintendent Christopher Cline to DOC's Equal Employment Division indicated that Johnson claimed "it was a hostile work environment." With respect to the video evidence, the ALJ found the witnesses to be credible and that both the expert and fact testimony of the witnesses indicate that investigative techniques are subjective and each investigator has a different style based on the nature of the witnesses and investigation. Both Alfonso and Cerame reviewed the videos and there is nothing in the record to demonstrate the ALJ's conclusions based on this were in error. Indeed, given the differing opinions regarding how best to conduct an interrogation, the ALJ appropriately based her determination on the testimony of these expert witnesses. The fact that Cerame may be unfamiliar with DOC rules

and regulations does not impeach his credibility as an expert in interrogation techniques.

Moreover, the appointing authority contends that Birardi and Smith's actions and omissions support the charges and reversal of the ALJ's decision. Specifically, it states that it cannot have investigators conduct biased investigations controlled by their own opinions while they ignore the facts. However, the initial question to be resolved by the investigation in this matter was why the hostile work environment allegation was not made at some point after Johnson was injured in May 2013. Indeed, the record clearly establishes that there were inconsistencies between the report Johnson filed in June 2013 and the one filed about the same incident in May 2014. As such, any questioning regarding the inconsistent reports would be germane to the conduct of a hostile workplace investigation. In this regard, the Commission has emphasized in numerous decisions the duty of correction officers to accurately report their observations or incidents they witness. The importance of providing full, accurate, and detailed reports in a prison setting cannot be overstated. See *In the Matters of Kenneth Bolton, Robert Knoblock and Michael Lubrano, Mercer County*, Docket No. A1457-10 (App. Div. February 4, 2013) affirming (CSC, decided September 15, 2010); *In the Matter of Michael Ogonowski* (CSC, decided June 1, 2011). See also, *In the Matter of Quadir Lewis* (CSC, decided February 8, 2012) (Appellant's completion of observation reports in advance and his retroactive alteration of the reports constituted neglect of duty). See *In the Matter of Jermane Carter* (CSC, decided December 21, 2011) (It is axiomatic that County Correction Officers must report in detail all unusual incidents in which they are involved or which they witness as this is one of the basic duties of all personnel in a correctional facility). Compare, See *In the Matter of Ronald Jamison* (CSC, decided December 19, 2012) (Although appellant may not have intentionally falsified his report, he inappropriately documented the incident which warranted a suspension, but not removal). Thus, when faced with two differing reports about the same incident authored by the same individual, be it during a hostile work environment, workplace violence, or disciplinary matter, it is prudent to question the inconsistencies.

Under these circumstances, the appointing authority has not shown that there is clear material error in the ALJ's determination and no new evidence has been presented which would change the outcome of the case. Accordingly, the Commission finds no grounds on which to grant reconsideration of the prior decision.

ORDER

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 16TH DAY OF AUGUST, 2017



Robert M. Czech, Chairperson
Civil Service Commission

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November 1, 2016

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Trenton, New Jersey 08625-0863

Re: *Christopher Birardi and Terrence Smith v Department of Corrections (CSC*
Docket Nos. 2015-1023 and 2015-1169; OAL Docket Nos. CSV 13394-14 and
CSV 14216-14) (Consolidated)

Dear Mr. Dorsi and Ms. Rudow:

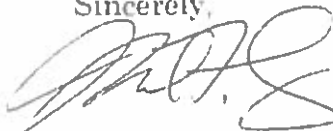
The appeal of Christopher Birardi, a Senior Investigator, Parole and Secured Facilities with the Department of Corrections, of his 15 working day suspension and demotion, on charges, was before Administrative Law Judge Sarah G. Crowley (ALJ), who rendered her initial decision on August 3, 2016, recommending reversal of the suspension and demotion. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

The time frame for the Civil Service Commission (Commission) to make its final decision was to initially expire on September 17, 2016. See *N.J.S.A. 52:14B-10(c)* and *N.J.A.C. 1:1-18.6*. Prior to that date the Commission secured a 45-day extension of time to render its final decision no later than November 1, 2016. See *N.J.A.C. 1:1-18.8*. Since the Commission's next scheduled meeting is November 10, 2016, it sought consent from the parties, as required, to secure a second 45-day extension. However, neither party provided consent for an additional extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A. 52:14B-10(c)*.

