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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of Ah'Kaleem Ford,  
Hudson County

CSC Docket No. 2015-2281

Request for Enforcement

ISSUED: **NOV 06 2015** (CSM)

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Ah'Kaleem Ford, a County Correction Officer with Hudson County, requests enforcement of the decision rendered on July 31, 2013 which ordered that he be granted back pay, benefits, and seniority pursuant to *N.J.A.C. 4A:2-2.10* if he was reinstated following a determination of psychological fitness for duty.

By way of background, the petitioner was suspended and removed on charges of insubordination, conduct unbecoming a public employee, neglect of duty, other sufficient cause and inability to perform duties. With respect to the suspension, the appointing authority asserted that on December 18, 2011, the appellant was arrested and charged with assault. Regarding the removal, the appointing authority asserted that on May 21, 2012, during a fitness for duty evaluation, the appellant was uncooperative and hostile to the evaluating doctor. In her initial decision, the Administrative Law Judge (ALJ) concluded that the appointing authority sustained the charges regarding an altercation that the appellant was involved in on December 18, 2011 and concluded that a 132 working day suspension was appropriate. However, when considering the testimony of the two experts on the appellant's psychological fitness for duty, the ALJ found that the testimony and report of the appellant's psychologist, Dr. David Gallina, was entitled to greater weight than that of the appointing authority's psychologist, Dr. Robert Kanen. Accordingly, the ALJ recommended that the appellant's removal be reversed. The Civil Service Commission (Commission) agreed that the 132 working day suspension, effective December 20, 2011, was appropriate for the incident of December 18, 2011, but concluded that the removal should only be reversed contingent upon the appellant's completion of a current psychological fitness for duty examination.

Subsequently, the appointing authority requested that the Commission take action against the appellant since he failed to comply with the July 31, 2013 order requiring that he submit to a fitness for duty evaluation within 30 days of the issuance of the Commission's order, and the appellant requested reconsideration of the original decision. In its determination on reconsideration, the Commission found that the appointing authority took timely steps to comply with the initial decision by providing the names of four doctors to the appellant, that the appellant took no action to obtain the required fitness for duty evaluation, and denied the appellant's request for reconsideration. However, the appellant was offered one more opportunity to complete the required fitness for duty evaluation and he was directed to contact Dr. Susan A. Furnari to schedule a fitness for duty examination within 15 days of receipt of the Commission's reconsideration order. The Commission indicated that if the appellant was deemed fit for duty, he was to be immediately reinstated to his position, but that he would not be entitled to back pay for the period between July 31, 2013 and March 26, 2014. *See In the Matter of Ah'Kaleem Ford* (CSC, decided March 26, 2014). Dr. Furnari found the appellant fit for duty and he was reinstated effective July 11, 2014.

In his request for enforcement, the appellant states that the ALJ issued an interlocutory decision on May 1, 2013 and ordered that the appointing authority pay him his base salary starting June 24, 2013. The appellant presents that the appointing authority complied with this order, but has not issued his back pay from June 22, 2012 to June 30, 2013 and that it only owes him benefits and seniority from July 2013 until his reinstatement on July 11, 2014. In a supplemental submission, the appellant provides an unsworn affidavit stating that he attempted to obtain employment with the Hudson County Sheriff's Office, Jersey City Police, State Park Police, as a Police Aide with Essex County, a Security Officer for Cambridge Security, a Gas Attendant with Wawa, and postal position with the United States Postal Service. The appellant maintains that during his period of improper suspension, he would have received a base salary of \$46,875.40, \$2,738.80 for medical coverage, 20 sick days, 15 vacation days, and 3 personal days from July 2012 until June 2013. He also states that he should have received 20 vacation days, 15 sick days, 3 personal days, and \$2,738.85 for medical opt-out coverage, from July 2013 to his reinstatement on July 11, 2014. Additionally, the appellant states that he received \$20,375.90 in unemployment insurance benefits from July 2012 to June 2013.

In response, the appointing authority, represented by John J. Collins, Assistant County Counsel, states that the appellant has not provided any documentation in support of his request and the matter should be dismissed.

### CONCLUSION

Pursuant to *N.J.A.C. 4A:2-2.10(d)*, an award of back pay shall include unpaid

salary, including regular wages, overlap shift time, increments and across-the-board adjustments. *N.J.A.C.* 4A:2-2.10(d)3 provides that an award of back pay shall be reduced by the amount of money that was actually earned during the period of separation, including any unemployment insurance benefits received, subject to any applicable limitations set forth in (d)4. Further, *N.J.A.C.* 4A:2-2.10(d)4 states that where a removal or a suspension for more than 30 working days has been reversed or modified and the employee has been unemployed or underemployed for all or a part of the period of separation, and the employee has failed to make reasonable efforts to find suitable employment during the period of separation, the employee shall not be eligible for back pay for any period during which the employee failed to make such reasonable efforts. "Reasonable efforts" may include, but not be limited to, reviewing classified advertisements in newspapers or trade publications; reviewing Internet or on-line job listings or services; applying for suitable positions; attending job fairs; visiting employment agencies; networking with other people; and distributing resumes. The determination as to whether the employee has made reasonable efforts to find suitable employment shall be based upon the totality of the circumstances, including, but not limited to, the nature of the disciplinary action taken against the employee; the nature of the employee's public employment; the employee's skills, education, and experience; the job market; the existence of advertised, suitable employment opportunities; the manner in which the type of employment involved is commonly sought; and any other circumstances deemed relevant based upon the particular facts of the matter. The burden of proof shall be on the employer to establish that the employee has not made reasonable efforts to find suitable employment. See *N.J.A.C.* 4A:2-2.10(d)4, *et seq.*

In the matter at hand, the appellant asserts that he is entitled to back pay and benefits from June 22, 2012 to June 30, 2013 and that the appointing authority only owes him benefits and seniority from July 2013 until his reinstatement on July 11, 2014. The Commission disagrees. In his submissions, the appellant confirmed that he was paid by the appointing authority for the period from June 24, 2013 until his reinstatement effective July 11, 2014 based on the ALJ's May 1, 2013 interlocutory order of salary payment. However, given the appellant's failure to comply with the Commission's initial order to obtain the required fitness for duty evaluation, it specifically determined that the appellant *was not entitled* to back pay for the period between July 31, 2013 and March 26, 2014. Given that the appellant has indicated that he received pay for a period to which he was not entitled to be paid, the pay provided to the appellant as a result of the interlocutory salary order should be applied to the period he would have been entitled to back pay following his 132 working day suspension. Accordingly, the appellant's back pay award is calculated as follows:

DATES	WORK DAYS	DAILY RATE
June 22, 2012 (date after 132 working day suspension) to June 23, 2013	262	\$49,614.25/262 work days = \$189.36
June 24, 2013 (date appellant indicated he received pay) to July 10, 2014 (last day of pay prior to reinstatement on July 11, 2014)	253	
Work Days Owed Back Pay	9	9 X \$189.36 = 1,677.24

Back Pay:		\$1,677.24
Less Unemployment compensation:	-	\$20,375.90
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Gross Back Pay Due:		\$ 0.00

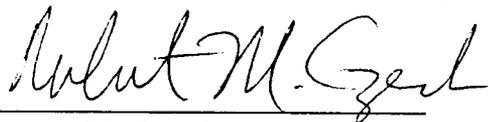
As to benefits, the appellant requests reinstatement of a number of vacation, sick and personal leave days that he would have accrued from July 2012 to July 2014. Vacation leave not taken in a given year can only be carried over to the following year. See *N.J.S.A. 11A:6-3(e)* and *N.J.A.C. 4A:6-1.2(g)*. In this regard, the appellant was reinstated in 2014. At that time, he could only be credited with vacation leave earned in 2013. Therefore, at present, the appellant is only due pro-rated vacation time earned in 2013. As to the amount of sick time due to the appellant, he should receive any unused sick days up to and following his suspension and the period of time the Commission determined he was not entitled to back pay between July 31, 2013 and March 26, 2014, since sick leave can accumulate from year to year without limit. See *N.J.S.A. 11A:6-5* and *N.J.A.C. 4A:6-1.3(f)*. With respect to his personal days, the Commission does not have jurisdiction over personal days in local service and cannot address this issue.

