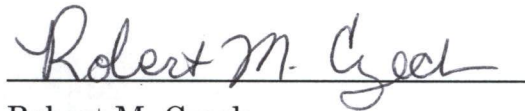


Re: Joshua Feldman

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
APRIL 5, 2017



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 14933-16

**IN THE MATTER OF JOSHUA FELDMAN,
HUDSON COUNTY (DEPARTMENT OF
CORRECTIONS).**

Matthew W. Young, Esq., for appellant Joshua Feldman (Mason Thompson,
attorneys)

Daniel W. Sexton, Assistant County Counsel, for respondent Hudson County
Department of Corrections (Donato J. Battista, County Counsel, attorney)

Record Closed: February 1, 2017

Decided: March 10, 2017

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE

County correction sergeant Joshua Feldman was removed from his employment at the Hudson County Department of Corrections (HCDOC) for alleged insubordination, conduct unbecoming a public employee, neglect of duty, and other sufficient cause, as a result of his driving while intoxicated and involvement in a motor-vehicle accident on October 30, 2012.

PROCEDURAL HISTORY

On November 2, 2012, the HCDOC served upon Feldman a Preliminary Notice of Disciplinary Action (PNDA) reflecting that he was suspended effective November 2, 2012. (J-1.) He was issued a Notice of Immediate Suspension on November 2, 2012, reflecting that suspension was necessary to maintain safety, health, order, or effective direction of public services, and because he had been formally charged with a crime of the first, second, or third degree. (J-1.) A departmental hearing was held on November 9, 2012. (J-1.) On April 4, 2013, the HCDOC served upon Feldman a Final Notice of Disciplinary Action (FNDA) reflecting that he was indefinitely suspended. Feldman was thereafter indicted on one count of assault by auto (third degree) and three counts of endangering the welfare of a child (second degree). On or about June 24, 2013, Feldman pleaded guilty to (1) assault by auto; (2) DWI with minors; and (3) DWI, and entered Pretrial Intervention (PTI) with conditions. The charges of careless driving and endangering the welfare of a child were recommended for dismissal. (J-1.) Feldman completed PTI, and an order was entered on June 24, 2016, dismissing the complaint/indictment/accusation and discharging the posted bail.

On June 27, 2016, the HCDOC served upon Feldman a second PNDA. (J-1.) A second departmental hearing was held on August 29, 2016. On September 1, 2016, the HCDOC served upon Feldman a second FNDA, removing him from his employment effective September 1, 2016. (J-2.) Feldman filed a request for a hearing with the Office of Administrative Law (OAL) and the Civil Service Commission (Commission). The appeal was received by the OAL on September 20, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 and N.J.S.A. 40A:14-200 et seq., and was perfected on September 22, 2016.

I heard the matter on January 4, 2017, and the record closed on February 1, 2017.¹

¹ The record was to have closed on January 25, 2017, but respondent's brief was not received via email, and the hard copy was received on February 1, 2017.

FACTUAL DISCUSSION

Background

Having had an opportunity to consider the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following material **FACTS** in this case:

Feldman commenced employment with the HCDOC as an officer in September 1997 and was promoted to sergeant in August 2006.

On October 30, 2012, the day after Superstorm Sandy, Feldman was driving home from a gathering. Feldman's wife and three children, then ages eleven, ten and four, were with him. At approximately 6:55 p.m., Feldman swerved over the double yellow lines and crashed head-on into another vehicle (the crash). Special Officer Haley had been traveling behind the other vehicle and witnessed the accident. (R-1.) Det. Ryan Hoppock has been employed by the Woodbridge Police Department since October 2009 and was a patrol officer at the time of the crash. He was dispatched to the crash scene. Lt. Joseph Licciardi has been a police officer since 1995, and was a patrol sergeant at the time of the crash. Licciardi arrived at the crash scene shortly after Hoppock.

Hoppock observed two vehicles with heavy damage disabled in the middle of the road. It appeared to Hoppock that there was a serious injury to the other driver (injured driver) and that he was trapped inside his vehicle. The fire department was at the crash scene and had to cut the driver-side door to remove the injured driver. Licciardi arrived as the fire department was trying to remove the injured driver from his vehicle.

After the injured driver was removed from his vehicle and taken to the hospital, Hoppock went to speak to Feldman. It appeared to Hoppock that Feldman had been drinking. After determining that there were no injuries to Feldman or his family, Hoppock asked Feldman if he had been drinking. Feldman admitted to having consumed alcohol.