Since the appellant's suspension and demotion have been reversed, he is entitled to 15 days of back pay, benefits and seniority for the suspension and any applicable differential pay, benefits and seniority for the demotion. Additionally, the appellant is entitled to reasonable counsel fees. An affidavit in support of reasonable counsel fees should be submitted to the appointing authority within 30 days of the date of

this letter. Pursuant to *N.J.A.C. 4A:2-2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of counsel fees.

Sincerely,

A handwritten signature in black ink, appearing to read 'N. Angiulo', written in a cursive style.

Nicholas F. Angiulo
Assistant Director

Attachment

c: The Honorable Sarah G. Crowley, ALJ (w/out attachment)
Kelly Glenn
Records Center



CHRIS CHRISTIE
Governor
Kim Guadagno
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P O Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

ROBERT M CZECH
Chair Chief Executive Officer

November 1, 2016

Brian M. Cige, Esq.
7 East High Street
Somerville, New Jersey 08876

Tamara Rudow, Legal Specialist
Department of Corrections
P.O. Box 863
Trenton, New Jersey 08625-0863

Re: *Christopher Birardi and Terrence Smith v Department of Corrections* (CSC
Docket Nos. 2015-1023 and 2015-1169; OAL Docket Nos. CSV 13394-14 and
CSV 14216-14) (Consolidated)

Dear Mr. Cige and Ms. Rudow:

The appeal of Terrence Smith, a Principal Investigator, Parole and Secured Facilities with the Department of Corrections, of his 30 working day suspension, on charges, was before Administrative Law Judge Sarah G. Crowley (ALJ), who rendered her initial decision on August 3, 2016, recommending reversal of the suspension. Exceptions were filed on behalf of the appointing authority.

The time frame for the Civil Service Commission (Commission) to make its final decision was to initially expire on September 17, 2016. See *N.J.S.A. 52:14B-10(c)* and *N.J.A.C. 1:1-18.6*. Prior to that date the Commission secured a 45-day extension of time to render its final decision no later than November 1, 2016. See *N.J.A.C. 1:1-18.8*. Since the Commission's next scheduled meeting is November 10, 2016, it sought consent from the parties, as required, to secure a second 45-day extension. However, neither party provided consent for an additional extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A. 52:14B-10(c)*.

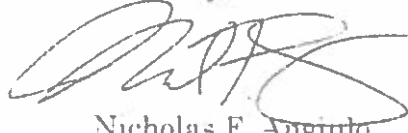
Since the appellant's suspension has been reversed, he is entitled to 30 days of back pay, benefits and seniority. Additionally, the appellant is entitled to reasonable counsel fees. An affidavit in support of reasonable counsel fees should be submitted to the appointing authority within 30 days of the date of this letter. Pursuant to

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N.J.A.C. 4A:2-2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of counsel fees.

Sincerely,

A handwritten signature in black ink, appearing to read 'N. Angiulo', written over a faint, illegible typed name.

Nicholas F. Angiulo
Assistant Director

Attachment

c: The Honorable Sarah G. Crowley, ALJ (w/out attachment)
Kelly Glenn
Records Center



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 13394-14

AGENCY DKT. NO. 2015-1023

**IN THE MATTER OF CHRISTOPHER
BIRARDI, CENTRAL OFFICE DEPARTMENT
OF CORRECTIONS.**

AND

**IN THE MATTER OF TERRENCE SMITH,
EAST JERSEY STATE PRISON,
DEPARTMENT OF CORRECTIONS.**

OAL DKT. NO. CSV 14216-14
AGENCY DKT. NO. 2015-1169
(CONSOLIDATED)

