

concerning back pay or counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to her permanent position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Mariela Rivera. The Commission further orders that appellant be granted back pay, benefits, and seniority from December 18, 2017 to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C. 4A:2-2.12*. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10* and *N.J.A.C. 4A:2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*. After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF JUNE, 2018



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

**Inquiries
and
Correspondence**

attachment

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT.NO. CSR 00265-18

AGENCY DKT. NO. N/A

**IN THE MATTER OF MARIELA RIVERA, ESSEX
COUNTY DEPARTMENT OF CORRECTIONS.**

Nicholas Palma, Esq., for Appellant

**Jill Caffrey, Assistant County Counsel, for Respondent (Courtney Gaccione,
Essex County Counsel, attorney)**

Record Closed: May 23, 2018

Decided: May 24, 2018

BEFORE ELLEN S. BASS, ALJ:

STATEMENT OF THE CASE

Mariela Rivera, a Corrections Officer formerly employed by the Essex County Department of Corrections (the County), appeals the termination of her employment. The County charged Rivera with conduct unbecoming an employee after she was criminally charged with harboring a criminal. Rivera denies that she engaged in criminal activity; the charges against her were dismissed after she successfully completed a Pretrial Diversion Program.

PROCEDURAL HISTORY

On January 4, 2016, Rivera was indefinitely suspended, per a Preliminary Notice of Disciplinary Action (PNDA) issued on February 25, 2016. That suspension came in the aftermath of a criminal complaint filed against her, and was imposed pending disposition of the criminal charges. The criminal charges were filed on September 24, 2015, and were dismissed on December 18, 2017, after Rivera successfully completed six months of a Pretrial Diversion Program, per an agreement she reached with the U.S. Attorney's Office dated May 17, 2017.

Rivera was still on an unpaid suspension, when, on September 12, 2017, the County again served her with a PNDA in which it sought her removal. The specifications provided as follows:

On August 30, 2017, it was learned that Employee, a Corrections Officer at the Essex County Correctional Facility, entered into an Agreement for Pretrial Diversion on May 15, 2017. Previously this employee was arrested and charged with United District Court Criminal Complaint Mag. No 15-8033 dated September 24, 2015 for violating Title 18, United States Code, Section 1071 and Section 2.

Specifically, the employee was charged with knowingly and intentionally harboring and concealing Omar Serrano, a person for whose arrest a warrant and process had been issued under the provision of a law of the United States, so as to prevent the discovery and arrest of Omar Serrano, after notice and knowledge of the fact that a warrant and process had been issued for the apprehension of Omar Serrano, and which warrant had been issued on a felony charge.

As a result of the violations set forth above, employee's conduct rises to the level of Conduct Unbecoming a Public Employee and therefore the employee's continued suspension and ultimate removal are necessary to maintain the safety, health, order and/or effective operation of the Department of Corrections.

[R-2].

Following a Departmental hearing conducted on November 20, 2017, the County served Rivera with a Final Notice of Disciplinary Action (FNDA) dated December 4, 2017, sustaining charges of conduct unbecoming a public employee, and other sufficient cause, and removing Rivera from her position of employment effective January 4, 2016.¹

Rivera filed an appeal with the Office of Administrative Law (OAL) on December 26, 2017. At a prehearing conference conducted via telephone on January 22, 2018, counsel for the County asked that the matter not be scheduled until May 2018, to accommodate the schedule of the assigned attorney who was on a leave of absence. Counsel for Rivera consented to May 9, 2018, as a hearing date, and moreover agreed to toll the 180-day requirements of N.J.S.A. 40A:14-201(a). See also: N.J.S.A. 40A: 14-201b.

The hearing was conducted on May 8, 2018. At the request of counsel, post-hearing written submissions were filed on May 9 and 22, and 23, 2018, at which time the record closed. As this decision was issued on May 24, 2018, and in light of appellant's waiver, forty-four days have elapsed from filing to decision.

FINDINGS OF FACT

Rivera had been employed by the County since 2006 when, on September 24, 2015, a criminal complaint was filed against her. The complaint alleged that she knowingly and intentionally harbored and concealed Omar Serrano, a person for whose arrest a warrant and process had been issued. At the time, Serrano was Rivera's husband. A narrative that accompanies the criminal complaint states that, on the morning in question, Federal Bureau of Investigation (FBI) agents arrived at a two-family home in Newark, New Jersey to execute an arrest warrant for Serrano. The author of the narrative, Paulo Oliveria, indicates that law enforcement knocked on the front door for some fifteen minutes; and during that time, and after peering out the window, Rivera advised her husband to go to a separate upstairs apartment, and only

¹ The removal was retroactive to the date of the suspension without pay.

then opened the door to her residence. The FBI agents duly identified themselves, but Rivera advised that she did not know where to locate Serrano, and that she had not seen him for several days. After conducting a search of her apartment, and concluding that Serrano was not there, the officers proceeded to the upstairs apartment. They ultimately entered the apartment forcibly, and found Serrano there with an elderly female. According to Oliveria, Rivera subsequently supplied a video-recorded statement admitting that Serrano had been at her apartment that morning and that she had assisted Serrano in attempting to elude arrest by hiding him upstairs.