Hoppock told Licciardi that he detected an odor of alcohol on Feldman's breath and told Licciardi that Feldman said he had consumed alcohol. Licciardi went to speak to Feldman. Licciardi greeted Feldman and observed that his eyes were bloodshot and watery. Licciardi also detected an odor of alcohol on Feldman's breath. Licciardi asked Feldman what happened and Feldman told him that he crossed over the double yellow lines to avoid a tree branch and then he struck the other vehicle. (R-3.) Licciardi asked Feldman about alcoholic beverages and Feldman admitted that he had consumed alcohol.

Licciardi commenced the standard field sobriety testing. Licciardi was trained at the State Police Standard Field Sobriety Testing course in 1996 and he was a breathalyzer operator and is now an Alcotest operator. Licciardi checked Feldman's eyes for nystagmus by having Feldman follow a pen with his eyes. Licciardi observed a lack of smooth pursuit in both eyes, nystagmus at maximum deviation in both eyes, and an onset of nystagmus prior to forty-five degrees in both eyes. Licciardi asked Feldman to do the one-leg stand after demonstrating it to him. Feldman stood on his right leg and immediately fell down, so Licciardi stopped the one-leg stand test. Licciardi then conducted the "walk and turn" test, and Feldman missed every step on that test. Licciardi concluded that Feldman was intoxicated, and he was placed under arrest and taken to the police station.

Hoppock completed a New Jersey Police Crash Investigation Report and Incident Report. (R-1; R-2.) Licciardi completed an Incident Report. (R-3.) Feldman was charged with driving while intoxicated (DWI), DWI with minors, and careless driving. Due to the seriousness of the injuries to the other driver, Feldman was also charged with aggravated assault (N.J.S.A. 2C:12-1(b)), and because his children were in the vehicle Feldman was also charged with three counts of endangering the welfare of children (N.J.S.A. 2C:24-4). (R-2; R-3.) Hoppock determined that Feldman was responsible for the crash. (R-1.) Feldman was polite and cooperative with the officers.

Licciardi attempted a breathalyzer at police headquarters, but the machine malfunctioned. Feldman consented to a blood sample, and was taken to the hospital for a legal BAC² sample. Feldman's BAC was .298.

On November 2, 2012, the HCDOC served upon Feldman a PNDA reflecting that he was suspended effective November 2, 2012. (J-1.) He was issued a Notice of Immediate Suspension on November 2, 2012, reflecting that suspension was necessary to maintain safety, health, order, or effective direction of public services, and because he had been formally charged with a crime of the first, second, or third degree. (J-1.) A departmental hearing was held on November 9, 2012. (J-1.) On April 4, 2013, the HCDOC served upon Feldman a FNDA reflecting that he was indefinitely suspended. Feldman was thereafter indicted on one count of assault by auto (third degree) and three counts of endangering the welfare of a child (second degree). On or about June 24, 2013, Feldman pleaded guilty to (1) assault by auto; (2) DWI with minors; and (3) DWI, and he entered PTI with conditions. The charges of careless driving and endangering the welfare of a child were recommended for dismissal. (J-1.)

On June 24, 2013, Feldman admitted on the record that he consumed beer and liquor prior to operating his vehicle on October 30, 2012; that his toxicology results were a .298; that it impaired his ability to operate his vehicle; that his three children, ages eleven, ten, and four, were with him in the vehicle; that as a result of his alcohol consumption he was involved in a motor-vehicle accident with another vehicle; and that as a result of his driving while intoxicated he caused serious injury to the driver of the other vehicle. He entered pleas to driving while intoxicated (a traffic violation) and driving while intoxicated with minors in the vehicle (a traffic violation), and to assault by auto (a third-degree crime). In exchange for the pleas, the three counts of endangering the welfare of a child (a second-degree crime) would be dismissed at the time of sentencing, and the charge of careless driving (a traffic violation) would also be dismissed. The assistant prosecutor noted on the record that Feldman "is a Hudson County Corrections officer, and he understands that by pleading guilty to this, as a condition of PTI, that he will not be able to work while he's in PTI." (R-6.) Likewise, the

² Blood alcohol content.

judge stated, "I'm being told that as a condition of pre-trial intervention, you will not be able to work. I'm inferring from that that once PTI is up, he can go back to work. But I have no idea." (R-6.)

