A-3

STATE OF NEW JERSEY

In the Matter of Thomas Caraccio,
Hudson County

CSC Docket No. 2016-4060
OAL Docket No. CSR 07931-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCT 19 2017 (DASV)

The appeal of Thomas Caraccio, a County Correction Officer with Hudson County, of his removal, effective May 13, 2016, on charges, was heard by Administrative Law Judge Ellen S. Bass (ALJ), who rendered her initial decision on September 5, 2017. Exceptions were filed on behalf of the appellant, and cross exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on October 4, 2017, accepted and adopted the Findings of Fact and Conclusions as contained in the initial decision and the recommendation of the ALJ to uphold the appellant's removal.

DISCUSSION

The appellant was served with a Final Notice of Disciplinary Action, removing him from employment on charges of incompetency, inefficiency or failure to perform duties; insubordination; conduct unbecoming a public employee; neglect of duty; and other sufficient cause. Specifically, the appointing authority asserted that the appellant committed a willful act of insubordination by failing to comply with verbal and written orders from Kevin Dille, a County Correction Sergeant, to complete all of his outstanding Power Directive Management System (Power DMS) assignments by the end of his shift on September 27, 2015. The appointing authority alleged that while the appellant completed most of his assignments by 9:30 a.m. on September 26, 2015, the appellant failed to sign two documents, as

required, until he was ordered to do so by John Geoghegan, a County Correction Lieutenant, on September 28, 2015. Upon the appellant's appeal to the Commission, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In the initial decision, the ALJ set forth that Power DMS is an electronic system which informs staff of policy adoptions and revisions. It also serves to train staff on the performance of their duties and as an e-mail system to allow staff to communicate with each other. In 2012, a revised "Written Directive System" policy was issued that all employees were to log into Power DMS "preferably at the beginning of his/her tour, on each scheduled work days." Employees were to digitally sign for each document which was posted on the site within 10 days of issuance of the document. If a directive was not understood by the employee, the policy indicates that the employee should contact his or her immediate supervisor for clarification. The ALJ found that the appellant received and reviewed this policy. However, the record revealed that the appellant, as well as many other officers, did not comply with signing posted documents within the required time period. As a result, Geoghegan had a protocol in place for follow-up with noncompliant officers. In the present case, Geoghegan delegated the task to Dille, who was not the appellant's regular supervisor, to follow-up with the appellant as to his compliance with the policy. On Saturday, September 26, 2015, by way of verbal order and written memorandum, Dille advised the appellant that he must complete outstanding assignments in the Power DMS by the end of his shift the next day. The appellant had eight outstanding assignments, which included documents to review, courses to take, and messages to read. The appellant completed six of the assignments, but did not acknowledge that he received and reviewed the policy on body armor nor complete an assignment regarding "GPS Programs Violations and Escapes." On Monday, Geoghegan discovered that the appellant did not complete the two assignments and contacted the appellant. The appellant indicated that he intended to call Geoghegan because he was unclear as to whether the two policies applied to him. Geoghegan told him that he was required to complete all eight assignments, which he then completed by noon that day. Thereafter, disciplinary charges were sought against the appellant for his untimely completion of the two assignments. At the OAL, the appellant "implied that retaliation was behind the decision to discipline him for this small infraction."

However, the ALJ found the appellant's testimony "not [to] hold together" and his excuses for noncompliance were unpersuasive. The ALJ indicated that the appellant had more than one opportunity to raise questions regarding his assignments to Geoghegan and Dille. Additionally, some of the six assignments he completed did not apply to his daily duties but yet he timely completed them. Thus, the ALJ determined that the appellant "willfully and knowingly failed to comply with the order." Moreover, the ALJ concluded that the appellant's failure to complete the two Power DMS assignments rose to insubordination, neglect of duty,

and unbecoming conduct. The ALJ did not find persuasive evidence that the charges against the appellant were motivated by anti-union animus or that the appointing authority was "out to get him" given that the appellant was successful in a prior removal attempt. The ALJ noted that the prior removal was irrelevant as to whether the appellant was guilty of the present charges as that removal action "rose and fell on in its own merits."

Regarding the penalty, the ALJ reviewed the appellant's disciplinary history which revealed the following infractions: a three-day suspension in March 2006, a two-day suspension in July 2006, a three-day suspension in May 2010, a fine in May 2010, a fine in November 2011, a 20 working day suspension in January 2012, and a 120 working day suspension and demotion in December 2014. Based on the foregoing, the ALJ recommended upholding the removal. The ALJ stated that over 10 years, the appointing authority had attempted to redirect the appellant's conduct by steadily increasing the level of discipline. However, the appellant failed to comply with the rules of his workplace. Therefore, the penalty of removal was deemed appropriate.