### ORDER

Therefore, it is ordered that this request be granted in part and the appellant be credited with vacation and sick leave consistent with this decision but no back pay.

This is the final administrative determination with regard to this issue. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 5<sup>TH</sup> DAY OF NOVEMBER, 2015



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Chairperson  
Civil Service Commission

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c: Ah'Kaleem Ford  
John J. Collins, Assistant County Counsel  
Joseph Gambino

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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of Ah'Kaleem Ford,  
Hudson County

CSC Docket No. 2014-640

Request for Reconsideration

ISSUED: MAR 27 2014

(CSM)

Ah'Kaleem Ford, County Correction Officer, Hudson County, represented by James Addis, Esq., requests reconsideration of the attached decision rendered on July 31, 2013, which upheld his 132 working day suspension and reversed his removal contingent upon his successful completion of a psychological fitness for duty examination.

By way of background, the petitioner was suspended and removed on charges of insubordination, conduct unbecoming a public employee, neglect of duty, other sufficient cause and inability to perform duties. With respect to the suspension, the appointing authority asserted that on December 18, 2011, the appellant was arrested and charged with assault. Regarding the removal, the appointing authority asserted that on May 21, 2012, during a fitness for duty evaluation, the appellant was uncooperative and hostile to the evaluating doctor. In her initial decision, the Administrative Law Judge (ALJ) concluded that the appointing authority sustained the charges regarding an altercation that the appellant was involved in on December 18, 2011 and concluded that a 132 working day suspension was appropriate. However, when considering the testimony of the two experts on the appellant's psychological fitness for duty, the ALJ found that the testimony and report of the appellant's psychologist, Dr. David Gallina, was entitled to greater weight than that of the appointing authority's psychologist, Dr. Robert Kanen. Accordingly, the ALJ recommended that the appellant's removal be reversed. The Civil Service Commission (Commission) agreed that the 132 working day suspension was appropriate for the incident of December 18, 2011, but concluded

that the removal should only be reversed contingent upon the appellant's completion of a current psychological fitness for duty examination.

On reconsideration, the appellant states that the appointing authority refused to restore him to duty after the criminal charges lodged against him for the incident of December 18, 2011 were dismissed on January 31, 2012, in violation of *N.J.S.A. 40A:14-149.2*. He also asserts that there was no formal order directing him to submit to a psychological evaluation prior to returning to duty. In this regard, the appellant maintains that the Final Notices of Disciplinary Action (FNDA) he received did not contain any order or requirement that a psychological examination be completed prior to his return to duty. Additionally, the appellant contends that the appointing authority filed the fitness for duty charges against him on July 17, 2013, more than 45 days after Dr. Kanen determined he was unable to perform the duties of a County Correction Officer, which is contrary to the requirements of *N.J.S.A. 40A:14-147*.

In response, the appointing authority, represented by John J. Collins, Assistant County Counsel, presents that in compliance with the Commission's order, on August 26, 2013, it supplied the appellant's counsel with the names of four doctors that would be acceptable to perform the appellant's fitness for duty examination. The appellant replied with the name of one doctor that same day, to which the appointing authority responded with a counter-proposal. However, the appellant did not propose any counter-offer to the appointing authority's position until November 4, 2013, well after the 30 day time limit ordered by the Commission. In this regard, the appointing authority notes that the appellant has still not satisfied the requirement of completing a fitness for duty examination.

With respect to the appellant's petition for reconsideration, the appointing authority states that the nature of the December 18, 2011 incident, as well as the appellant's prior disciplinary history stemming from a fight outside of a barber shop, were violent acts, which is contrary to his position as a County Correction Officer. Thus, the appointing authority continued his suspension pending the outcome of his departmental disciplinary hearing for safety reasons. In this regard, the appointing authority states that it is not required to reinstate an officer, after the disposition of a criminal matter, before it can pursue administrative charges against the officer. Regarding the procedural argument that he was not advised of the requirement to complete a fitness for duty examination, the appointing authority asserts that the appellant was aware of this requirement as evidenced by his making the initial, and subsequent appointments with Dr. Kanen. The appointing authority emphasizes that in his little more than two years of employment, the appellant had been charged on three separate occasions with serious disciplinary matters all involving acts of violence, aggression and/or insubordination. Finally, if applicable, the appointing authority requests penalties be imposed for the appellant's failure to adhere to the order requiring that he

submit to a fitness for duty evaluation within 30 days of the issuance of the Commission's order.

### CONCLUSION

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

In the present matter, the appellant raises several procedural challenges regarding his disciplinary actions. However, a review of the record indicates that he did not raise these issues as exceptions to the ALJ's initial decision for the Commission to review at the original proceeding. The appellant provides no explanation in his petition for reconsideration as to why he did not raise these issues at the original proceeding. Therefore, appellant has not satisfied the standard for reconsideration and his request may be dismissed on those grounds alone.

However, even assuming *arguendo* that the appellant's submissions could now be reviewed, they do not provide a basis on which to reverse the original decision. Initially, the appellant states that the appointing authority failed to comply with the provisions of *N.J.S.A.* 40A:14-149.2 when it failed to reinstate him after the prosecution against him regarding the December 18, 2011 incident was terminated. *N.J.S.A.* 4A:14-149.2 states:

If a suspended police officer is found not guilty at trial, the charges are dismissed or the prosecution is terminated, said officer shall be reinstated to his position and shall be entitled to recover all pay withheld during the period of suspension subject to any disciplinary proceedings or administrative action.

The appellant is a County Correction Officer, *not* a Police Officer. Therefore, the provisions of *N.J.S.A.* 40A:14-149.2 do not apply to him. Further, appellant was charged with insubordination, conduct unbecoming a public employee, neglect of duty, other sufficient cause and inability to perform duties as a result of the incident. In this regard, the appellant was charged with simple assault and a temporary restraining order was issued him. The appellant was properly issued a Preliminary Notice of Disciplinary Action (PNDA) apprising him of the charges, a departmental hearing was held on December 27, 2011, and he was issued an FNDA dated January 4, 2012 indefinitely suspending him pending disposition of the criminal complaint in compliance with *N.J.A.C.* 4A:2-2.7(a)3. Upon resolution of the criminal complaint, the appointing authority properly held a departmental

hearing regarding the administrative disciplinary charges against the appellant on April 30, 2012 and imposed a 132 working day suspension. Thus, there is no evidence of a procedural violation. Regardless, even if there were procedural violations, such violations are deemed cured based on the appellant's receipt of a *de novo* hearing on the merits of the charges.