An Order of Postponement was executed on June 26, 2016, which reflects the following:

In accordance with the provisions of N.J.S.A. 2C:43-12 & 13 & R. 3:28, and upon the recommendation of the PTI Director and with the consent of the Prosecutor and defendant to the attached listed terms and conditions of the supervisory treatment, it is ORDERED that all further proceedings be and are postponed for a period of 36 months, beginning June 26, 2016.

[R-4.]

The terms and conditions reflected on the Special Conditions of PTI Supervisor (Special Conditions) included, inter alia, fifty hours of community service, restitution to the injured driver, certain drug/alcohol testing and/or counseling, and medical/psychological tests/evaluations or counseling. (R-4.)

Feldman completed PTI. On June 26, 2013, an Order of Dismissal and Discharge of Bail (Dismissal Order) was entered by the Honorable Alberto Rivas, P.J.Cr., ordering that the complaint(s)/indictment(s)/accusation(s) were dismissed and the posted bail discharged. (P-2.) Feldman received a copy of the Dismissal Order on July 13, 2016. (P-3.) On August 26, 2016, an Order was entered by the Honorable Mary K. Costello, P.J.Civ., denying with prejudice the HCDOC's Order to Show Cause for an order forfeiting Feldman's public employment. (P-4.)

Feldman's disciplinary history includes some minor discipline for lateness and one major discipline in 2008 for excessive force, for which he received a twenty-day suspension.

Testimony

Ryan Hoppock

At the crash scene, Feldman told Hoppock he had a couple of drinks today.

Joseph Licciardi

Licciardi observed Feldman swaying and unable to stand. Licciardi asked Feldman what type of alcoholic beverages he had consumed and Feldman stated, "ten beers." Feldman was alert and conscious and spoke coherently. Standard field sobriety testing only indicates whether someone is a .08 or above; .08 is the legal limit. Feldman's BAC of .298 is significantly above the legal limit. However, Licciardi has seen people with a .30 remain standing, and some people at .08 or .09 falling during the standard field sobriety testing.

The other driver was seriously injured. Licciardi happened to see the injured driver a couple of years after the accident, and he was still recuperating.

Chris Yurecko

Capt. Chris Yurecko started as an officer in September 1997. He became a lieutenant in 2012 and became a captain a year ago. As a lieutenant, he was the unit commander. Unit commanders handle discipline of members.

Yurecko testified that Feldman's was not a run-of-the-mill DWI. A typical DWI is when someone gets pulled over and they are .08 or above, and it results in a six-month driver's-license suspension. Feldman's DWI involved aggravated assault by auto, endangering the welfare of minors, a guilty plea, and PTI. Feldman was a sergeant at the time. An officer, in particular a supervisor, being arrested on a charge that hurts a person does not reflect well on the officer or the HCDOC. Officers are held to a higher standard, and supervisors are held to a higher standard than officers. Typically if an

officer and a supervisor are found guilty of the same infraction at a hearing, the supervisor winds up with a more severe punishment.

James Nieves

Sgt. James Nieves has been employed by the HCDOC since October 1994 and has been a sergeant for eleven years. He is the PBA president for the Supervisor's Association. At the time of the crash he was a trustee.

Nieves has known Feldman since Feldman commenced his employment with the HCDOC. Feldman is a strong individual, and is liked by everyone. Nieves has never heard a complaint about Feldman, but he has heard compliments. Feldman worked in an area that many supervisors try to avoid. If a mistake is made in that area, it could result in suspension or termination. Feldman is an exceptional supervisor. Nieves had no knowledge of any drug or alcohol abuse by Feldman. Feldman made a mistake.

Joshua Feldman

At the time of the crash, it was dark out and there were no lights or power because of Superstorm Sandy. Feldman could only see headlights coming. There was debris on the road. Feldman moved over the center line and the two vehicles hit their headlights together. On impact, Feldman's body hit the steering wheel and his eyeglasses went flying. Feldman was all bruised the next day. He thought he lost consciousness for a second. His wife was screaming. Feldman closed his eyes and opened them and made sure his children were okay. His son was screaming. Feldman got out of the car. The airbags had deployed on the other vehicle, and the injured-driver's face was bleeding.