In his exceptions, the appellant asserts that the ALJ's initial decision should be rejected, since the ALJ ignored and/or mischaracterized facts as to the appointing authority's burden of proof and her credibility determinations. Specifically, the appellant argues that the evidence presented cannot substantiate that he violated Civil Service law and rules by "seeking clarification with his immediate supervisor prior to acknowledging two policies." Rather, he alleges that the appointing authority violated the Civil Service Act in its "continued attempt to arbitrarily dismiss" him from employment. The appellant notes that the ALJ restricted the testimony of two appointing authority directors relating to anti-union activities, union leadership, and the appellant. He also contends that the ALJ "turned a blind eye" to Geoghegan's interactions with the appellant regarding union issues.

Moreover, the appellant maintains that the ALJ "was shockingly silent" regarding the credibility of Geoghegan. The ALJ ignored that Geoghegan attempted to place blame on Dille, asserting that it was Dille who brought the appellant's alleged noncompliance to his attention when in fact the charges were sought by Geoghegan. The appellant states that the "credibility issue is compounded by Dille's false report." In that regard, the ALJ noted that the report erroneously indicated that Dille reviewed the Power DMS list and noticed the appellant's noncompliance. Further, the appellant takes exception to the finding that Geoghegan had a "routine protocol" regarding Power DMS assignments. In that regard, the ALJ failed to address Geoghegan's lack of credibility in justifying why the appellant was never previously notified of his alleged noncompliance over the years when the appellant was under Geoghegan's direct supervision and why there was an "urgency of immediate compliance and the extreme sanction" against

the appellant. In addition, the appellant contends that Geoghegan had no credible explanation as to why officers were not sanctioned over the years for noncompliance of the Power DMS policy. The appellant also argues that he did not intentionally disobey Dille's order to complete the outstanding assignments. He notes that he "was left on his own" and expected to complete the assignments while he performed his duties. Other officers were being supervised by Dille and received their orders to comply on the Wednesday prior to the appellant's order on Saturday. The appellant emphasizes that, although the ALJ indicted that the appellant could have reached out to Dille for clarification, Dille was not the appellant's direct supervisor and he was unaware as to which Power DMS assignments the appellant was required to complete. Additionally, the appellant asserts that the "Written Directive System" policy allowed for leniency. Geoghegan was not at work on Saturday or Sunday when the appellant was presented with the memorandum from Dille. The appellant stresses that it would not have been appropriate to communicate with Geoghegan when he was off duty nor to involve Dille because he was not his immediate supervisor. Moreover, the appellant emphasizes that less than 12 hours later, he immediately completed his assignments when his questions were addressed. He reiterates that the appointing authority was "looking for a reason to terminate" him and this was its first opportunity when he was reinstated back to work and was isolated in his unit.

In addition, the appellant maintains that he credibly testified as to what had occurred and why the two policies/assignments remained unsigned. He notes that the signing of the Body Armor and GPS policy had not been an issue over the years. Moreover, the ALJ disregarded witness testimony that if an officer does not understand a policy, "he is not blindly suppose[d] to sign the documents to just be done." The appellant submits that his alleged infraction should not be considered an egregious violation which warrants termination, especially given that he needed clarification from his immediate supervisor. His action also did not rise to insubordination, neglect of duty, or unbecoming conduct. Further, the appellant asserts that the charge of other sufficient cause should be dismissed as the appointing authority failed to provide any substance to that charge.

Furthermore, the appellant takes exception to the Commission's determination to decline interlocutory review regarding the ALJ's order to dismiss the appellant's civil rights complaint and recognize that anti-union animus was the motivation behind the "overzealous charges" against him. In regard to the former, the ALJ found, among other things, that the validity of the appellant's removal was the sole issue that could be reviewed in the OAL proceeding and the OAL was without jurisdiction to review claims pertaining to anti-union animus. Consequently, the appellant states that he was not given the opportunity to fully develop his anti-union animus claims and defenses pursuant to *Winters v. North Hudson Fire and Rescue,* 212 *N.J.* 67 (2012). Thus, he requests that the Commission order a new hearing.