With respect to his argument that he did not receive any order or notice to complete a psychological evaluation, again, he did not raise this argument in the initial proceeding. Regardless, this argument is without merit as the appellant was clearly rescheduled for the evaluation and took steps to contact Dr. Kanen's office when he was running late for his appointment. In response to the appellant's allegation that charges against him based on his May 21, 2012 evaluation with Dr. Kanen were not made within 45 days, the Commission notes that *N.J.S.A. 30:8-18.2*, not *N.J.S.A. 40A:14-147*, applies to County Correction Officers for violations of internal rules. Specifically, *N.J.S.A. 30:8-18.2* states:

A person shall not be removed from employment or a position as a county corrections officer, or suspended, fined or reduced in rank for a violation of the internal rules and regulations established for the conduct of employees of the county corrections department, unless a complaint charging a violation of those rules and regulations is filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. A failure to comply with this section shall require a dismissal of the complaint. The 45-day time limit shall not apply if an investigation of a county corrections officer for a violation of the internal rules and regulations of the county corrections department is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State; the 45-day limit shall begin on the day after the disposition of the criminal investigation. The 45-day requirement in this section for the filing of a complaint against a county corrections officer shall not apply to a filing of a complaint by a private individual.

However, similar to *N.J.S.A. 40A:14-147*, the 45 day time limitation contained in *N.J.S.A. 30:8-18.2* only expressly applies to charges related to violations of departmental rules and regulations. See e.g., *Hendricks v. Venettone*, Docket No. A-1245-91T5 (App. Div. October 29, 1992); *In the Matter of Bruce McGarvey v. Township of Moorestown*, Docket No. A-684-98T1 (App. Div. June 22, 2000); *McElwee V. Borough of Fieldsboro*, 400 *N.J. Super.* 388 (App. Div. 2008). In this case, the appellant was not charged with violations of internal rules and regulations. Rather, he was specifically charged with the general causes for disciplinary action specified in *N.J.A.C. 4A:2-2.3*. Therefore, since he was not

charged with a violation of specific internal rules developed by the appointing authority, *N.J.S.A.* 30:8-18.2 does not apply.

In response to the appointing authority's request for the Commission to take action against the appellant for his failure to comply with the July 31, 2013 order, the Commission is specifically given the power to assess compliance costs and fines against a party, including all administrative costs and charges, as well as fines of not more than \$10,000, for noncompliance or violation of Civil Service law or rules or any order of the Commission. *N.J.S.A.* 11A:10-3; *N.J.A.C.* 4A:10-2.1(a)2. *See In the Matter of Fiscal Analyst (M1351H), Newark*, Docket No. A-4347-87T3 (App. Div. February 2, 1989). In its decision, the Commission specifically ordered the parties to select the psychiatrist or psychologist by agreement of both parties within 30 days of the date of the decision and for the appointing authority to pay for the cost of this evaluation. It is unrebutted in the record that the appointing authority attempted to comply with the Commission's order by providing the names of four doctors to the appellant, but, other than his one counter-proposal, the appellant has taken no action to obtain the required fitness for duty evaluation. Regardless, since the matter of his petition for reconsideration has now been adjudicated, the Commission will offer the appellant one more opportunity to complete the required fitness for duty examination. Under the circumstances presented in this case, the Commission concludes that it must determine who should give a fitness for duty evaluation to the appellant. *See In the Matter of Kenneth Rankin* (MSB, decided April 20, 2005). The Commission notes that it has previously utilized Susan A. Furnari, D.Ed. to provide independent psychological evaluations. Consequently, the Commission orders that the appellant be sent to Dr. Furnari for a fitness for duty evaluation.

If Dr. Furnari determines that the appellant is fit for duty, without qualification, the appellant is to be immediately reinstated to his position. However, he would not be entitled to back pay for the period between July 31, 2013 and the date of this order, March 26, 2014. If the appellant fails to obtain and/or schedule the required fitness for duty evaluation, as specified in this decision, the Commission orders that the appellant be removed effective September 25, 2012.

### ORDER

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

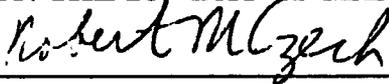
The Civil Service Commission also orders that Ah'Kaleem Ford be administered a fitness for duty evaluation. Therefore, Mr. Ford is to contact Dr. Susan A. Furnari within 15 days of receipt of this order. Dr. Furnari's address is as follows:

Susan A. Furnari, D.Ed.  
596 Franklin Avenue  
Nutley, New Jersey 07110  
(973) 661-1732

If the appellant does not contact Dr. Furnari within 15 days from receipt of this order, schedule an appointment within 30 days of that contact and appear for a fitness for duty evaluation within 45 days from receipt of this order, the appointing authority may issue a new FNDA upholding the appellant's removal effective September 25, 2012.

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 26<sup>TH</sup> DAY OF MARCH, 2014



Robert M. Czech  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

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

Attachment

- c. Ah'Kaleem Ford  
James Addis, Esq.  
John Collins, Assistant County Counsel  
Dr. Susan A. Furnari  
Joseph Gambino



In her consolidated initial decision, the ALJ found that on December 18, 2011, the appellant engaged in a verbal argument and altercation with Latrese Roby, an individual who he has been in a relationship with and who is the mother of his son. On that date, the appellant was to pick his son up at Roby's apartment since he was scheduled to have custody of the boy. Upon entering the apartment, Roby told the appellant that he was not taking the child, which gave rise to pushing and Roby receiving a swollen lip as a result of an "accidental" slap by the appellant. The police responded to the scene and arrested the appellant and charged him with simple assault and domestic violence. A temporary restraining order (TRO) was also issued against the appellant. Ultimately, the criminal charges and the TRO were dismissed and disciplinary charges were brought against the appellant as a result of the December 18, 2011 incident. Upon the issuance of the Final Notice of Disciplinary Action (FNDA) sustaining the charges surrounding the December 18, 2011 incident and imposing the suspension, the appellant was advised that he should undergo a psychological fitness for duty evaluation.

On May 17, 2012, the appellant reported to Dr. Robert Kanen for a psychological fitness examination. After gathering preliminary information, Dr. Kanen asked the appellant if the Division of Youth and Family Services<sup>1</sup> had ever had involvement with him or his family both currently and in his childhood. The appellant felt that these particular questions were intrusive so he asked to call his attorney. With that, Dr. Kanen ended the evaluation and advised the appellant that the examination would need to be rescheduled through the appointing authority's personnel office. The ALJ found that the meeting between Dr. Kanen and the appellant lasted at most ten minutes. Through his efforts to reschedule the evaluation, the appellant learned that Dr. Kanen had written an official report based on the May 17, 2012 evaluation. In that report, Dr. Kanen determined that the appellant was unsuitable to perform the duties of a County Correction Officer because he is prone to be uncooperative, hostile, and oppositional. Based on this report, the appointing authority removed him from employment. Subsequently, the appellant sought a psychological evaluation on his behalf and was evaluated on September 6, 2012 by Dr. David Gallina. Dr. Gallina evaluated the appellant, arranged to have him take a battery of psychological tests, and determined that the appellant had no propensity toward violence or difficulties with anger management, and that he was fit for duty as a County Correction Officer.

Based on the foregoing, the ALJ determined that the appointing authority had sustained the charges regarding the altercation with Roby on December 18, 2011 and concluded that a 132 working day suspension<sup>2</sup> was appropriate. However, when considering the testimony of the two experts on the appellant's psychological fitness for duty, the ALJ found that the testimony and report of Dr. Gallina was entitled to greater weight than that of Dr. Kanen. Specifically, the ALJ determined

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<sup>1</sup> Now the Division of Child Protection and Permanency.