Several police officers came and spoke to Feldman. Feldman was concerned about his eyeglasses because he could not see, but they were unable to locate them. The first "officer" on scene was a "special" officer, not a full officer. Hoppock arrived shortly after that. Feldman told Hoppock that he had crossed the double yellow lines to avoid debris on the road and then he collided with the other vehicle.

Feldman denied telling Licciardi he had ten beers. Feldman said "two" to everyone he spoke to, but one officer reported he said "ten," and another reported he said "too much." Feldman was drinking. He does not recall how many beers. He had a lot of beers throughout the day, and before he left he had a couple of mixed drinks. Feldman is not contesting the DWI.

Feldman thought he was just getting tickets, and did not find out about the criminal charges until after the breathalyzer and blood test. He thought the charges would impact his employment, so he hired an attorney and spoke to numerous people, including his superiors, union representatives, and colleagues. Feldman appeared in Superior Court on the criminal charges. There was an offer of PTI, and he discussed the implications of PTI with the HCDOC. The prosecutor had mentioned pleading guilty to one of the charges, and that Feldman should pick one. Feldman did not think that would be good for his job, so he discussed it with Deputy Director Eady. Eady contacted county counsel. Feldman waited for answers, but did not immediately get feedback. On June 10, 2013, at 2:45 p.m., Feldman's criminal attorney emailed Donald Battista, county counsel. Battista emailed back that he would let the criminal attorney know. Battista did not further respond via email or in writing. Feldman's criminal attorney received a telephone call from Battista, who told his criminal attorney that it was fine for PTI with a guilty plea and that Feldman was not going to be terminated, but that he would definitely have to go through the disciplinary process. Before Feldman entered into PTI, Feldman's criminal attorney told him Battista had input. Feldman had numerous discussions about not wanting to go to a hearing. He was told once PTI was completed and dismissed, he could get his job back. Feldman has nothing in writing about getting his job back.

Feldman entered PTI on June 26, 2013, after making sure he had his job secure. Feldman's understanding, based on his consultations with various people, was that after he signed the PTI paperwork he could go right back to work after the disciplinary hearing; that he could work while on PTI; and that he would be demoted and suspended for six months. Feldman received a PNDA on November 2, 2012, and everything was held in abeyance until any final proceedings in the criminal matters took place. Since PTI took so long, the HCDOC had to issue the PNDA. Feldman received another

PNDA on June 27, 2013, because the previous PNDA had been for an indefinite suspension pending the criminal charges.

Feldman was not allowed to return to work while on PTI or at any time since the accident. Feldman's license was suspended. Feldman had a breathalyzer in his car for seven months.

Feldman was in PTI for thirty-six months. The entire indictment was dismissed on June 24, 2016, after he satisfied all the requirements. Feldman received another PNDA on June 27, 2016. He did not receive the Dismissal Order until July 27, 2016, when his current attorney forwarded it to him via email.

Hudson County filed a complaint against Feldman in Superior Court in July 2016 seeking automatic forfeiture of Feldman's employment for a third-degree crime. However, Feldman does not have a criminal record because all charges have been dismissed.

Feldman feels horrible about the crash. One event changed his life. He will regret it for the rest of his life. His memory of the crash is clear because it happened to him and his family. The crash scene is near his house. He passes it daily and thinks about this. Feldman acknowledges the DWI and that it was conduct unbecoming to drink and drive and disobey the law. It happens. He made a bad judgment call and a bad mistake. He is not an alcoholic, and he did not have to go for treatment. Feldman's conduct does not warrant his termination. He was offered six months, and many other officers were not terminated for similar conduct. Feldman feels remorseful about what he did. Feldman does not deny that .298 was his BAC or that he was drinking. Feldman acknowledged drinking and careless driving. He made a stupid mistake. He did not purposely assault the other driver with his vehicle. He got into a car accident.

Feldman was promised numerous times that he would get his job back and he followed the correct protocol for it. At one point Feldman went and got his uniform without his sergeant stripes on it, but was told to get the stripes because he was going back to work. However, thereafter he was no longer receiving telephone calls and was

told not to get the stripes. Instead, he was told to shut up and not say anything and to come back in three years because HCDOC had every right to fire him then if they wanted to. Feldman looked up title 4A of the New Jersey Administrative Code relative to actions involving criminal matters, and determined that the HCDOC could do whatever it wanted involving PTI. The HCDOC could allow Feldman back to work, fire him, give him a hearing, or have him wait until PTI was completed. Feldman decided that if the HCDOC wanted him to wait he would humbly wait until he completed PTI, because he did something wrong. Feldman did not want to forfeit his job. He thought he was getting his job back after PTI, but the HCDOC thereafter suddenly did everything in N.J.A.C. 4A:2-2.7 and gave him a hearing the following Monday. It is a game the HCDOC plays. Feldman feels that he has been treated unjustly, but is not sure by whom. Deputy Director Eady told him he could have his job back. Director Nalls gave Feldman a big hug at a retirement party and said that she could not wait until Feldman finished PTI, and that he would get his job back. After Nalls became the director, county counsel told her not to speak to Feldman anymore.