Lastly, the appellant alleges that the Commission has taken a "pro-management position" as evidenced by its decisions relating to disciplinary matters since 2013. The appellant is allowed to defend against his removal in the disciplinary appeal by demonstrating that the disciplinary action was brought against him in retaliation for his exercise of legally protected speech or conduct as an employee. As such, he requests that the Commission take "the unprecedented action of decreasing" the penalty imposed and expanding the "1%" of cases where the Commission has reversed an employee's removal. Alternatively, the appellant requests that his discipline be reduced in accordance with progressive discipline principles. In that regard, the appellant maintains that he is a long-term employee of 23 years[1] and his alleged minor infraction should justify a penalty reduction. While the ALJ set forth his prior disciplinary history, the appellant notes that those violations did not involve insubordination and were "generally" during the years of his union activities. He stresses that five of the violations were minor disciplines. The 120 working day suspension and demotion related to a DWI violation and since that event, the appellant states that he has "turned his life around." Therefore, he requests that a suspension and remedial training of the Power DMS policy be imposed instead. He notes that the testimony at OAL revealed that no other officer was disciplined for their Power DMS delinquency.

In reply, the appointing authority contends that the appellant's exceptions to the Commission's determination to decline interlocutory review should be rejected. It indicates that the appellant raised an anti-union animus claim as part of his defense at the OAL hearing, and the ALJ correctly determined that the appellant's discipline was not motivated by such animus. Notably, the appointing authority states that the appellant did not testify as to anti-union animus by Dille, who initially recommended disciplinary action against the appellant. Moreover, the appointing authority submits that to the extent that the appellant seeks to claim harassment and discrimination, he should have filed such claims in the appropriate forum. Additionally, the appellant's allegation that the Commission is "pro-management" and biased "is nothing more than [the appellant's] attempt to avoid accountability for his conduct." As to the charges, the appointing authority maintains that the appellant had two days to complete his Power DMS assignments and to contact Dille or Geoghegan. However, he "unilaterally determined to 'pick and choose'" which assignments to complete even though he was given both a verbal and written order to complete all assignments by September 27, 2015. Furthermore, the appointing authority notes that the appellant's own witness testified that all officers were required to complete the Power DMS assignment regardless of their particular post since an officer could be reassigned to another post. In addition, it points out that the appellant on cross examination admitted that officers must comply with a superior officer's order. Thus, the appellant's

---

[1] Agency records indicate that the appellant was appointed provisionally pending open competitive examination procedures, effective June 13, 1994, as a County Correction Officer with Hudson County. He received a regular appointment on April 29, 1996.

"smoke screen" arguments that Dille was not his immediate supervisor should be rejected. The Commission should also disregard the appellant's challenge to the ALJ's credibility determinations, as the ALJ correctly found that the other assignments the appellant completed did not pertain to his unit. Thus, considering that noncompliance with a superior officer's order is a significant violation and the appellant has a prior disciplinary history, the appointing authority maintains that removal is the only appropriate penalty.

Upon its *de novo* review, the Commission agrees with the ALJ's assessment of the charges. There is no dispute that the appellant did not complete all of the outstanding Power DMS assignments in a timely manner. He was given a verbal and written order to do so by a certain date and failed to do so. While the appellant argues that he needed clarification from his supervisor pursuant to policy, the ALJ correctly evaluated that the appellant's excuses were not credible. In that regard, it is emphasized that the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). Nevertheless, upon its review of the entire record, the Commission finds that there is sufficient evidence in the record to support the ALJ's credibility determinations.

The ALJ explicitly delineated her credibility findings as to the appellant's implausible testimony. The appellant could have raised his questions with Dille, who gave the direct order, or he could have contacted Geoghegan if he believed that only the latter could have answered his questions prior to the due date of the assignments. The appellant also did not contact Geoghegan on Monday, when they were both at work. Rather, it was Geoghegan who called the appellant regarding his delinquency. Moreover, the appellant's excuse that the two assignments did not pertain to his daily duties is clearly not credible, as he completed other assignments that did not apply. Further, although the appellant asserts that the ALJ restricted and disregarded testimony, it is clear that the ALJ took the appellant's claims of anti-union animus into consideration but did not find his claims persuasive given that the appellant committed the infraction as charged. Nothing in the record demonstrates that Geoghegan was untruthful as to the infraction, and which,