Matthew C. Dorsi, Esq., for appellant, Christopher Birardi (DiFrancesco,
Bateman, Kunzman, Davis, Lehrer & Flaum, P.C., attorneys)

Brian M. Cige, Esq., for appellant, Terrence Smith

Tamara L. Rudow, Esq., Assistant Director, for respondent Office of Regulatory
and Legal Affairs, State of New Jersey, Department of Corrections
pursuant to N.J.A.C. 1:1-5.4(a)2

Record Closed: July 11, 2016

Decided: August 3, 2016

BEFORE SARAH G. CROWLEY, ALJ:

STATEMENT OF THE CASE

Appellant, Christopher Birardi is a Senior Investigator (SI), in the Special Investigations Unit (SIU) of East State Prison, Department of Corrections (NJDOC). Respondent seeks to demote the appellant and impose a fifteen day suspension as a result of his conduct in connection with an investigation he conducted in May 2014. It is alleged that the investigation and was conducted in such a way as to violate rules regarding professional behavior. It is further alleged that this conduct was unbecoming an employee and in violation of Internal Management Procedure #35. Principal Investigator (PI) Smith, who was his supervisor has also been disciplined as a result of his failure to recognize and correct the alleged improprieties in the investigation as well as the reporting done by SI Birardi. PI Smith has received a thirty day suspension for this conduct.

PROCEDURAL HISTORY

On July 18, 2014, the respondents served Preliminary Notices of Disciplinary Action on the appellants. On October 3, 2015, Final Notices of Disciplinary Action were issued to appellants. Appellants filed timely appeals and the matters were transmitted separately to the Office of Administrative Law (OAL) on October 17, 2014, and November 3, 2014, to be heard as contested cases. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matters were consolidated by Order dated February 18, 2016. The matter was heard on April 5, April 7 and June 9, 2016. The parties submitted post hearing submissions on July 11, 2016, and the record closed on that date.

SUMMARY

On May 31, 2013, Rajeeyah Johnson, a Senior Corrections Officer (SCO) at East Jersey State Prison sustained an injury to her eye as a result of ice falling from the above level tier and hitting her in the eye. She suffered an injury to her eye and was out on a medical leave for approximately one year. SCO Johnson prepared a report

following the incident dated June 3, 2013. Her report states that "ice fell" from an above tier and hit her in the eye. The report does not name anyone specifically, and does not allege the ice was thrown or a result of some intentional conduct. She did not follow up on the incident or amend her report following the submission of this June 2013 report. The reports from fellow officers prepared at the time of the injury, all indicated that ice fell from above. There was no investigation into the incident, as there was no allegation of any wrongdoing and all reports related to requirement regarding reporting of injuries.

SCO Johnson returned to work on May 6, 2014. On that date, she went to Assistant Superintendent Christopher Cline and requested a shift change and filed a hostile work environment claim. In her request for a shift change and the hostile work environment claim, SCO Johnson specifically names two officers involved in the incident and claims the ice was "thrown" as opposed to falling from an above tier. She claims that she is disappointed that no charges were brought against anyone as a result of the incident and states that she "feels unsafe, stressed out, and worried about my physical wellbeing." Mr. Cline found that the claims did not constitute an Equal Employment Division (EED) claim but referred the matter to SI Birardi to investigate the allegations of a hostile work environment, an assault by a fellow officer, and the unsafe work environment claims made by SCO Johnson.

The report prepared by SI Birardi dated June 13, 2014, indicates that he reviewed the initial report from SCO Johnson dated June 2, 2013 and the May 6, 2014, report. In addition, he conducted interviews of all witnesses. SI Birardi notes that SCO Johnson's June 2, 2013 report fails to name any officers involved in the incident. Moreover, SCO Johnson's initial report did not allege that the ice was thrown or that any intentional act occurred. In contrast, the May 6, 2014, report names specific officers, claims it was intentional, that the ice was "thrown" and that the conduct was "criminal." SI Birardi concluded that SCO Johnson claims could not be substantiated. The report also concludes that she was guilty of misstatements, inaccuracies, and a distortion of facts. He also questions the allegations relating to how the injury even occurred. He notes that she ultimately retracted her complaint and stated that she does not feel she is

working in a hostile work environment. His report was forwarded to Patrick Nogan the Administration for whatever action they deemed appropriate.