Feldman was involved in the Officers' Union from 2001 to 2008, and was treasurer until he became a sergeant in 2008. Thereafter, he served as treasurer, vice-president, and acting president of the Supervisors' Union. Feldman was a union representative numerous times. Feldman has never had a subordinate make a complaint about him. He has good rapport with all officers and the chain of command.

Additional Findings of Fact

Based upon the testimony, I **FIND** the following additional **FACTS**:

Feldman had "a lot of beers throughout the day" on the day of the crash, and before he left the gathering he had a couple of mixed drinks. There exists nothing in writing that Feldman was to be reinstated to his employment.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.S.A. 11A:1-1 through 12-6, the "Civil Service Act," established the Civil Service Commission in the Department of Labor and Workforce Development in the Executive Branch of the New Jersey State government. N.J.S.A. 11A:2-1. The Commission establishes the general causes that constitute grounds for disciplinary action, and the kinds of disciplinary action that may be taken by appointing authorities against permanent career-service employees. N.J.S.A. 11A:2-20. N.J.S.A. 11A:2-6 vests the Commission with the power, after a hearing, to render the final administrative decision on appeals concerning removal, suspension or fine, disciplinary demotion, and termination at the end of the working test period, of permanent career-service employees.

N.J.A.C. 4A:2-2.2(a) provides that major discipline shall include removal, disciplinary demotion, and suspension or fine for more than five working days at any one time. An employee may be subject to discipline for a number of reasons enumerated in N.J.A.C. 4A:2-2.3(a), including "insubordination," "conduct unbecoming a public employee," "neglect of duty," and "other sufficient cause." In appeals concerning such major disciplinary actions, the burden of proof is on the appointing authority to establish the truth of the charges by a preponderance of the believable evidence. N.J.A.C. 4A:2-1.4; N.J.S.A. 11A:2-21; Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

Feldman is charged with insubordination (N.J.A.C. 4A:2-2.3(a)(2)), conduct unbecoming a public employee (N.J.A.C. 4A:2-2.3(a)(6)), neglect of duty (N.J.A.C. 4A:2-2.3(a)(7)), and other sufficient cause (N.J.A.C. 4A:2-2.3(12)). The HCDOC Rules and Regulations reflect that insubordination may include, but shall not be limited to, (1) refusing to obey lawful orders or commands from a supervisor, (2) using profane or insulting language to a supervisor, and (3) making insulting gestures to a supervisor. The HCDOC Rules and Regulations also reflect that custody-staff members shall not commit acts of insubordination, and that the following specific acts are prohibited: (1) failure or deliberate refusal to obey a lawful order, verbal or written, by the director of corrections, deputy director, deputy warden(s), unit manager(s), or other supervisory staff member(s) or any authorized person; and (2) any disrespectful, mutinous, insolent, obscene, and/or abusive behavior or language towards any supervisory staff member or their orders (verbal and/or

written). In view of the applicable HCDOC Rules and Regulations regarding insubordination, I **CONCLUDE** that the charge of insubordination is not sustained.

Per the HCDOC Rules and Regulations, custody staff members (CSMs) are prohibited from engaging in “unprofessional or illegal behavior, both on and off duty that could in any manner reflect negatively on the HCDOC”; every CSM shall “[c]omply with all federal and state laws, regulations and/or statutes”; every CSM shall “[a]dhere to all rules, regulations, policies, procedures, orders, and directives of the HCDOC”; intoxication is subject to disciplinary action and may include that which is “off duty, not in uniform, and arrested”; “[a]ny act or omission to act contrary to good order, discipline, or accepted social practice may subject a custody staff member to disciplinary action”; CSMs “shall comply with all Federal and State laws; HCDOC policies, procedures, rules and orders”; and CSMs “shall conduct their private and professional life in such a manner as to avoid an adverse reflection upon themselves and the HCDOC.” Feldman’s conduct, including driving while intoxicated with three children in the vehicle, resulting in serious injury to another driver, was illegal; was a violation of federal and State laws, regulations, and statutes; was a violation of several Rules and Regulations of the HCDOC; and was contrary to acceptable social practice. The HCDOC Rules and Regulations reflect that “neglect of duty” may include failure to comply with HCDOC Rules and Regulations. Accordingly, I **CONCLUDE** that the charge of neglect of duty is sustained.