contrary to the appellant's exceptions, would deem his testimony not credible. It is also of no consequence as to who actually discovered the appellant's noncompliance. The appellant's arguments in that regard are overreaching. Moreover, the appellant does not raise a meritorious claim with respect to the Commission's determination to decline interlocutory review of the ALJ's dismissal of his civil rights complaint. The ALJ correctly found that although the appellant could present claims of retaliation and discrimination as part of a defense to the disciplinary charges at issue, which he did, he cannot seek relief pursuant to the New Jersey Civil Rights Act because a civil rights cause of action is not within the scope of the OAL's jurisdiction in a disciplinary appeal. Moreover, there was not a procedural basis for the ALJ to have adjudicated the causes of action raised in the civil rights complaint in the context of the appellant's disciplinary appeal. In that regard, it is noted, that, under *Winters, supra,* the pursuit of such a defense during disciplinary proceedings would not automatically bar an appellant from separately pursuing a cause of action based upon retaliation or discrimination in a judicial forum, notwithstanding that the administrative determination on that issue could preclude the parties from rearguing the question of whether the disciplinary action was the product of discrimination or retaliation in a subsequent litigation. Accordingly, the ALJ correctly dismissed the appellant's complaint and there is no basis to remand this matter to the OAL for further proceedings.

Therefore, the Commission finds that the charges against the appellant have been sustained. It is noted that, even assuming, *arguendo*, that the charge of other sufficient cause was dismissed for lack of substance or deemed a duplicative charge, the appellant's infraction clearly rose to insubordination, neglect of duty, and unbecoming conduct and is worthy of discipline. *See In the Matter of Alex Siniavsky* (CSC, decided May 2, 2012) *aff'd on reconsideration* (CSC, decided March 6, 2013) (Appellant's admitted refusal to comply with his supervisor's direct order did not excuse his disobedience since employees are not permitted to select which orders to follow and which to ignore).

With regard to the penalty, the Commission's review is also *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 *N.J.* 571, 580 (1980). It is settled that the principle of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). In the instant matter, while the Commission acknowledges that the appellant's infraction is not sufficiently

egregious in and of itself to warrant his removal, the appellant possesses an abysmal prior disciplinary record. In that regard, the Commission emphasizes that a County Correction Officer is a law enforcement officer who, by the very nature of his job duties, is held to a higher standard of conduct than other public employees. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied*, 47 N.J. 80 (1966). *See also*, *In re Phillips*, 117 *N.J.* 567 (1990). Moreover, the Commission is mindful that:

> The appraisal of the seriousness of [the appellant's] offense and degree which such offenses subvert discipline . . . are matters peculiarly within the expertise of the corrections officials. The appraisal is subject to de novo review by the [Commission] . . . but that appraisal should be given significant weight. *Bowden v. Bayside State Prison*, 268 *N.J. Super.* 301, 306 (App. Div. 1993), *cert. denied*, 135 *N.J.* 469 (1994).

The appellant clearly has not learned his lesson, despite that the appointing authority has progressively disciplined him through the years. Moreover, although the appellant indicates that no other officer had been disciplined for their Power DMS delinquency, he has not identified any specific individual nor has he presented that these unnamed officers have similar appalling disciplinary records. The Commission emphasizes that while career service employees are protected from arbitrary disciplinary actions and possess tenure rights, employment remains a privilege and not an absolute right, especially in the appellant's case where he has consistently not followed the rules of his workplace. Therefore, the Commission finds that the appropriate course of action is to remove the appellant from employment.

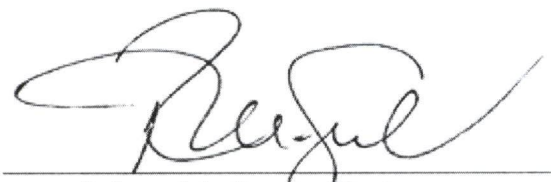
As a final comment, the Commission takes umbrage with the appellant's accusation that it is "pro-management" and biased. Each disciplinary appeal is reviewed on its own merits. The Commission carefully evaluates whether an employee has committed the violation as charged and if that violation is worthy of the employee's discipline, considering the seriousness of the offense and the employee's disciplinary history. In the present case, the appointing authority has met its burden of proof. The appellant has had ample opportunity to correct his behavior and has failed to do so. His removal is therefore necessary.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission, therefore, affirms that action and dismisses the appeal of Thomas Caraccio.

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 4TH DAY OF OCTOBER, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT.NO. CSR 07931-16

IN THE MATTER OF THOMAS CARACCIO, HUDSON COUNTY CORRECTIONS DEPARTMENT.

Charles J. Sciarra, Esq., and **Deborah Masker Edwards**, Esq., for Appellant (Sciarra & Catrambone, attorneys)

Sean Dias, Esq., for Respondent (Scarinci and Hollenbeck, attorneys)

Record Closed: August 30, 2017 Decided: September 5, 2017

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Thomas Caraccio, a Correctional Officer formerly employed by the Hudson County Department of Corrections (the County), appeals from the termination of his employment. The County asserts that Caraccio failed to timely obey a written order directing that he complete on-line assignments related to policy review and training. Caraccio replies that he misunderstood the scope of the order, and completed the work expected of him once he obtained clarification.