<sup>2</sup> This is equivalent to a six-month suspension.

that Dr. Gallina's evaluation was more thorough and premised upon an actual and thorough evaluation while Dr. Kanen did not conduct any evaluation and had no basis upon which to form a psychological opinion. Accordingly, the ALJ recommended that the appellant's removal for psychological unfitness for duty be reversed. Additionally, the ALJ ordered that counsel fees should be awarded to the appellant, with a "25% discount for legal services provided on the unsuccessful appeal."

In his exceptions to the ALJ's decision, the appellant states that his only previous discipline was a five-day suspension. Therefore, he argues that since the ALJ noted that he expressed regret over the incident and learned from the experience, a 132 working day suspension is unduly harsh and the penalty should be reduced to 90 days.

In response, the appointing authority maintains that the 132 working day suspension should be upheld. In this regard, it emphasizes that the appellant completed an anger management course months before the incident and that law enforcement officers are held to a higher standard of conduct. With respect to the fitness for duty evaluation, the appointing authority contends that the fact that the interview with the appellant did not make it past the initial background information of the evaluation, due to the unprovoked, irresponsible misbehavior of the appellant, is indicative of his unfitness and clearly warrants removal. In this regard, the appointing authority emphasizes that Dr. Kanen was able to observe the appellant and his responses to standard, non-stressful questions, and formulate his opinion based on those observations as well the documents provided to him regarding the appellant's past behavior. Regarding the award of counsel fees, the appointing authority states that even if the appellant's removal is ultimately overturned, the legal fees awarded must be severely reduced since the appellant did not prevail in his appeal of the 132 working day suspension.

Upon its *de novo* review of the record, the Commission agrees with the ALJ's findings of fact in this matter and concludes that the appointing authority has met its burden of proof regarding the charges of insubordination, conduct unbecoming a public employee, neglect of duty, and other sufficient cause for the December 18, 2011 incident and that the 132 working day suspension is appropriate. It also agrees that a 132 working day suspension for this infraction is warranted.

In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*,

96 N.J.A.R. 2d (CSV) 463. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. See *Henry v. Rahway State Prison*, 81 N.J. 571 (1980). It is settled that the theory 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 case of the 132 working day suspension, while the appellant argues that this should be reduced to 90 days because he only has a minor disciplinary history, he admitted that it was more his responsibility than Roby's that the situation got out of control. Indeed, the situation got so out of control, Roby suffered from a swollen lip, the police had to be called, and the appellant was arrested. Notwithstanding the fact that the criminal charges and the TRO were later dismissed and the appellant mended his relationship with Roby, the appellant's behavior in that situation is significantly egregious to warrant a substantial penalty. Moreover, the Commission is mindful that a law enforcement officer is held to a higher standard than a civilian public employee. 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). Accordingly, the Commission finds that the penalty imposed by the appointing authority was neither unduly harsh nor disproportionate to the offense and should be upheld.

Regarding the appellant's fitness for duty, the Commission concurs with the ALJ that Dr. Kanen's truncated ten-minute interview and three-paragraph report constitute an insufficient basis to support the appellant's removal. Nevertheless, it has trepidation ordering the appellant's reinstatement without some assurance that he is fully capable of performing the duties of his position. Thus, the appellant should be scheduled for an evaluation with a qualified psychiatrist or psychologist. The selection of the psychiatrist or psychologist shall be by agreement of both parties within 30 days of the date of this decision. The appointing authority shall pay for the cost of this evaluation. If the psychiatrist or psychologist determines that the appellant is fit for duty, without qualification, the appellant is to be immediately reinstated to his position. Additionally, he would be entitled to mitigated back pay, benefits, and seniority from the end of his 132 working day suspension until the time he is reinstated. If the psychologist or psychiatrist determines that the appellant is unfit for duty, then the Commission orders that the appointing authority issue a new FNDA upholding the appellant's removal based on his current unfitness, with a date of removal of September 25, 2012. Upon receipt of that FNDA, the appellant may appeal that matter to the Commission in accordance with N.J.A.C. 4A:2-2.8. Upon timely submission of any such appeal, the appellant would be entitled to a hearing regarding the current finding of unfitness only. Should he be unsuccessful in that appeal, he shall be deemed to be removed on September 25, 2012. See *In the Matter of Kenneth Rankin, City of Newark*, Docket No. A-5566-04T5 (App. Div. April 23, 2007).

With respect to counsel fees, the Commission has upheld the imposition of the 132 working day suspension and the matter of the charge for inability to perform duties is pending. Therefore, it is unknown at this time if the appellant will prevail on all or substantially all of the primary issues on appeal. However, the Commission disagrees with the ALJ's recommendation that the appellant be awarded 75 percent of reasonable counsel fees if he prevails on the charge for inability to perform duties. In this regard, *N.J.A.C. 4A:2-2.12* provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See *Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A4489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this case, should the appellant prevail on the charge of inability to perform duties, it cannot be ignored that the Commission sustained the other charges. The Commission has previously found that an award of partial counsel fees may be appropriate under circumstances where, an appellant has prevailed on the most serious charge or charges leaving only incidental charges, which give rise to a significantly reduced penalty, such as a minor discipline. However, assuming the appellant is successful on the fitness for duty charge, the charges that were sustained were clearly not incidental. Therefore, the Commission finds that, if the appellant is successful on the inability to perform duties charge, an award of counsel fees in the amount of 50 percent of services is appropriate.

#### **ORDER WITH RESPECT TO THE 132 WORKING DAY SUSPENSION**

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant for 132 working days was appropriate. Therefore, the Commission affirms that action and dismisses the appeal of Ah'Kaleem Ford.

#### **ORDER WITH RESPECT TO THE CHARGE OF INABILITY TO PERFORM DUTIES**

The Civil Service Commission finds that the removal of the appellant shall be reversed contingent upon his successful completion of a psychological fitness for duty examination. The outcome of that examination shall determine whether the appellant is entitled to be reinstated or removed, as outlined previously. If ultimately reinstated, the appellant is entitled to back pay, benefits and seniority for the period following his medical leave of absence until he is actually reinstated. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. It is further ordered that, if ultimately reinstated, reasonable counsel fees be awarded for services rendered in the amount of 50 percent of

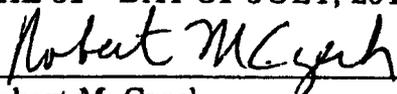
services. Should the appellant be reinstated, proof of income earned and an affidavit in support of reasonable counsel fees shall be submitted to the appointing authority within 30 days of said reinstatement. Pursuant to *N.J.A.C. 4A:2-2.10* and *N.J.A.C. 4A:2-2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and/or counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay and/or counsel fee dispute.

If the appellant is reinstated, the parties must inform the Commission, in writing, if there is any dispute as to back pay and/or counsel fees within 60 days of said reinstatement. 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)*.

If the appellant fails the psychological fitness for duty examination, and subsequently does not appeal his removal, his removal effective September 25, 2012 shall be deemed to be upheld. This determination shall then be considered the final administrative action of the Commission with any further review pursued in the Appellate Division.