Following the submission of the SI Birardi report, SID Chief Investigator Kevin Bolden conducted an investigation into the conduct of SI Birardi in connection with the investigation. Chief Bolden concluded that SI Birardi's conduct was unprofessional, abusive and his report subjective. He found violations of the SID internal management procedures regarding conducting investigations, preparing reports and conduct unbecoming an officer. He recommended that SI Birardi be removed from SID and suspended for fifteen days as a result of this investigation. He also recommended that his supervisor, PI Smith receive a thirty days suspension for not properly supervising SI Birardi. The investigation and report were conducted by Bolden and did not include any interview of SI Birardi. Bolden did not testify at the hearing as he had passed away.

TESTIMONY

For respondent:

Christopher Cline is the Assistant Superintendent of the East Jersey State Prison. He has been working there since 1997. He has been in his current position since 2014. He oversees disciplinary matters at East Jersey and South Woods Prison. He testified that SCO Johnson came in to see him when she returned from her leave of absence in 2014. He was the Equal Employment Division (EED) liaison. He testified that if an individual thinks there is a hostile work environment or anything like that, he gives them an EED packet. If they file a report, he sends it up to the EED Director with an explanation of what happened and they take it from there. He testified that SCO Johnson did not want initially was to file a claim but wanted a shift change. She was complaining that the two officers whom she felt were responsible for throwing ice which resulted in the injury to her eye had not been disciplined. He testified that he discussed it with his boss and referred the complaint to SID for an investigation.

Manuel Alfonso is a chief investigator for the SID at DOC and has been in this position since 2014. He has worked for the NJDOC for twenty-six years. He worked for ten years as a corrections officer and then was promoted to an investigator. He considers himself an expert in investigations at the correction center. He was not involved in the SID investigation or the initial investigation in this matter, but he reviewed the documents relating to SI Birardi and PI Smith's investigation of SCO Johnson. He viewed the video of SI Birardi's interview of SCO Johnson. He explained that SCO Johnson had filed a complaint and SI Birardi was assigned to do an investigation into her allegations. He testified that he treated her like she was the target of the investigation as opposed to the victim. He thought it was odd to give her Weingarten rights and testified that he was attacking her about the incident that occurred a year ago. Chief Alfonso thought that SI Birardi's conduct in the interview was improper.

Chief Alfonso thought it was unusual that SI Birardi was investigating the incident that occurred a year ago as opposed to her current claim of feeling threatened. She had a documented medical injury and was indeed injured so he did not understand why he was treating her like she was the target of an investigation. He also viewed the video of Sgt. Yunckes' interview and noted that SI Birardi was very friendly toward her and not hostile like he was towards SCO Johnson. SI Birardi was also very friendly toward Taglarini, calling him "Tags" and saying "good" after he answered his questions. He did not understand why he interviewed Mitchell and the others before SCO Johnson, who was the victim. He conceded that there were no hard and fast rules on the order of interviews or interviewing techniques.

For petitioners

Kevin Koch is employed a principle investigator at Northern State Prison. He has held that position since October 2015. He had about conversations with Kevin Bolden, who was his boss prior to him passing away regarding SI Birardi. He testified that SI Birardi was the president of the Union and it was his job to relay concerns to the

administration, which would have been Chief Kevin Bolden. Mr. Koch indicated that, SI Birardi and Chief Bolden had issues with one another related to their respective Union roles, and Chief Bolden did not like him.