PROCEDURAL HISTORY

On November 5, 2015, Hudson County served Caraccio with a Preliminary Notice of Disciplinary Action; an amended notice was served on November 9, 2015. Following a departmental hearing conducted on May 9, 2016, the County served Caraccio with a Final Notice of Disciplinary Action dated May 13, 2016, sustaining charges of failure to perform duties, insubordination, conduct unbecoming a public employee, and other sufficient cause, and removing Caraccio from his position of employment.

Caraccio filed an appeal with the Office of Administrative Law (OAL) on May 23, 2016. Hearing dates were scheduled for August 22 and 26, 2016, but were adjourned at the request of the County, and with appellant's consent, due to witness unavailability.[1] The hearing was rescheduled for September 26 and 27, 2016. On September 16, 2016, Caraccio filed a complaint directly with me in which he asserted various civil rights and unfair labor practice claims. He indicated that he was asserting his rights under Winters v. North Hudson Regional Fire and Rescue, 212 N.J. 67 (2012). Via letter dated September 20, 2016, the County raised objections to this newly filed complaint, and asked to adjourn the hearing dates so that it could more fully articulate its concerns.

I conferred with counsel, and with their mutual consent, adjourned the hearing until January 18 and January 25, 2017. Via letter dated September 23, 2016, counsel for Caraccio agreed to waive the 180-day provisions of N.J.S.A. 40A:14-201(a), and any back-pay entitlement for the period of the adjournment.[2] Via letter dated December 1, 2016, the County filed a Motion to Dismiss the Civil Rights complaint. Caraccio replied via letter dated December 23, 2016. Via Letter Order dated January 5, 2017, I granted the County's motion.

---

[1] Per N.J.S.A. 40A:14-201(b)(4), "[i]f the officer and the agency. . . agree to any postponement or delay of a hearing before the 181st calendar day, the calendar days that accrue during that postponement or delay shall not be used in calculating the date upon which that officer . . . is entitled to receive his base salary pending a final determination on his appeal . . ."

[2] December hearing dates were discussed and are referenced in counsel's letter, but were never scheduled as they proved to not be workable dates, again due to witness availability issues. Both parties agreed to schedule the hearing in January 2017.

Thereafter, via letter dated January 9, 2017, counsel for Caraccio again sought to adjourn the hearing so that he could appeal my January 5, 2017 Order interlocutorily to the Civil Service Commission. Counsel again stipulated that this adjournment was requested with the understanding that Caraccio would waive back pay until the next scheduled hearing date. With the consent of the County, the matter was adjourned until April 17, 2017. By letter dated January 19, 2017, the Civil Service Commission declined to review the interlocutory appeal.

Due to a substitution of attorney, the matter was again adjourned at the request of the County, with Caraccio's consent, until April 27, 2017, and July 11, 2017; with an ongoing agreement to waive the 180-day provisions of the statute. After the hearing concluded on July 11, 2017, the parties sought leave to file written submissions. Caraccio agreed to continue to waive back pay until the filing of these submissions on August 30, 2017, at which time the record closed. Ninety-one days countable toward the 180-day provision of N.J.S.A. 40A:14-201 elapsed between the filing of the appeal and closing of the record.

FINDINGS OF FACT

Caraccio has been employed by the County as both a Correctional Officer and a Sergeant, having worked for the Department of Corrections for over twenty years. The charges against him arise from the events of the weekend of September 26, 2015, and his failure to timely comply with an order that he complete eight assignments on an on-line system known as Power DMS. Caraccio was then serving as a correctional officer.[3] After returning to work after a period of disciplinary suspension, he had been assigned to the surveillance center at the Juno Unit, where his role was to observe activity on monitors and report concerns. Caraccio reported to Lieutenant John Geoghegan; this was the superior to whom Caraccio generally directed questions about training, time off, or vacation day requests. [4]

[3] Caraccio had previously been demoted from the rank of Sergeant. The circumstances of that demotion are irrelevant, except as part of an analysis of progressive discipline.

[4] Geoghegan testified at the hearing; he has since been promoted to Captain.