If the appellant timely appeals his removal based on his failure of the psychological fitness for duty examination, he shall be granted a hearing regarding only that failure. If unsuccessful in that appeal, he shall be deemed to be removed effective September 25, 2012.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 31<sup>ST</sup> DAY OF JULY, 2013



Robert M. Czech  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Henry Maurer  
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**

**IN THE MATTER OF AH'KALEEM FORD,  
HUDSON COUNTY DEPARTMENT  
OF CORRECTIONS.**

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OAL DKT. NO. CSV 07692-12  
AGENCY DKT. NO. 2012-3290

**IN THE MATTER OF AH'KALEEM FORD,  
HUDSON COUNTY DEPARTMENT  
OF CORRECTIONS.**

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OAL DKT. NO. CSR 15066-12  
AGENCY DKT. NO. N/A

**James D. Addis, Esq.,** for appellant Ah'Kaleem Ford (Galantucci & Patuto,  
attorneys)

**John C. Collins,** Assistant County Counsel, for Hudson County Department of  
Corrections (Donato J. Battista, County Counsel, attorneys)

Record Closed: May 14, 2013

Decided: May 22, 2013

**BEFORE GAIL M. COOKSON, ALJ:**

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

Ah'Kaleem Ford (appellant) appeals from disciplinary actions filed against him by Hudson County (County) Department of Corrections (DOC) with respect to his position as a Senior Corrections Officer. The first disciplinary action imposes a 132-day suspension on appellant stemming from his arrest on charges of simple assault for an alleged domestic violence incident on December 18, 2011. The second disciplinary

action seeks appellant's removal for his alleged failure to satisfactorily pass or lack of cooperation with respect to a psychological fitness for duty evaluation established as a pre-condition to his returning to employment after completion of the prior suspension.

The first matter was referred to the Office of Administrative Law (OAL) for filing on June 8, 2012, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. It was assigned to the undersigned Administrative Law Judge on July 10, 2012. During a case management conference on the first matter, both parties acknowledged that a second disciplinary matter would be forthcoming and that it involved the derivative issue of the appellant's fitness to return to duty after conclusion of the term of suspension issued on the first disciplinary matter. The second matter was transmitted to the OAL under the expedited procedures of P.L. 2009, c. 16, N.J.S.A. 40A:14-202(d), where it was received on October 26, 2012, but was not perfected until November 8, 2012. It was assigned to the undersigned Administrative Law Judge on November 29, 2012. Accordingly, I issued an Order on December 10, 2012, that these matters should be consolidated for all purposes for judicial and administrative efficiencies insofar as the procedural and substantive histories of the two cases were intertwined.

Plenary hearings were conducted on April 3, 4, 26, 2013, and May 14, 2013. Pursuant to N.J.S.A. 40A:14-201 and N.J.A.C. 4A:2-2.13(h), appellant might have been entitled to commence receiving his full salary as early as May 8, 2013, subject to reimbursement of such pay should the termination be upheld here or on appeal, and subject to any further tolling by the OAL or the Civil Service Commission pending their respective decisions. Because the hearings were extending beyond that date and because there were some periods when tolling might apply, I reviewed and accounted for the periods I determined should be tolled either on consent of appellant or for good cause. Accordingly, by Order dated May 1, 2013, the appointing authority was advised that appellant would be entitled to commence his salary on June 24, 2013. These interlocutory Orders are incorporated herein.

**FACTUAL DISCUSSION**

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

Appellant was hired as a correction officer with the County in June 2009. He is thirty-two years old and grew up in Jersey City. Upon graduating from high school, he went to one year of college at William Paterson, then worked for one year as an unarmed security guard and thereafter joined the Navy. Appellant was based in Virginia after completion of training at the Great Lakes Training Center. He deployed on the USS Dwight D. Eisenhower aircraft carrier as a Disbursement Clerk handling payroll and accounts for many of the enlisted personnel on the vessel. Appellant achieved the full rank of E4. Even though he passed the test for promotion to E5, he was not advanced because there were no openings. Appellant was never disciplined during his service in the Navy and never engaged in any fights. He was discharged honorably in September 2007.

Upon his departure from the Navy, appellant returned to his New Jersey roots and took some accounting course at Jersey City University. He then procured employment with the United States Postal Service as a Mail Clerk. During that time, appellant took the law enforcement examination and sought employment from several local agencies. He was offered and accepted a position as Corrections Officer with Hudson County and began that employment in June 2009. In October 2009, he completed the seventeen-week training at Bergen County Police Academy. As with his naval career, appellant received no negative reviews or discipline during his Academy training. He stated that he was never late, never out of uniform, and engaged in no fights or incidents with fellow recruits or staff. Appellant was assigned as a tier officer with responsibility to supervise the inmates on that tier. He has never been disciplined for actions or inactions on the job.

On November 30, 2010, appellant was at a barber shop getting his hair cut. While in the chair relaxed and with his eyes closed, he was verbally accosted by a voice who advised appellant, "I'm going to fuck you up when you come out!" Appellant quickly opened his eyes to see Teyan Grant standing near him, whom he knew to be an ex-inmate at the Hudson County facility. Grant paced around a little, repeated his threat but then exited the barber shop. Appellant thought the incident was over. He also assumed it had to do with an encounter with Grant when the latter was incarcerated during which Grant asked appellant about a female corrections officer he said he was dating and in whom he seemed concerned appellant was also interested. Appellant did not want to talk about this inmate's personal business and cut Grant off, especially because he knew it was against DOC policy. As far as appellant knew, that was the end of their interaction. Grant was not an inmate on a tier to whom appellant was regularly assigned.

When appellant left the barber shop, he did not expect Grant to still be outside waiting for him but he was and he charged at appellant. Appellant punched him and he ended up getting slammed to the sidewalk by grant, a bigger man than he. Appellant threw more punches. Around this time, some officers from the Jersey City Police Department arrived but appellant was still busy defending himself. Somebody grabbed him from behind but he testified that he had no idea who it was so he pushed that hand away not knowing it belonged to an officer because he did not hear anyone identify themselves to him as such. He also was not tuned into the sound of any police siren. Soon the fight was broken up by officers separating the two of them. Appellant then tried to identify himself as a Corrections Officer and Grant as an ex-inmate, reaching for his identification and wallet which had been scattered during the fight (and shirt which Grant had torn off). He never got that chance because an officer shoved him up against a wall and hand-cuffed him. Appellant was adamant that he did not resist arrest, resist being handcuffed or in any manner physically resist or assault an officer.

The police report states otherwise but the only person to testify on this incident was appellant. His expert, Dr. David J. Gallina, also discussed it but only through the recitation of appellant as a result of his interview and evaluation. Consistent with Dr.

Gallina, outlined below, I **FIND** that appellant was the victim here and acted out of self-defense during an attack by an ex-inmate who surprised him and intended him harm. In the rush of the unexpected fight, appellant understandably was tuned out to external circumstances but I **FIND** that he was not the aggressor against either Grant or a law enforcement officer. He used his basic military and Academy training to defend himself in this altercation.

As a result of his arrest for this fight, appellant was brought up on disciplinary charges on which he agreed on advice of his union representative to accept a five-day suspension and an anger management course. While appellant did file a municipal complaint against Grant for instigating the fight, Grant could not be located or served. A year later, Grant was actually arrested for making death threats against appellant. Appellant completed the mandatory "5½ hours of instruction" on "Cooling the Flames of Anger" on June 10, 2011. At my request, appellant described that course as a basic lecture course taught by a County instructor without benefit of any power points or role play.

Appellant is the father of a little boy who is now twenty months old. He has been in a relationship with the child's mother Latrese Roby for approximately three years. She is a registered nurse and lives in Bloomfield. Back in 2011, they were living together but maintaining separate residences. Even today, appellant has access to an apartment he "shares" with his sister but he and Ms. Roby are basically cohabitating. An incident arose between the appellant and Ms. Roby on December 18, 2011, that is the basis for the suspension charges herein.