Michael Cerame is self-employed. He was a police officer for Middle Township for twenty-eight years and has his Associate's degree in Criminal Justice. He teaches interrogation techniques. He has been hired by special investigations unit to teach interviewing techniques. He was not familiar with the DOC rules in question in this case. He was qualified as an expert in interrogation techniques. He testified that he reviewed the tape and the transcripts as well as the written report prepared by SI Birardi in connection with this matter. He also reviewed the report that he prepared dated July 5, 2015. He was asked to review the interviews of the investigation, the videotaped interviews conducted by SI Birardi and the relevant rules and regulations regarding NJDOC employees.

He testified that the circumstances regarding the investigation were unusual as they involved allegations which had occurred over a year ago and had been alleged to be criminal and creating a hostile work environment by SCO Johnson. He stated that it was not unusual for an interview to turn into an interrogation. He had no opinion regarding SI Birardi giving SCO Johnson her Weingarten right before the interview but opined that given the two diametrically opposed stories given by SCO Johnson regarding the 2013 events and the claim of hostile work environment a year later, he too might have erred on the side of caution and given Weingarten rights. He conceded that SI Birardi was very demeaning of the witness that he was interviewing, but that each interviewer style and technique is different, and he did not find the aggressive technique improper. He did note some irregularities in the interview and stated that he would not have had so many people in the room. He stated there is no such thing as a bad investigative technique and sometimes individuals need to be tough and repeat questions. He found that his interview was in compliance with generally accepted standards for interviews.

Edward Soltys is employed by New Jersey Department of Corrections and a principal investigator. He has the same title as Terrence Smith. He has been with the DOC for nineteen years. He had nothing to do with the investigation into SI Birardi and PI Smith, but he is familiar with the policies and procedures for internal management and procedures for conducting investigations. He reviews the procedures and if there are changes that need to be made, he will make recommendations and go to the chief with the proposed changes. He was not familiar with any rules that would prevent you from interviewing someone on leave. He testified that SID investigators do not recommend discipline, they do an investigation, prepare a report and it goes up the chain of command. Chief Bolden was up the chain of command and a report would go to him.

He was questioned about their internal policy with respect to giving Weingarten rights. He said normally it would be the victim that you would interview first and he was not sure why you would give the victim Weingarten rights, but there are circumstances where you go out of order on witnesses. If they are the target of the investigation you want to know their side of the story. He testified that he would wait if they were on leave or try to make contact, if it was essential to the investigation. He testified that there are no hard and fast rule on when and if you do an investigation in a certain order or how you conduct the investigation.

Guy Cirrillo is a Superintendent at the DOC. He was aware that SCO Johnson was agitated when she was ordered to report back to work in early May 2014. She told him that they wanted her to go back to work tomorrow, and she did not want to do that. She said she was told to drop off information at personnel and that she was scheduled for second shift the next day. She then told him that she was not going back to work because she did not want to be around the people she had problems with. SCO Johnson told him that she wanted a shift change. He told her she was scheduled to return to work and she should return to work. She told him she wanted to file a complaint against these people, and he recommended that she go see Mr. Cline. Mr. Cline advised him

that she came to file a hostile work environment complaint as a result of the incident that had occurred a year ago.

Mr. Cirillo testified that if a hostile work environment claim is filed it would go to SID for an investigation. The day after she filed the claim, she came in with her union representative and said she wanted to withdraw the complaint as it was getting "blown out of proportion." She said that she just wanted to go back to work. He told SCO Johnson that she had to put that in writing, which she did.

Richard Salort is an administrative lieutenant. He has worked at East Jersey Prison for twenty-nine years. He was aware of the incident that occurred on May 31, 2013, involving SCO Johnson getting hit in the eye with ice. He takes the custody reports and forwards them out for investigation. These reports are done on a daily basis and he reviews all of them and decides what to do. In the case involving SCO Johnson's eye injury, there was nothing criminal or intentional about it, it was just an injury. It was sent out for an injury investigator to do a report about the injury, but that is all it was. There was no allegation of an intentional or criminal act, nor was anyone named as causing the injury. It was just an investigation of the actual injury.