With respect to conduct unbecoming a CSM, the HCDOC Rules and Regulations state:

A custody staff member of the HCDOC is a conspicuous representative of the Department and all of its custody staff members. To the majority of people, he/she is a symbol of stability and reliability. His/her conduct is scrutinized and when his/her actions are found to be excessive, unwarranted, or unjustified, he/she is criticized far more severely than comparable conduct of persons in other fields of endeavor. The conduct of a public employee, on and off duty, reflects upon the HCDOC. Therefore, custody staff members must avoid conduct that might discredit themselves or the Department.

The HCDOC Rules and Regulations state that a CSM may be subject to disciplinary action for conduct unbecoming an officer and infractions of rules and regulations and/or policy and procedures of the HCDOC.

Notwithstanding the foregoing, conduct unbecoming an employee need not “be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye 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) (citation omitted). Per N.J.S.A. 2A:154-3, correction officers are recognized as law-enforcement officers, and as such may enforce the criminal law of this state, and a correction officer’s involvement in maintaining security at the jail is a compelling public interest. Allen v. Cnty. of Passaic, 219 N.J. Super. 352, 374 (Law Div. 1986). Police officers are held to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576–77 (1990). This higher standard of conduct is one of the obligations a police officer undertakes upon voluntary entry into the public service. In re Emmons, 63 N.J. Super. 136 (App. Div. 1960). A police officer’s primary duty is to enforce and uphold the law, and a police 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.” Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). The obligation to act in a responsible manner is especially compelling in a case involving a law enforcement official. In re Philips, supra, 117 N.J. at 576.

By his own admission, Feldman had “a lot of beers throughout the day,” and before he left the gathering he had a couple of mixed drinks. Feldman nevertheless drove his vehicle while intoxicated, with a BAC of .298, at night the day after Superstorm Sandy when there was no power, with three children in the vehicle, and he caused a head-on collision resulting in serious injury to the other driver. I **CONCLUDE** that such conduct, especially by a law-enforcement officer, in particular a sergeant, is unbecoming a public employee and sufficient cause for discipline pursuant to N.J.A.C. 4A:2-2.3(a).

Section 1.14 of the HCDOC Rules and Regulations reflects, in pertinent part, that CSMs, “regardless of rank or position, shall be subject to disciplinary action according to the nature of the offense for violating their oath and/or trust by committing an offense punishable under the laws or statutes of the United States of America, the State of New Jersey, or Municipal ordinances” or for violation of any general order or rules of the HCDOC. Section 1.14 also reflects that “[d]isciplinary action in all cases shall be decided on the merits of each case.”

The Commission may increase or decrease the penalty imposed by the appointing authority, though removal cannot be substituted for a lesser penalty. N.J.S.A. 11A:2-19. When determining the appropriate penalty, the Commission must utilize the evaluation process set forth in West New York v. Bock, 38 N.J. 500 (1962), and consider the employee’s reasonably recent history of promotions, commendations and the like, as well as formally adjudicated disciplinary actions and instances of misconduct informally adjudicated. Accordingly, my review of the case is de novo, and I am not bound by a prior penalty determination.

Appellant argues that Feldman’s guilty plea and entry into PTI should not constitute sufficient cause for removal on their own. I concur with appellant, as the determination as to the appropriate penalty is instead based upon Feldman’s conduct on October 30, 2012. As such, the parties’ difference of opinion as to the effect of PTI upon appellant’s criminal record, specifically whether appellant does or does not have a criminal record after the Dismissal Order was entered, is immaterial, and no determination or opinion is made herein as to appellant’s current criminal record. Likewise, the parties’ difference of opinion relative to the forfeiture statute is immaterial. Appellant also argues that he was the subject of unfair and unequal treatment by the HCDOC. However, any such treatment would be cured by the within de novo review.