Several days prior to December 18, 2011, appellant and Ms. Roby had engaged in a verbal argument as a result of which they decided to "cool off" by having appellant return to the apartment he shared with his sister. Their child was then three months old and as appellant reviewed in hindsight that period in their lives, they were both new and anxious parents and sleep deprived. The evening before December 18, appellant had confirmed with Ms. Roby that he would pick up the child the next night after work and would have custody of him during appellant's two days off of work. Appellant arrived at

Ms. Roby's apartment a little before 11:00 p.m. after working a double shift. She electronically granted him entry to the building and he went up to her fourth floor apartment.

Once in the apartment, appellant went toward the crib where the baby was asleep. She interceded and told appellant that he was not taking the child because she did not like his attitude. The exact words that were exchanged between these two people when he first arrived were not detailed on this record. Appellant testified that she then pushed him and he pushed back. He readily admitted that it "got out of hand" when it reached this more physical level but there were never any punches or slaps thrown by either of them but rather simply pushing and grabbing actions. He also believes that it was more his responsibility than hers that it did get out of control. He recalled that her lip was swollen but believed it was from an accidental slap with a hand that held his cell phone. Ms. Roby then used her phone to call her best friend detailing the fight that had just taken place and crying, while appellant just stood there in the bedroom doorway a few feet away. The baby was still in the crib, never having been picked up and never having awakened. Apparently, this girlfriend contacted her husband who was an East Orange police officer and it was one of them who called the Bloomfield Police Department.

By the time any officers responded to the scene, the East Orange police officer was also at Ms. Roby's building. Appellant was sitting on the couch as the flare-up between he and Ms. Roby had already de-escalated by then. He recalls that Bloomfield Officer Trinidad and the East Orange officer arrived almost together to the apartment with several other officers following in fairly rapid succession. Officer Trinidad asked appellant some questions but appellant declined to make any statements and requested the opportunity to contact his union representative. It was clear that Officer Trinidad already knew that appellant was a Corrections Officer because he asked him about his weapons. Ms. Roby spoke to the officers in the hallway. Appellant remained on the couch until Officer Trinidad made it obvious that he was going to be arrested with his statement to appellant, "Do you want to do this the hard way or the easy way?" Appellant understood that such a statement was law enforcement code for cooperating

with the arrest rather than resisting it. Appellant did not resist. Once in the hallway, appellant was spoken to by Lieutenant Schwindt who did not interrogate him but rather just advised that in the future a Family Court custody order would help to clarify custodial arrangements for their child.

Appellant was processed at Bloomfield Police Department, provided written Miranda rights to review and sign and then released on his own recognizance at approximately 5:00 a.m. A Temporary Restraining Order was also issued against him. Appellant went home and spent considerable time thinking about how the situation had gotten so out of control that evening. Ultimately, the criminal charges of simple assault and domestic violence were dismissed and he notified his agency's Internal Affairs of the disposition. The TRO was dismissed within days of the incident at Ms. Roby's request. Even if he believed that Ms. Roby had also shoved him, appellant did not even consider filing for restraints against her because he regretted the whole situation and did not want to make matters worse in view of their role as new parents.

Appellant was brought up on disciplinary charges and he pursued his legal rights to have the matters heard. He received a six month suspension (132 working days) with credit for time he had already been suspended without pay. Appellant expected to be able to return to work at the correctional facility on June 22, 2012. He did not learn of the decision that he should undergo a psychological fitness evaluation until after the departmental hearing and the issuance of the department's final decision on the charges of neglect of duty, insubordination, conduct unbecoming, inability to perform his job, and other causes. Appellant acknowledges that he missed the May 1, 2012, appointment for his psychological evaluation but only as a result of not receiving any written or oral notice of it. He also acknowledges that he was a little late to the May 17, 2012, appointment because he miscalculated the address. Nevertheless, he took the responsible steps of calling the doctor's office both at 12:31 and 12:36 to try to advise Dr. Kanen. Due to the automated telephone answering service utilized by the Rossi Group, appellant was unsuccessful in reaching the doctor to give him the courtesy of an apology but it was not for lack of trying.

Once at Dr. Kanen's office, which he described as a small area with no formal reception room and no staff present, appellant was first asked to read and sign a waiver. Dr. Kanen began to ask and take notes on some background questions about his address, employment and age. Then he commenced to ask if DYFS had ever had involvement with him or his family both currently and in his childhood. Appellant was uncomfortable and legally concerned with the questions about DYFS and his childhood upbringing and could not understand why they were relevant to the fitness for duty evaluation, notwithstanding that he had never had any DYFS involvement. Appellant had undergone a psychological fitness exam when he was first hired and an inquiry into DYFS was never made. Appellant also knew why he was being required to undergo this examination but felt that these particular questions were intrusive so he asked to call his attorney. With that request, Dr. Kanen started to pack up the file on his desk and stated that the evaluation was over and would need to be rescheduled. Appellant asked when it would be rescheduled and Dr. Kanen advised that appellant would have to go through the County's Department of Personnel for that. As appellant exited the doorway to the small office, he was already on his phone to his attorney. At the same time, Dr. Kanen was locking up the office and proceeded past him to the stairs and the door to the outside. Appellant followed behind him and left the building.

In view of the time between the appellant's second attempt to advise Dr. Kanen that he was running late (12:36 p.m.) and the call to his attorney which terminated the interview (12:56 p.m.), it is clear and I **FIND** that the meeting between appellant and Dr. Kanen lasted at most ten minutes, with some of that being used to complete a waiver form. As set forth below, Dr. Kanen did not genuinely dispute this but defended his professional opinion relating to appellant in spite of the duration of the appointment.

After the appointment with Dr. Kanen ended, appellant spoke with his attorney but did not immediately contact the County Personnel Office because he thought that they might reach out to him. When he called on May 24, 2012, he was told to expect a call from Howard Moore. Moore never contacted appellant and the evaluation was never rescheduled. Only after he expressed his concern with his upcoming return-to-work date of June 22, 2012, did he and his attorney learn that Dr. Kanen had not just

terminated the evaluation but written an official report. He was shocked at Dr. Kanen's conclusion that he was "oppositional." Based upon his military and corrections experience, appellant knows that taking that type of attitude would just lead to a "powder keg" situation in a prison.

On cross-examination, appellant was probed as to why he did not walk away from the domestic situation with his girlfriend before it escalated. Similarly, he was asked as to why he did not contact the police from the barber shop after Grant verbally accosted him. With respect to his girlfriend, appellant explained that it was late and he wanted to leave with his son for his two days off from work. He reiterated that he regretted how the argument got out of hand. The circumstances at the barber shop were different because he thought Grant had left the area and that the matter already was defused so he saw no need to call the police.

Respondent presented several witnesses in support of these disciplinary charges. A report of the domestic disturbance at the Roby residence was reported to the Bloomfield Police Department on December 18, 2011, at approximately 11:34 p.m. Police Officers Orlando Trinidad and Jose Alicea, who were patrol partners that evening, arrived at the reported address in separate vehicles. Trinidad went upstairs and arrived at the apartment door as a black female was running out of the apartment. She ran into his arms crying and also holding her side. Trinidad observed that her lip was swollen like she had been punched in the mouth. The woman said that her boyfriend had come over to take their baby but that it was late and she had stood between him and their child. He pulled her hair and hit her when she tried to use her cell phone.

