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STATE OF NEW JERSEY

In the Matter of Darin McClenny
Central Reception and Assignment
Facility,
Department of Corrections

CSC DKT. NO. 2015-2153
OAL DKT. NO. CSR 1554-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 15, 2015 BW

The appeal of Darin McClenny, Senior Correction Officer, Central Reception and Assignment Facility, Department of Corrections, removal effective January 2, 2015, on charges, was heard by Administrative Law Judge Susan M. Scarola, who rendered her initial decision on June 29, 2015. No exceptions were filed.

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 July 15, 2015, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission therefore grants the motion for summary decision and affirms the removal of Darin McClenny.

Re: Darin McClenny

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
JULY 15, 2015

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. CSR 1554-15

AGENCY REF. NO. N/A 2015-2152

IN THE MATTER OF DARIN McCLENNY, DEPARTMENT OF CORRECTIONS, CENTRAL RECEPTION AND ASSIGNMENT FACILITY.

Todd McConnell, union representative, appearing for appellant Darin McClenny pursuant to N.J.A.C. 1:1-5.4(a)(6)

Adam Verone, Deputy Attorney General, appearing for respondent Department of Corrections, Central Reception and Assignment Facility (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: June 10, 2015 Decided: June 29, 2015

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

Appellant, Darin McClenny, appeals from the determination of the respondent, the Department of Corrections, Central Reception and Assignment Facility (CRAF), to

remove him from his position as a senior correction officer (SCO) due to his testing positive for cocaine during a random drug screen.

The appellant is charged with violations of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause. He is also charged with violations of Human Resources Bulletin (HRB) 84-17, C11, conduct unbecoming an employee; C30, use, possession, or sale of any CDS; and E1, violation of a rule, regulation, policy, procedure or administrative order.

PROCEDURAL HISTORY

A Preliminary Notice of Disciplinary Action was filed against appellant by the respondent on December 2, 2014. A departmental hearing was conducted. On January 2, 2015, the Final Notice of Disciplinary Action (FNDA) removing the appellant from his position was filed, to be effective that date. The appellant promptly filed an appeal. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on January 28, 2015. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

The hearing was scheduled for March 27, 2015, but was adjourned at the request of the respondent following a telephone conference on March 12, 2015. On April 30, 2015, the respondent filed a motion for summary decision. Telephone calls and a letter were sent to the appellant's representative to determine whether a response to the motion would be filed on his behalf. No response was received to the communications, and no reply was filed in opposition to the motion. The matter is listed for hearing on June 30, 2015.

FACTUAL DISCUSSION

The facts are not in dispute and, accordingly, I **FIND**:

1. The appellant was an SCO at the CRAF. His name was drawn for the taking of a random urine sample for testing on September 22, 2014, in accordance with the Department of Corrections (DOC) Drug Screening Program.

2. On September 22, 2014, the appellant signed a copy of the Drug Testing Employee Notice and Acknowledgement Form, which provided that the DOC required drug testing for all covered persons as a condition of employment. The appellant also completed the Drug Testing Medication Information Form, which required him to list all prescribed and non-prescribed medications he had taken in the thirty days prior to the testing date. Nothing on this form indicated that the appellant would test positive for a controlled dangerous substance (CDS).

3. The appellant completed the testing and provided the specimen according to the testing protocol. The appellant voided his urine in the specimen container, which was checked, marked for identification and sealed.

4. The urine sample was transported to the NJ State Toxicology Laboratory, Newark, New Jersey, for analysis. The chain of custody was maintained.

5. On November 7, 2014, the laboratory issued a report indicating that the appellant's urine sample was positive for benzoylecgonine, a metabolite of cocaine. Cocaine is a Schedule II controlled dangerous substance.[1]

6. The DOC's Rules and Regulations for Law Enforcement Personnel are binding upon law-enforcement personnel. Article IV, Section 1, provides that "[no] officer shall . . . (b) use . . . any illegal drug or controlled dangerous substance, whether on or off duty." The penalty for the use of any controlled dangerous substance is removal from the employment position, and preclusion from other law-enforcement employment.

7. The DOC's HRB 84-17 Table of Offenses and Penalties provides for removal for the use of any CDS.

[1] "The director shall place a substance in Schedule II if he finds that the substance: (1) has high potential for abuse; (2) has currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions; and (3) abuse may lead to severe psychic or physical dependence." N.J.S.A. 24:21-6(a). Possession of a Schedule II CDS is a crime of the third degree. N.J.S.A. 2C:35-10(a)(1). Use or being under the influence of a Schedule II CDS is a disorderly-persons offense. N.J.S.A. 2C:35-10(b).

8. A departmental hearing was held in December 2014 which resulted in the FNDA for removal, effective January 2, 2015. The appellant is charged with violations of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause. He is also charged with violations of HRB 84-17, C11, conduct unbecoming an employee; C30, use, possession, or sale of any CDS; and E1, violation of a rule, regulation, policy, procedure or administrative order.

LEGAL ANALYSIS AND CONCLUSION

Summary Decision

Summary decision may be granted only "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). These provisions mirror the summary-judgment language of R. 4:46-2(c) of the New Jersey Court Rules. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995).

Motions for summary decision in agency actions must be analyzed "in accordance with the principles set forth by the Supreme Court in" Brill, supra, 142 N.J. at 540. Nat'l Transfer, Inc. v. N.J. Dep't of Envtl. Prot., 347 N.J. Super. 401, 408 (App. Div. 2002). In Brill, the Court explained that

> a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. . . . [W]hen the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment.

> [Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986).]