Since West New York v. Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct: to support the imposition of a more severe penalty for a public employee who engages in habitual misconduct, and to mitigate the penalty for a current offense. In re Herrmann, 192 N.J. 19, 30–33 (2007). However, in an instance where an employee

commits an act that is sufficiently egregious, removal may be appropriate notwithstanding the lack of a prior history of infractions. See, e.g., In re Herrmann, supra, 192 N.J. 19. According to the Supreme Court, progressive discipline is a worthy principle, but it is not subject to universal application when determining a disciplined employee's quantum of discipline. Id. at 36.

Although progressive discipline is a recognized and accepted principle that has currency in the [Civil Service Commission's] sensitive task of meting out an appropriate penalty to classified employees in the public sector, that is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.

Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580, 410 A.2d 686 (1980); Bowden v. Bayside State Prison, 268 N.J. Super. 301, 306, 633 A.2d 577 (App. Div. 1993), certif. denied, 135 N.J. 469, 640 A.2d 850 (1994).

[Id. at 33–34.]

In addition, “[o]ur appellate courts also have upheld dismissal of employees, without regard to whether the employees have had substantial past disciplinary records, for engaging in conduct that is unbecoming to the position.” Id. at 34.

The theory of progressive discipline is not a fixed and immutable rule to be followed without question, as some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007). The Supreme Court has noted that “the question for the courts is ‘whether such punishment is so disproportionate to the offense, in the light of all the circumstances,

as to be shocking to one's sense of fairness.” Ibid. (quoting In re Polk License Revocation, 90 N.J. 550, 578 (1982)). The Supreme Court also noted that the Appellate Division has likewise acknowledged and adhered to this principle, where the acts charged, regardless of prior discipline, warranted the imposition of the sanction. Id. at 485.

Feldman did not present any recent history of promotions or commendations, but prior to his removal, Feldman's only major discipline was a twenty-day suspension in 2008 for excessive force. As a correction officer, Feldman is undeniably subject to a higher standard, and it is imperative that he represent law and order and present an image of personal integrity and dependability. A number of aggravating factors exist that far exceed a DWI. Feldman operated his vehicle at night the day after Superstorm Sandy when there was no power and there was debris on the roads, with a blood alcohol concentration of .298, and with three children in the vehicle, and caused a head-on collision and serious injury to another driver. Although Feldman testified that he swerved to avoid debris, and that it was “an accident,” opting to swerve into an oncoming vehicle rather than hit a tree branch suggests impairment and that his intoxication, rather than the tree branch, was the cause. Additionally, he was not charged solely with DWI. He was charged with assault by auto, a third-degree crime; endangering the welfare of three children, a second-degree crime; DWI with minors; and careless driving. Likewise, the result was not the typical penalty for a first-time DWI. Instead, he was in PTI for thirty-six months and required to comply with a number of conditions.

Progressive discipline has been bypassed especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. Feldman's conduct caused actual harm to the injured driver and to property, and caused risk of harm to his wife and children. In view of a totality of the circumstances, I **CONCLUDE** that removal is not shocking to one's sense of fairness and is the appropriate penalty.

ORDER

It is hereby **ORDERED** that the charges of conduct unbecoming a public employee, neglect of duty, and other sufficient cause are **SUSTAINED**. It is hereby further **ORDERED** that the penalty of removal of Joshua Feldman from his public employment is **AFFIRMED**.

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.

3/10/17
DATE


KELLY J. KIRK, ALJ

Date Received at Agency:

3/10/17

Date Mailed to Parties:

3/10/17

dlc

APPENDIX

WITNESSES

For Appellant:

Ryan Hoppock
Joseph Licciardi
Chris Yurecko

For Respondent:

Joshua Feldman
James Nieves

EXHIBITS IN EVIDENCE

Joint

J-1 PNDA, dated June 27, 2016
J-2 FNDA, dated September 1, 2016

For Appellant:

P-1 (Not in evidence)
P-2 PTI Program Order of Dismissal and Discharge of Bail
P-3 Email from Shylo Rollins to Matt Young, dated July 13, 2016
P-4 Order, dated August 26, 2016

For Respondent:

R-1 New Jersey Police Crash Investigation Report
R-2 Incident Report of Hoppock
R-3 Incident Report of Licciardi
R-4 Pretrial Intervention Documents and Plea Form
R-5 HCDOC Custody Staff Rules and Regulations Manual
R-6 Transcript of Plea