Trinidad went into the apartment and found the appellant sitting down. Appellant cooperated and did not interfere with their investigation of the scene. He described it to the officer as a minor altercation over custody of the baby for the night. Trinidad arrested and cuffed appellant, and read him his Miranda rights. Appellant volunteered that he was a DOC Corrections Officer. Accordingly, another officer was dispatched to

appellant's apartment in order to take custody of his firearms as was policy under these circumstances.

Trinidad also recalled that there was an unidentified black male wearing a bulletproof vest but plain clothes on the steps when the officers arrived. He was later identified as a police officer from another jurisdiction who was the husband of the victim's girlfriend. Apparently, he was the person who had called in the domestic disturbance report after his wife contacted him. He complied with direction to stay out of the way until after the arrest when he then went into the apartment to comfort his wife's friend.

Officer Alicea also provided testimony for the respondent at the hearing. He also recalled that appellant's girlfriend ran out of the apartment and down the stairs crying hysterically when he and his partner Trinidad arrived. He confirmed the nature of the victim's injuries. Alicea also recalled appellant denying that he had done anything but he also confirmed that he otherwise cooperated with the arrest.

Officer James Romano also arrived at the scene of the reported domestic disturbance. When he arrived, the victim was already talking to Trinidad. Romano began to question the appellant who described the incident as a fight that had ensued when he tried to pick up his son in accordance with his understanding of the couple's informal custody arrangements. Later, Romano assisted the victim with filing for a temporary restraining order (TRO) against appellant.

The last Bloomfield officer to testify was Lieutenant Sean Schwindt who has been with the department for a total of sixteen years, rising through the ranks. Lieutenant Schwindt was called to the scene because it was a confirmed domestic violence incident. He brought appellant's girlfriend into a bedroom in order to interview her separately, calmly and without interruption. She confirmed that appellant had hit her with her own phone. Lieutenant Schwindt observed her swollen lip and could also see blood in her mouth. He directed that appellant be placed under arrest. He then departed from the scene as appellant was being placed in the patrol vehicle.

I **FIND** that appellant was a very credible witness. He showed balanced emotions, did not come across as self-righteous or haughty on the witness stand, and was willing and able to accept responsibility for both the big (domestic violence) and little mistakes (tardiness) he has made. Moreover, his testimony on how the domestic violence incident and the subsequent psychological evaluation was out of character for him is supported by the objective evidence in the record, including, but not limited to, a clean history in the Navy, school, and prior employment. In addition, his telling of the stories both with respect to Ms. Roby and Dr. Kanen hangs together and makes sense. I **FIND** that any discrepancies between his testimony and those of other law enforcement officers were either minor or explained by the natural difference in perspective or vantage point. The conflict in testimony between appellant and Dr. Kanen is discussed in more detail below. Ms. Roby was not called by either party.

As a result of this arrest, an investigation was initiated by Internal Affairs (IA) for DOC. Thaddeus Caldwell with IA testified with respect to actions taken by the County following this incident. Caldwell has been with IA for three years but previously served in a similar capacity for fifteen years with the State of New Jersey Department of Corrections. He also had ten years in other capacities with the State DOC prior to his retirement as a Principal Investigator. In light of appellant's status as a Correctional Officer with the County, Caldwell explained that the Bloomfield Police Department referred this incident to IA. He identified the Preliminary Notice of Disciplinary Action (PNDA) issued on December 20, 2011, against appellant proposing a suspension for this domestic violence incident which had occurred two days earlier.

Kirk Eady is the Deputy Director for the County Department of Corrections. He has held that position since 2005, having been promoted through the ranks since his career started in 1996. In this matter, Eady reviewed the disciplinary charge related to the charges that appellant failed to complete or cooperate with the fitness for duty evaluation. That examination had been established as a pre-condition of his return to work following the earlier suspension on the domestic violence charge. Eady explained that it was policy and custom to send an officer for a fitness evaluation – medical and/or

psychological – following any long absence or suspension. In this instance, he believes that the fitness examination was part of the recommendation of the hearing officer on the suspension matter but upon cross-examination acknowledged that it might have been a decision derived from discussions with the County Department of Personnel.

In or about April, 2012, the County made arrangements for appellant to undergo a fitness for duty examination with the Rossi Psychological Group, P.A. (Rossi). The first appointment was made for May 1, 2012, but appellant failed to keep the appointment. As discussed above, he claims that he never received notice of that appointment. The appointment was rescheduled for May 17, 2012. Robert Kanen, Psy.D., prepared a Fitness for Duty Evaluation under cover of May 21, 2012. Dr. Kanen has been an independent contractor with Rossi since 1996. He is licensed in New Jersey, New York and Illinois. He graduated from the Illinois School of Psychology and practiced with federal agencies prior to entering private practice in approximately 1986. He has testified in numerous proceedings, mostly in northern New Jersey venues. Dr. Kanen was qualified at the hearing as an expert in psychology.

Dr. Kanen described his typical procedure for conducting a fitness for duty examination, whether necessitated by a new hire or due to problems with a law enforcement employee on the job or in the community. He has done several hundred law enforcement fitness for duty evaluations in his career or an average of fifty each year. He would normally receive some personnel files from the requesting agency. In appellant's case, he had received the December 2011 PNDA and an earlier one relating to the incident on November 30, 2010, and probably also the underlying police reports. Dr. Kanen then would conduct an interview of the officer to obtain details on his or her social history, early childhood, education and employment history, and current problems including a "why are you here?" component in order to explore the individual's self-awareness of what brought them to the evaluation. He would continue with getting an oral history of medications, mental health history, substance abuse history, criminal history, and legal history. Throughout the oral background portion of the examination, Dr. Kanen would be making observations about the person's orientation to time and place and degree of cooperativeness. Dr. Kanen would then

normally proceed to conduct a standard law enforcement personality test such as Inwald, or the MMPI 2 or 3 standard personality exam.

During appellant's initial background interview, Dr. Kanen found appellant to be so hostile and "oppositional" that he actually terminated the evaluation early. He found appellant's attitude to be very rare, especially for an employee who must know that his job is on the line as a result of the fitness for duty process. He estimated that 99.9% of people would have no problem answering these initial non-invasive questions. Yet, appellant did have a big problem with them. Specifically, appellant "threw questions back at him," and indicated that he had no knowledge as to why he was undergoing the evaluation. Appellant seemed reluctant to even provide basic personal information and Dr. Kanen barely got through the first part of the typical history. At one point, appellant stated that he wanted to call his attorney, which Dr. Kanen found so defensive that he terminated the appointment. Dr. Kanen never had the opportunity to ask appellant as to the disposition of the TRO or the earlier 2010 incident but stated that he would have asked those questions if he had been able to continue the interview process.

Dr. Kanen's evaluation consists of three paragraphs, the first two of which were recitations or even quotations from other documents provided to him. The key concluding paragraph set forth –

Within five minutes of this psychological fitness for duty evaluation, Ah'Kaleem Ford was uncooperative, hostile, and oppositional. When questions were asked of him, he began to throw back the questions on this examiner asking me "What do you think?" He did report that he has been a Hudson County Correction's [sic] Officer for three years and has been suspended for six months. He did not know what he did that led to the suspension. He refused to answer questions regarding the suspension. He reports he was unaware of previous suspensions. He wanted to talk to his attorney. It was apparent that he was too hostile and oppositional to continue this fitness for duty evaluation. His presentation on this day was a behavioral sample of how Ah'Kaleem Ford behaves; that is, he is prone to be uncooperative, hostile, and oppositional. At his current level of functioning, he is considered psychologically unsuitable to perform the duties of a Correction's [sic] Officer. At his

current level of functioning it would be difficult for the county to employ him in any capacity.