Power DMS is an electronic system designed to keep staff up-to-date on policy adoptions and revisions, and is used to train staff on information essential to the proper performance of their duties. Per the Deputy Director of the Department of Corrections, the intent behind the system is to ensure that all staff are well-versed in important local and state policies that govern the safe and efficient operation of the correctional facility. Power DMS includes an intranet system that functions like email and allows staff to communicate with each other. It is the subject of a policy revised on January 22, 2012, and entitled "Written Directive System." The policy specifies, quite unequivocally, that

> it is the responsibility of each employee to log into the Power DMS system, preferably at the beginning of his/her tour, on each of their scheduled work days. All employees must digitally sign for each document posted to the site within ten (10) days of issuance and comply with any other directions as instructed to do so, i.e. provide feedback, complete tests, etc.

The policy moreover specifies that if "for some reason employees do not understand a particular directive, the employees should consult with their immediate supervisor for proper clarification." The policy was shared with staff, and I **FIND** that Caraccio received and reviewed it. The testimonial and documentary evidence made it clear, however, that the requirement to timely access Power DMS and sign for policies was observed more in the breach. I **FIND** that many officers did not fulfill this obligation; Caraccio did not do so either. And this noncompliance was confirmed in a report that summarized officer signatures for receipt of policies. This document revealed that on more than one occasion many months, sometimes even a year, would elapse between issuance of a policy, and evidence that the officer signed for it.

In 2015, some six sergeants reported to Geoghegan, which include Sergeant Kevin Dille. Noncompliance with the Power DMS requirements was so commonplace that Geoghegan had a protocol in place for follow-up. He would regularly print-out a log of unfinished work and direct his sergeants to address compliance with offending officers. The Wednesday prior to the weekend of September 26, 2015, Geoghegan received word from his Captain that several officers again were late in acknowledging receipt of policies. Per his normal protocol, Geoghegan delegated the task of following

up to his Sergeants; Dille was directed to follow-up with Caraccio. Dille was not Caraccio's regular supervisor, nor was he his supervisor that day; although Caraccio was accountable to anyone of a higher rank. Generally, it was Geoghegan who was responsible for monitoring Caraccio's his compliance with requirements like signing into Power DMS.

Dille did as directed. On Saturday, September 26, 2015, he verbally advised Caraccio that he must complete his outstanding assignments on Power DMS, and do so by the end of his shift the next day, at about 1:45 p.m. Dille confirmed this order by memorandum dated September 26, 2015. Dille arranged for other derelict officers to be relieved of their duties so that they could have access to a computer, and have the needed time to complete any unfinished Power DMS assignments. But he suggested to Caraccio that he do the work at his post, as a computer was available to him there. Dille also gave Caraccio the option of going to the Computer Learning Center to complete his assignments. Dille's memorandum confirmed that Caraccio had eight outstanding assignments, which included documents to review, courses, and messages. It is uncontroverted and I **FIND** that Caraccio completed all but two: an acknowledgement that he had received and reviewed a policy on body armor, and an assignment pertaining to "GPS Programs Violations and Escapes." As for why there was a lag of some three days after the Captain spoke with Geoghegan before Caraccio was directed to comply, Geoghegan and Dille both noted that either they were not at work, or Caraccio was not, during the intervening days.

Geoghegan was not at work over the weekend, but on his return that Monday he discovered Caraccio's failure to complete two of the tasks assigned to him. Geoghegan contacted Caraccio, who told him that he had intended to call because he was unclear whether he needed to review these two policies since they had no relevance to his then current work responsibilities. Geoghegan told him that he was required to complete all eight assignments, and Caraccio complied; both uncompleted assignments were done by noon that day, and less than twenty-four hours after the deadline imposed by Dille. Importantly, Geoghegan agreed that Caraccio was not belligerent, rude or defiant during their conversation.

Dille confirmed that he did not have access to that aspect of Power DMS that would allow him to monitor the efforts of the correctional officers in completing assigned tasks. He checked with the officers he directly supervised before they left for the day on Sunday, but he did not do so with Caraccio. Hence, he learned from Geoghegan that Caraccio had not completed all eight assignments that Monday. At 10:30 a.m. that day, Dille drafted a report in which he noted the noncompliance, and asked for corrective action.[5] On October 1, 2015, Geoghegan completed a request for disciplinary action form, charging Caraccio with insubordination and neglect of duty, among other charges, and recommending major discipline, to include termination.