Oliveria's statement was accepted into evidence, because hearsay is admissible in administrative proceedings. However, in accordance with the "residuum rule," a factual finding cannot be based on hearsay alone. Weston v. State, 60 N.J. 36 (1972). As the Weston court stated:

Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal competent evidence in the record to support it.

[Id. at 51]

The Uniform Administrative Procedure Rules are in accord, and require that "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(b). Hearsay evidence must be accorded the weight deemed appropriate when the nature, scope and character of the evidence, together with the circumstances of its creation and production, are taken into account. N.J.A.C. 1:1-15.5(a).

No competent evidence was offered to corroborate Oliveria's version of the events; nor was the recorded statement to which he refers offered into evidence. A representative of the County, Sergeant Joseph Regateiro, readily admitted that he had

no personal knowledge regarding the events that led to Rivera's arrest. He based his recommendation for removal exclusively on the paperwork available, to include the criminal complaint and the Pretrial Diversion Agreement. The only witness with first-hand knowledge of the events of September 2015 was Rivera herself. And she told a very different story.

Rivera's testimony was entirely uncontroverted. I thus **FIND** that on September 24, 2015, at about 7:00 a.m., Rivera was at home in the master bedroom of her apartment, which was in the rear of the unit, and the furthest point from the front door. To access the apartment, which was part of a two-family house, a visitor would enter an outside front door, and then climb a few steps to the door to Rivera's residence. Another flight of stairs led to an upstairs apartment. Rivera was nursing her newborn baby, having given birth via cesarean section on September 4, 2015, a mere twenty days earlier. She has two small dogs. Although they are prone to barking, that morning their barking became incessant, and Rivera became concerned.

She got up, but moved slowly, because she was still recovering from surgery. Rivera dressed herself, gathered her baby, and proceeded to the front of the house. She saw people outside, but they were in plainclothes, and not readily identifiable as police officers. Rivera then heard the outer front door bell, and heard yelling; only when she opened her apartment's door did she realize that the people outside were shouting "FBI". She went to the outside front door, which was then opened by the officers with such force that she and her newborn were crushed between it and the wall. Her incision was reopened, and the baby was bruised. The officers asked for Serrano. Rivera indicated that he did not reside with her; that he lived upstairs with his mother.

Although the FBI agents presented no paperwork or warrants, she allowed them to search her apartment, and she told them her husband was upstairs. As the officers watched, Rivera texted Serrano, and advised that the police were looking for him. The FBI agents proceeded upstairs and apprehended Serrano. Rivera was not arrested or charged, but was asked to accompany the officers back to their office to supply a statement. She rode in the front of the car, and was not handcuffed. She was not told she was suspected of having committed a crime; the officers did not Mirandize her.

After giving a statement, and answering the questions asked of her, she thought the matter was over. Rivera was waiting for a ride home when the officers informed her that they would have to charge her with a crime.

Rivera adamantly denied that she harbored her husband in violation of law. She urged with credibility that she entered the Pretrial Diversion Program not because she admitted guilt, but because she wanted a speedy dismissal of the charges against her so she could return to work. Although the program can include a probationary period of as long as eighteen months, Rivera was required to participate for only six months, at which point the charges against her were dismissed. She has formally filed for divorce against Serrano.

The Pretrial Diversion Agreement confirmed that it was entered into by the parties after consideration of the nature of the offense and Rivera's background, and based on a determination that doing so would serve "the interests of the United States, [Rivera's] own interest and the interests of justice..." Moreover, and critically, the agreement expressly confirms that entry into Pretrial Diversion does not constitute an admission of guilt, as it states, "[a]ny statements made by [Rivera] in this Agreement will not be admissible on the issue of guilt in any subsequent proceeding."

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).

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 her 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).

“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 here, the County has failed to meet its burden of demonstrating that Rivera is guilty of conduct unbecoming a Corrections Officer. The specifications allege only that Rivera was arrested; a criminal complaint was filed against her; and the charges were dismissed after successful completion of a Pretrial Diversion Program. And these are the only facts that were presented by the County at the OAL hearing. The argument that an arrest alone, without more, rises to unbecoming conduct violates every notion of fundamental fairness, especially where the underlying conduct has been denied in unrebutted testimony. Indeed, Rivera herself offered the only legally competent evidence of what happened on September 24, 2015; she steadfastly maintained her innocence.² See: In re Rosado, CSR 16402-14, Initial Decision (July 19, 2016), deemed adopted, (September 19, 2016), <<http://njlaw.rutgers.edu/collections/oal/>>.