Adrian Ellison has been working at the prison for twenty three years. He is FOP president and was testifying as a witness for PI Smith. He testified that PI Smith asked him come as a witness to the interview. He went with PI Smith in lieu of a union representative because one was not available. The interview was not videotaped. The meeting was on July 17, 2014. At that meeting they suggested a change in the report that SI Birardi had prepared and that was all.

Respondents did not testify and they rested on the third day of hearings.

FINDINGS OF FACT

Having had an opportunity to carefully observe the demeanor of the witnesses, it is my view that the witnesses were all honest and sincere. The resolution of the charges against SI Birardi requires an analysis of whether the conduct in question constituted a violation of SID Internal Management Procedure #035, demonstrated a lack of professional objectivity, conduct unbecoming, and if so, was the imposition of a fifteen day suspension and a demotion appropriate for such a violation. The resolution of the charges against PI Smith requires an analysis of whether he failed to properly supervise SI Birardi with respect to his conduct in connection with this investigation of the claim of hostile working environment by SCO Johnson. Based upon my observations of the witnesses and a review of the evidence, I **FIND** as follows:

1. SCO Johnson was injured on May 31, 2013, after some ice either fell or was thrown from and above tier. She sustained a significant injury and was out on leave until May 6, 2014.
2. The report prepared by SCO Johnson immediately following the incident indicated that she was injured as a result of "ice having fallen" from the above tier and hitting her in the eye.
3. SCO Johnson reported that "ice came down from one of the tiers above." She reported that she yelled up "stop with the ice, I'm sitting down here," and a few seconds later "more ice came down, this time flying into my left eye."
4. SCO Johnson did not indicate who was responsible for the ice falling and never alleged it was the result of an intentional or criminal act.
5. Several other officers prepared reports following the injury and they all indicated that the injury to SCO Johnson as a result of ice "falling" from an above tier. There was no indication that it was intentional, or that anyone in particular was responsible for the ice falling.

6. SCO Johnson went out on a medical leave of absence and returned to work on May 6, 2014. She never amended her report or followed up on any investigation regarding her injury.
7. On her first day back at work, SCO Johnson went to Assistant Superintendent Christopher Cline, and advised him that she would like a shift change due to a hostile work environment. SCO Johnson stated that she did not to feel safe working with the officers who were responsible for her injury, but would be fine on the second shift.
8. The report that SCO Johnson prepared on May 6, 2014, identified, for the first time, the officers who she now claimed "threw" ice at her on May 31, 2013. She indicates that one of the officer tried to intimate her from writing a report, and "she is stressed out and worried and cannot perform her job properly under these conditions." She indicates that she is disappointed that "nothing was done as a result of this crime."
9. SI Birardi was assigned to do an investigation into the hostile working environment claim. He commenced his investigation by interviewing all the witnesses to the May 31, 2013, incident.
10. Officers Mitchell, Taglarini, Salamak, Yunkes and SCO Johnson were all interviewed. All interviews were videotaped. Tagliareni, Salamak, Yunckes and SCO Johnson were all provided with Weingarten Administrative Rights.
11. The first interview was conducted with SCO Mitchell who reported that the ice fell from above. Mitchell had prepared a report that was consistent with this recollection of the events of May 31, 2013.