Caraccio readily acknowledged that Dille, although not his regular supervisor, directed him to complete his eight Power DMS assignments. And Caraccio promptly proceeded to complete all but two of the assignments. As for the two that he omitted, Caraccio explained that he was confused regarding whether these were applicable to him. One pertained to inmate work release programs, an area irrelevant to his current post. The second pertained to body armor; Caraccio explained that having never been issued body armor he did not believe that he needed to review training materials about its proper use. Caraccio insisted that he did not intend to be insubordinate. He indicated that he fully intended to reach out to Geoghegan on Monday, and could not do so sooner because Geoghegan was not at work on weekends. But it is concerning that Caraccio did not try Geoghegan at home; discuss his concerns with Dille; or email Geoghegan to alert him that he had a question that needed to be promptly discussed on Monday.

Caraccio reported for work on Monday at 5:45 a.m., and testified that he fully intended to contact Geoghegan about his need to complete the controverted assignments. He was simply waiting for Geoghegan to report to work and get settled. But as of 11:30 a.m., Caraccio still had not done so, and Geoghegan initiated contact himself. Caraccio's version of the conversation echoed Geoghegan's; Caraccio did not

[5] The report erroneously stated that Dille himself reviewed the Power DMS list and noticed Caraccio's noncompliance. Caraccio appears to view this error as significant in some way; I cannot agree. Regardless of who discovered the noncompliance, the record is clear that the two controverted assignments were not timely completed.

think that the controverted trainings were applicable to him; Geoghegan advised that they should be completed; and Caraccio promptly complied.

Caraccio shared the history of his work as a union leader, and implied that retaliation was behind the decision to discipline him for this small infraction. In late 2010, when he was serving as Vice-President of the Supervisors Local, a dispute arose about promotions; the County had proposed promoting some eleven individuals but asked to freeze their salaries at a lower level for a year. The union was adamantly opposed; Geoghegan was one of the effected individuals. Apparently, the Director and Deputy Director clandestinely signed an agreement to proceed with the promotions and salary freeze over the union's objections. The union was often at odds with the prison administration; Caraccio stressed his lack of respect for management and took pains to note that the then Deputy Director ultimately was convicted of wiretapping and sent to prison.

Our courts have held that "credibility findings . . . are often influenced by matters such as observations of the character and demeanor of witnesses . . . that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1998). A credibility determination requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Caraccio's testimony did not hold together. His excuses for noncompliance were unpersuasive. Caraccio had more than one opportunity to timely raise questions about the need to complete the two controverted assignments. He could have emailed Geoghegan and at least registered his concern within the time frame for completion. Caraccio could have called Dille, who was not his regular supervisor but was the superior who issued the order, and received the clarification he sought. Moreover, Caraccio completed several outstanding assignments that day that were equally inapplicable to his daily duties in the Juno Unit. He is not involved with the transportation of inmates, but completed a module on that subject. He does not supervise inmates in their cells, but completed a suicide prevention module. I thus do not deem credible the explanation that Caraccio perceived that the two final modules, and only these two, were somehow inapplicable to him.

As for Caraccio's true motivation for completing all but two modules that day, the record offers no clear explanation. But the record is clear, and I **FIND** that he *willfully* and knowingly failed to comply with an order; and failed to timely seek clarification of any aspect of that order that he ostensibly misunderstood.

CONCLUSIONS OF LAW

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 designed 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 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). However, a Civil Service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be removed or subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing before an administrative law judge are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, to be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. N.Y. v. Bock, 38 N.J. 500 (1962). The appointing authority bears the burden of proving its charges by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

Correctional facilities operate through a rigidly hierarchical, almost "paramilitary," structure. Lockley v. Dep't of Corr., 177 N.J. 413, 425 (2003). Maintenance of strict discipline is critical in military-like settings such as police departments, prisons and correctional facilities. City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). While insubordination is always a serious matter, it is especially so in a paramilitary context. Our courts have held that "[r]efusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

Dictionary definitions have been utilized by our courts to define "insubordination" where it is not specifically defined in contract or regulation, explaining as follows:

> we are obliged to accept [the term "insubordination's"] ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended.
>
> [Ricci v. Corp. Express of the E., 344 N.J. Super. 39, 45 (App. Div. 2001) (citation omitted).]

Black's Law Dictionary 802 (7th Ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient."

"Neglect of duty" can arise from an omission or failure to perform a duty as well as negligence. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div 1977). "Duty" signifies conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957). Neglect of duty can arise from omission to perform a required duty, as well as, from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Although the term "neglect of duty" is not defined in the New Jersey Administrative Code, the charge has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title or was negligent in its discharge. Avanti v. Dep't of Military and Veterans Affairs, 97 N.J.A.R.2d (CSV) 564; Ruggiero v. Jackson Twp. Dep't of Law and Safety, 92 N.J.A.R.2d (CSV) 214.

"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 Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). 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)).