² As we know, criminal charges must be proven beyond a reasonable doubt, and a lesser standard governs this proceeding before me. The County thus could have proven by a preponderance of the credible evidence that Rivera illegally harbored her husband, even if the charges were dismissed at the criminal proceeding, and even if the criminal proceeding resulted in an acquittal at trial. But, it did not do so; indeed, its proofs did not even address Rivera's underlying conduct.

The fact that the criminal matter was dismissed after Rivera participated in a Pretrial Diversion Program does not alter my conclusion. The agreement Rivera executed makes it plain that there was no determination as to guilt made or implied by that agreement. She credibly explained her reasoning for choosing diversion over a trial. I **CONCLUDE** that Rivera must be reinstated to her position of employment as a Corrections Officer.

The post-hearing submissions of the parties address the issue of Rivera's entitlement to back pay. Rivera's period of unpaid suspension has been a lengthy one, dating back to January 2016.³ She was initially placed on an indeterminate period of suspension, pending the disposition of the criminal charges against her, in accordance with N.J.A.C. 4A:2-2.7. That regulation permits a suspension to continue, if the employee enters a diversionary program, until completion of the probationary period stipulated by the diversionary program agreement. And the regulatory scheme moreover makes it clear that if the criminal charges are dismissed via a diversionary program, there is no back pay awarded. N.J.A.C. 4A:2-2.10(c)(1).⁴ DelRossi v Department of Human Services, 256 N.J. Super. 286 (App. Div. 1992).

The County asserts that even if she is reinstated, Rivera is entitled to no back pay whatsoever. It overstates the limitations on Rivera's entitlement to relief. But, the County is correct, and I **CONCLUDE** that, for the period from January 2016, through the discharge of the criminal charges in December 2017, it is not obligated to make Rivera whole. N.J.A.C. 4A:2-2.10(c)(1). As for the period from December 18, 2017, to date, I **CONCLUDE** that Rivera is entitled to back pay. In re Gauthier, Rockaway Twp., 2018 CSC LEXIS 125, is instructive. There, a police officer was suspended without pay pending successful completion of PTI. He thereafter received back pay, covering the period between his completion of the intervention program and his reinstatement. But,

³ In her post hearing submission, Rivera asks for back pay during the period from October 25, 2015, through January 4, 2016. But, that suspension came in the aftermath of an earlier disciplinary action, which was amicably resolved with an agreement to reinstate Rivera as of October 25, 2015. But, that earlier Civil Service appeal and any issues pertaining to it, are not before me.

⁴ The regulation references Pre-Trial Intervention (PTI), the New Jersey equivalent of the Federal Pre-Trial Diversion Program that Rivera successfully completed here.

a claim for additional back pay for the period from his indictment to his completion of PTI was denied by the Civil Service Commission. So too here, Rivera is entitled only to be made whole for any compensation lost after the dismissal of her criminal complaint. See also: Walcott v. City of Plainfield, 282 N.J. Super. 121, 125 (App. Div. 1995).

ORDER

Based on the foregoing, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action of the Essex County Department of Corrections against Rivera is hereby **REVERSED**.

It is **ORDERED** that no penalty be imposed in this matter.

I further **ORDER** that Rivera be awarded back pay, benefits, and seniority in accordance with N.J.A.C. 4A:2-2.10 and reasonable counsel fees in accordance with N.J.A.C. 4A:2-2.12. The period for which Rivera is entitled to back pay shall commence on December 18, 2017, and shall continue to date.

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.

May 24, 2018



DATE

ELLEN S. BASS, ALJ

Date Received at Agency:

May 24, 2018

Date Mailed to Parties:

MAY 29 2018

May 24, 2018

sej



APPENDIX

WITNESSES

For Appellant:

Mariela Rivera

For Respondent:

Joseph Regateiro

EXHIBITS

For Appellant:

- A-1 Not admitted
- A-2 Not admitted
- A-3 Civil Service Decision issued November 5, 2015
- A-4 Appeal documents
- A-5 Not admitted
- A-6 Divorce Complaint
- A-7 Certificate of Recognition

For Respondent:

- R-1 FNDA, dated December 4, 2017
- R-2 PNDA with specifications, dated September 12, 2017
- R-3 Criminal complaint
- R-4 Pretrial Diversion Agreement
- R-5 PNDA with specifications, dated July 31, 2013
- R-6 FNDA, dated July 6, 2014
- R-7 Not admitted