If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998). An evidentiary hearing is not required if there is no genuine issue of material fact. Contini v. Bd. of Educ., 286 N.J. Super. 106, 121 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

This matter is appropriate for summary decision, as the facts are not in dispute.

Charges

The Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576, 581 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). The Act sets forth that State policy is to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). To carry out this policy, the Act authorizes the discipline (and termination) of public employees. N.J.S.A. 11A:2-6.

A civil-service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); In re Polk, 90 N.J. 550, 561 (1982).

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). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Delaware, Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933).

The appellant herein is charged with violations of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause. He is also charged with violations of HRB 84-17, C11, conduct unbecoming an employee; C30, use, possession, or sale of any CDS; and E1, violation of a rule, regulation, policy, procedure or administrative order.

Police officers are held to a higher standard of conduct than other citizens due to their roles in the community. In re Phillips, 117 N.J. 567, 576–577 (1990). Moreover, correction officers are held to the same high standard of conduct as police officers. Gloucester Cnty. v. Pub. Emp't Relations Comm'n, 107 N.J. Super. 150 (App. Div. 1969), aff'd, 55 N.J. 333 (1970). They represent "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." Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966).

As a paramilitary organization, respondent's rules and regulations are to be strictly followed. Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967).

"Conduct unbecoming a public employee" has been interpreted broadly as conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for governmental employees and confidence in the delivery of governmental services. Karins v. City of Atl. 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 "'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.'" 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)).

The appellant has also been charged with "other sufficient cause," in this case, violating DOC and CRAF policy which precludes the use of any CDS, and requires the employees to conduct themselves in a law-abiding manner. Violating a rule or policy means failure to adhere to the standards set forth by the particular institution.

In this matter, the facts are not in dispute. The appellant is an SCO. His conduct is governed by Addendum A of the DOC's Rules and Regulations for Law Enforcement Personnel, which includes his employment title of SCO. The appellant signed the Drug Testing Employee Notice and Acknowledgement Form prior to taking the test, which stated, "I understand that if I produce a positive result for illegal drug use, I will be dismissed from the New Jersey Department of Corrections and from my position as a 'Covered Person'." His urine specimen tested positive for benzoylecgonine, a metabolite of cocaine, a Schedule II controlled dangerous substance. The laboratory finding has not been contested, nor has any explanation for the result been proffered.

Summary decision is appropriate in this matter. The charges are hereby sustained. The appellant violated N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause. He also violated HRB 84-17, C11, conduct unbecoming an employee; C30, use, possession, or sale of any CDS; and E1, violation of a rule, regulation, policy, procedure or administrative order, and the appropriate penalty set forth in the policy should be imposed.

Penalty

Once a determination is made that an employee has violated a statute, regulation or rule concerning his employment, the concept of progressive discipline must be

considered. W. New York v. Bock, 38 N.J. 500 (1962). However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. Henry v. Rahway State Prison, 81 N.J. 571 (1980). Progressive discipline is not a "fixed and immutable rule to be followed without question." Carter v. Bordentown, 191 N.J. 474, 484 (2007). Indeed, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished record. Ibid.

The appellant's disciplinary history is as follows:

> October 2002—official reprimand (unexcused lateness);
>
> January 2010—20 days' suspension for record-keeping purposes only (conduct unbecoming);
>
> November 2011—official reprimand (unsatisfactory attendance);
>
> November 2012—5 working days' suspension modified to 3 days (violation of a rule or regulation);
>
> January 2013—3 working days' suspension (violation of a rule or regulation);
>
> July 2014—official reprimand (attendance);
>
> July 2014—3 working days' suspension (attendance);
>
> July 2014—5 working days' suspension (attendance); and
>
> August 2014—15 working days' suspension (attendance).[2]

In determining the appropriate penalty to be imposed, the following aggravating factors have been considered: the seriousness of the offense, namely, having used a Schedule II CDS knowing it was prohibited conduct by a law-enforcement officer; the lack of judgment demonstrated by the appellant; the wrong message it would send to inmates that correction officers are held to a lesser standard of conduct; and the lack of

[2] The drug testing was performed the following month.

regard for the law, rules and regulations the appellant swore to uphold. It is also of some concern that the appellant has a significant recent disciplinary history for attendance.

No mitigating factors have been presented.

When the aggravating and mitigating factors are weighed, there can be no conclusion but that removal is required. There can be no tolerance for the use of a medically unprescribed Schedule II CDS by a law-enforcement officer. I therefore **CONCLUDE** that the most appropriate penalty for the appellant's conduct is removal from his position as a senior correction officer.

ORDER

I hereby **ORDER** that the respondent's motion for summary decision is **GRANTED**. The action taken by the Department of Corrections, Central Reception and Assignment Facility in removing appellant from his position as a senior correction officer is **AFFIRMED**. The appeal is hereby **DISMISSED**.

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, 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.

June 19, 2015
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ

Date Received at Agency: June 19, 2015

Date Mailed to Parties: June 19, 2015

/cb

APPENDIX

WITNESSES

For appellant:

None

For respondent:

None

EXHIBITS

For appellant:

None

For respondent:

Respondent's Brief and Appendix, including Preliminary Notice of Disciplinary Action; Final Notice of Disciplinary Action; NJDOC Special Investigations Division Administrative Division Report; Master List for Donor Notifications; Drug Screening Program Monitor; Law Enforcement Drug Testing Chain of Custody; Report of the New Jersey State Toxicology Laboratory; DOC Law Enforcement Personnel Rules and Regulations; Table of Offenses and Penalties; and Work Disciplinary History.