I **CONCLUDE** that Caraccio's failure to timely complete the two Power DMS modules rose to insubordination, neglect of duty, and conduct unbecoming a correctional officer. He was presented with an unequivocal order that contained clear timelines; he failed to comply. In the event an order is unclear or confusing to a subordinate, it is the subordinate's duty to seek clarification prior to the expiration of the time frame for completion of the assignment at issue. Caraccio failed to do so here.

I **CONCLUDE** that Caraccio has not presented persuasive evidence that the charges against him were motivated by anti-union animus. Caraccio also pointed out that a prior attempt to remove him, in 2014, was overturned by the Civil Service Commission, thus urging that the County is essentially "out to get him." This argument is equally unpersuasive; and indeed, that prior disciplinary incident rose and fell on its own merits, and is irrelevant to the case presently before me. Caraccio urged that the County failed to produce certain policies both at the local hearing and before me; but even if true, this did not evidence that the charges here were motivated by anything other than Caraccio's conduct. Moreover, the sought-after policies could have been obtained through an Open Public Record Act (OPRA) request; or via a discovery motion before me. Neither avenue appears to have been pursued here. And any failure by the County to provide discovery at the local hearing was cured by Caraccio's opportunity for a de novo hearing before me. See: Ensslin v. Tp. of N. Bergen, 275 N.J. Super. 352 (App. Div., 1994); In re Darcy, 114 NJ. Super. 454 (App. Div., 1971).

Finally, Caraccio raises for the first time in his post-hearing submission the somewhat novel argument that the Civil Service Commission is biased toward management, and that this should somehow factor into my decision making. In support of this contention, counsel attaches data and a certification, none of which was presented at hearing; and accordingly, none of which, will I consider or make a part of

this record. And Caraccio's argument misapprehends my role, which is to make a recommendation to the Civil Service Commission in this specific case, and based on the facts developed at this hearing. It is not my role to comment or rule on *how the* Commission reaches its final decisions.

PENALTY

A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The core of this concept is the nature, number and proximity of prior disciplinary infractions evaluated by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential. When determining the appropriate penalty to be imposed, the appointing authority must consider an employee's past record, including reasonably recent commendations and prior disciplinary actions. W. New York v. Bock, supra. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24.

I have reviewed Caraccio's disciplinary record to determine whether the penalty of removal, as sought by the County, is reasonable under the totality of the circumstances. Clearly, standing alone, this minor infraction would not warrant termination of employment. But the law requires that I examine Caraccio's record in its entirety, and it reveals a troublesome record of disciplinary infractions:

1. In March 2006, Caraccio failed to report for a training session and received a three-day suspension.
2. In July 2006, Caraccio was late in reporting for duty and received a two-day suspension.
3. In May 2010, he was suspended for three days for using profanity and yelling at a co-worker.
4. Later that month, he was fined for lateness.
5. In November 2011, Caraccio was fined for altering a line-up without conferring with his superior.

6. In January 2012, disciplinary charges arising from use of profanity were settled with the parties agreeing to a twenty-day suspension, with five days to be held in abeyance.
7. And while Caraccio correctly pointed out that a prior attempt to remove him was overturned by the Civil Service Commission, an appeal of a demotion and a 120-day suspension for driving while intoxicated when off-duty was upheld by the Commission in December 2014.

This is an employer who has redirected Caraccio's conduct for over ten years, steadily increasing the level of discipline from fines and minor disciplinary suspensions, to major disciplinary suspensions of increasing length and duration. Caraccio nonetheless continues to fail to comply with the rules of his workplace. Our courts have recognized that "there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006). I **CONCLUDE** that the penalty of removal should be upheld.

ORDER

Therefore, it is hereby **ORDERED** that the charges against Caraccio are **SUSTAINED**, and for the reasons set forth above, the penalty of removal is likewise **SUSTAINED**.

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.

September 5, 2017

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: September 5, 2017

Date Mailed to Parties: SEP 6 2017

sej

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

For Appellant:

Ron Edwards

Sergei Duda

Thomas Caraccio

For Respondent:

John Geoghegan

Kevin Dille

EXHIBITS

For Appellant:

A-1 Report

A-2 Prior decisions

For Respondent:

R-1 Written Directive System Policy

R-2 General order

R-3 Request for Disciplinary Action

R-4 Report

R-5 Report

R-6 Body Armor Policy

R-7 Home Confinement (GPS) Policy

R-8 PNDA

R-9 Excerpts from Rules and Regulations Manual

R-10 Memorandum

R-11 Supplemental Report

R-12 Prior disciplinary record