12. SI Birardi interviewed SCO Johnson after Mitchell. SI Birardi provided SCO Johnson with Weingarten Rights, which she signed and elected to have a union representative present for the meeting. SI Birardi's interviewing technique with SCO Johnson was very aggressive. Investigator SI Birardi had concerns regarding the inconsistencies in the June 2013 report and the May 6, 2014 report, and the timing of the allegations being filed in connection with a request for a shift change.
13. He questioned her extensively regarding the failure to identify anyone in the initial report as well as her failure to allege anything intentional prior to her return to work a year later.
14. The possibility of the fabrication of the hostile work environment claim is a very serious matter and although SI Birardi's questioning was very aggressive, the expert and fact testimony of the witnesses indicates that investigative techniques are very subjective and every investigator has a different style which can vary based on the nature of the witness and the investigation.
15. There were no specific rules regarding interrogation techniques that were violated by SI Birardi's interrogation of SCO Johnson.
16. There were no specific rules regarding report writing that were violated by the report prepared by SI Birardi in connection with the SCO Johnson investigation.
17. SCO Johnson ultimately withdrew her claim of hostile work environment and other claims with respect to the incident.
18. No administrative charges were ever brought against SCO Johnson.

LEGAL DISCUSSION AND CONCLUSION

The Civil service employee's rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointment and broad tenure protection. See Essex Council Number 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1971); Mastrobattista v. Essex County Park Commission, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this State is to provide public officials with appropriate appointment, supervisory and other personnel authority in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). A public employee who is thus protected by the provision of the Civil Service Act may nonetheless be subject to major discipline for a wide variety of offenses connected to his or her employments. The general causes for such discipline are enumerated in N.J.A.C. 4a:2-2.3

"The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not purely operational have a capacity to become tinderboxes." Bowden, supra. 268 N.J. Super. at 306. Because correction officers, like police are part of a quasi-military organization, they are held to the higher standard. A correction officer represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public. Ibid.

In an appeal concerning major disciplinary action, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.S.A. 11:2-21; N.J.A.C. 4A:2-14 (a). This applies to both permanent career service employees and those in their working test period relative to such issues as removal, suspension, or fine and disciplinary demotion. N.J.S.A. 11A:2-14; N.J.S.A. 11A:2-6. The State has the burden 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 Licence Revocation, 90 N.J. 550 (1980)

This matter involves a major disciplinary action brought by the respondent appointing authority against SI Birardi seeking a fifteen day suspension and a demotion for his conduct in connection with the investigation of SCO Johnson. He is charged conduct unbecoming an officer, violation of rule, regulation, policy, procedure, or administrative order, Internal Management procedures and other sufficient cause. The specifications provide as follows:

In May and June 2014, you were assigned as the lead investigator in a matter involving SCO R.J. (EJSP). A review of your conduct during the investigation and your final written investigator report revealed that you acted in a matter that violation SID IMP #35 and demonstrated a lack of professional objectivity required of a Senior Investigator. During the interview of the witnesses you ignore relevant and materially objective facts, substitute your opinions for facts, ignored facts and statement that corroborated SCO R.J.'s version of events demeaned witnesses and repeatedly violation SID protocols and procedures. Your misrepresented the statements of witnesses in the context of your written report and created false conclusion that resulted in the removal (now withdrawn) of SCO R.J. Your conduct seriously failed to meet the SID standards requiring that investigations be done thoroughly, competently and in an objective manner. Additionally, your conduct was not professional, objective or was it conducted in a manner that would lead to the proper disposition of a matter free of preconceived conclusions.

PI Smith is charged with conduct unbecoming a public employee, violation of rule, regulation, policy, procedure, order or administrative decision and other sufficient cause in connection with his failure to supervise or correct the alleged inproprieties in the Birardi investigation and report.

Conduct unbecoming a public employee is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted

standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A. 2d 821, 825 (1959)). Such misconduct need not necessarily "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 as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Based upon the testimony and findings, I **CONCLUDE** that the respondent has not satisfied its burden of proving that SI Birardi engaged in conduct unbecoming an employee. SI Birardi was asked to do an investigation into charges of a hostile work environment filed by SCO Johnson. A charge of hostile work environment is a very serious charge, and there were several very significant inconsistencies in SCO Johnson's allegations. I **CONCLUDE** that although SI Birardi's interrogation tactics were aggressive, it became clear that SCO Johnson charges of a hostile work environment claim were in fact overstated, if not entirely fabricated and were subsequently withdrawn by her. I **CONCLUDE** that SI Birardi's conduct did not constitute conduct unbecoming, or a lack of professional objectivity.

I further **CONCLUDE** that the manner in which one conducts an interview and/or interrogation of a witness is entirely subjective and the respondent has not demonstrated by a preponderance of the credible evidence that the manner in which SI Birardi conducted the interview was in violation of Internal Management Procedures # 35, or any other policies and procedure for conducting such investigations. I further **CONCLUDE** that respondent did not prove by a preponderance of the evidence that the report prepared by SI Birardi violated of any rules or policies regarding the preparation of such a report or constituted conduct unbecoming.

With respect to PI Smith, I **CONCLUDE** that the respondent has not demonstrated by a preponderance of the credible evidence he violated any rules or regulations or was guilty of conduct unbecoming an officer in connection with his

supervisory role over SI Birardi's investigation, interview and preparation of the report on SCO Johnson.

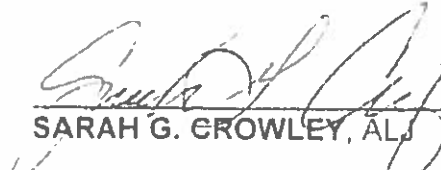
Therefore, I **ORDER** the actions taken by the Department in imposing a fifteen day suspension and demoting SI Birardi are **REVERSED**. I further **ORDER** that the imposition of a thirty day suspension on PI Smith is **REVERSED**.

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. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO 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.

August 3, 2016
DATE



SARAH G. GROWLEY, ALJ

Date Received at Agency:

August 3, 2016 (mailed)

Date Mailed to Parties:

August 3, 2016 (mailed)

SGC/mel

APPENDIX

WITNESSES

For appellant:

Michael Cerame
Edward Soltys
Guy Cirrillo
Richard Salort
Adrian Ellison

For respondent:

Christopher Cline
Manuel Alfonso
Kevin Koch

EXHIBITS

For Appellant

A-1

For Respondent

- R-1 Email from Christopher Cline
- R-2 Special Custody Report by SCO Johnson dated May 31, 2013
- R-3 Special Custody Report by SCO Johnson to Asst. Super. Cline dated May 6, 2014
- R-4 SID Report from SI Birardi to Nogan dated June 13, 2014
- R-5 Special Custody Report by SCO Johnson to Asst. Super. Cirillo dated May 6, 2014
- R-6 Report from PI Smith to Grade dated July 18, 2014
- R-7 Report from Grade to Bolden dated July 18, 2014

- R-8 Report from Bolden to OER dated July 15, 2014
- R-9 Special Custody Report by Sgt. Yunckes to Lt. Taruilli dated May 31, 2013
- R-10 Supervisor's Accident Report dated May 31, 2013
- R-11 Shift Release dated May 31, 2013
- R-12 Special Custody Report by Mary Smith to Centerkeeper dated May 31, 2013
- R-13 Special Custody by SCO Johnson to Shift Commander dated June 2, 2013
- R-14 Shift Commander Report dated May 31, 2013
- R-15 Daily Schedule dated May 31, 2013
- R-16 Daily Schedule dated May 31, 2013
- R-17 Second Shift General Assignment dated May 31, 2013
- R-18 Time and Leave Reporting System R. Johnson May 13 to May 14
- R-19 Level 1 Internal Management Procedure #035
- R-20 Law Enforcement Personnel Rules and Regulation
- R-21 SID Draft Report SI Birardi May 31, 2013
- R-22 Individual Training Summary Report – PI Smith
- R-23 FNDA/PNDA – SI Birardi and FNDA/PNDA – PI Smith
- R-24 Work History – SI Birardi/PI Smith
- R-25 HRB 84-17 as Amended
- R-26 DVD Interview SCO Johnson
- R-27 DVD Interview SCO Mitchell
- R-28 DVD Interview SCO Salamak
- R-29 DVD Interview SCO Tagliarini
- R-30 DVD Interview Sgt. Yunckes