On cross-examination, Dr. Kanen clarified that he considered appellant to be hostile to the questions and examiner but that he did not conduct himself in a loud, angry or sarcastic manner. The psychologist assumed that appellant would reschedule the examination after he had had the chance to speak with his attorney. The entire albeit truncated interview took approximately fifteen to twenty minutes. No testing was conducted and no diagnosis was ever arrived at, which admittedly could have been none. The interview was ended and Dr. Kanen escorted appellant back to the reception area where he departed. There was no communication as they parted as to who should take responsibility for the rescheduling of the evaluation. Dr. Kanen just assumed it would be up to appellant or the County. Yet, unbeknownst to appellant, Dr. Kanen did not consider the evaluation as needing to be re-scheduled because he submitted a report on appellant's fitness for duty under cover of May 21, 2012.

In spite of this extremely abbreviated evaluation session, Dr. Kanen expressed confidence in his conclusion that appellant was unemployable simply based on the unexplained documents and his behavior in the psychologist's office. He admitted that he took note of appellant's tardiness to the evaluation but stated that it had not been determinative. Dr. Kanen was of the opinion that a person's future behavior is best predicted by his past behavior of acting out in the community, acting out in the place of employment, and/or acting out in the evaluator's office. Dr. Kanen found appellant's presentation of himself to be so poor that he decided to provide a professional fitness for duty opinion notwithstanding the paucity of information and total lack of testing.

Appellant presented an expert witness on the issue of his fitness for duty. Dr. David J. Gallina has Board Certifications in Psychiatry, Neurology, Forensic Psychiatry, and Alcoholism and Drug Dependencies. He is licensed in New Jersey, New York and Rhode Island with a private practice in Wyckoff, New Jersey. Dr. Gallina graduated from the predecessor institution to UMDNJ over forty years ago and undertook a residency at Mt. Sinai, an advanced residency at Cornell, and was also a physician in the Navy. He stated that he has done hundreds of fitness for duty examinations and

pre-employment screenings for many agencies. In addition, he has been a consultant to Boards of Education and Child Study Teams in the area of pediatric neurology. Dr. Gallina elaborated on the field of neuropsychiatry as entailing the diagnosis of both organic diseases and emotional diagnoses which can be triggered by either internal or external causes. He undertakes approximately ten to fifteen fitness for duty evaluations per year for law enforcement personnel, most often at the request of the agency. Dr. Gallina was qualified as an expert in his field.

Dr. Gallina evaluated appellant on September 6, 2012. He also reviewed and had copies of the disciplinary records, some correspondence, and the Report of Dr. Kanen. He detailed his standard means of conducting a fitness for duty examination, including a mental status examination, personality testing using a large standardized exam such as the MMPI-2, and the taking of the patient's childhood, education, military and employment history. Dr. Gallina found that he had no problems getting appellant comfortable with the evaluation setting and obtaining his cooperation for the examination. He finds that most subjects are defensive at the inception of an evaluation because the individual does not know the doctor, he or she has his/her job on the line, he or she might be skeptical of psychiatric practice in general, or the individual might even be scared. Sometimes that initial defensiveness leads to the person asking to speak to their attorney or union representative. Dr. Gallina not only allows that but offers to speak with the representative or even invite them to have a representative present as a means of defusing the concerns. In his opinion, the evaluation does not commence until he and the subject of the evaluation have gotten past any initial defensiveness.

During his interview of appellant, Dr. Gallina learned that appellant and his girlfriend had been temporarily separated just prior to the December 18, 2011, incident. They had a verbal agreement with respect to custody of their child which appellant thought was being ignored on the night of the incident. Appellant described himself that night as overtired from working a long shift. He was plainly remorseful about the incident. It was an incident which did get out of control but appellant showed good self-awareness about that fact. Appellant explained to Dr. Gallina that the couple have

since reconciled and are living together. She withdrew the restraining order and any charges. Dr. Gallina also inquired about an earlier fight at a community barber shop in 2010 wherein a former inmate attacked appellant, which had resulted in appellant's arrest and discipline because of the ongoing brawl when the police arrived. Upon his review of all the facts, including subsequent threats from the assailant, Dr. Gallina was convinced that appellant had acted in self-defense against an irrational attacker. Appellant's military service, school and employment history were all normal and unblemished. Thus, Dr. Gallina considered the domestic violence incident to have been an isolated and unfortunate incident in appellant's history but not in itself grounds for a determination that appellant was psychologically unfit for duty as a corrections officer.

Dr. Gallina also arranged for appellant to take a battery of psychological tests, including the extensive MMPI-2; IVA, which is a computer simulation of the impact of stresses on concentration; House-Tree-Person, which is a subjective drawing with narrative; Three Wishes Test; and Sentence Completion. All of appellant's responses were within normal limits and he evidenced no diagnosable medical neuropsychological illness. There was no evidence of mood disturbance, anxiety or depression. Appellant's peer and family relationships were good, as were his verbal and non-verbal communication skills.

In his fitness for duty methodology, Dr. Gallina focuses in part on any pattern of difficulties the person has had over his or her lifetime. He wants to evaluate a person in the larger context of his life in order to be able to determine if there is a propensity toward a negative characteristic because isolated incidents should not be a sufficient basis for a fitness for duty opinion. The two off-duty incidents were isolated and "do not prognosticate any future difficulties that Officer Ford might have with anger management." Dr. Gallina also found that appellant demonstrated good insight and awareness as a result of these incidents and has the ability to govern his future behaviors appropriately. Dr. Gallina opined within a reasonable degree of medical certainty that appellant has no propensity toward violence or difficulties with anger management, and that he is fit for duty as a correctional officer.

Based upon the unusual report written by Dr. Kanen, with whose reports Dr. Gallina has some familiarity, Dr. Gallina was of the opinion that the former's evaluation got off to a bad start and never got off the ground. At best, Dr. Kanen had an "encounter" with appellant but no genuine evaluation took place. There was no testing undertaken by Dr. Kanen and the initial interview was truncated. A professional in the field could not and should not come to any conclusion as to an individual's propensities based on such a short interaction. The examination should have been rescheduled either with Dr. Kanen or with another psychologist if he and appellant were not able to deal comfortably with each other. Dr. Gallina acknowledged that this can happen between any two people. In his opinion, it would be a professional mistake to draw any conclusions from what took place during Dr. Kanen's appointment.

On cross-examination, Dr. Gallina more than adequately defended the validity of the objective tests appellant underwent. He also explained that a person cannot really cheat or fudge on these tests, notwithstanding internet resources available about them. The MMPI is 540 true-false questions which would be nearly impossible to memorize; the sentence completion exercise has too many versions and variations to prepare for; and the IVA is a copyrighted computer interactive program that has no "right answer." In general, while an employee undergoing a fitness for duty examination might come into the evaluation knowing the point the doctor is looking for, yet it is ultimately extremely difficult to not be genuine for the entire duration of the process.

An expert must be able to identify the factual basis for his conclusion, explain his methodology, and demonstrate that both the factual basis and underlying methodology are scientifically reliable. The court's role is to "determine whether the expert's opinion is derived from a sound and well-founded methodology that is supported by some expert consensus in the appropriate field." *Id.* 127 N.J. at 417 (citing Rubanick, supra, 125 N.J. at 449-50). Support for an expert's methodology may be found in professional journals, texts, conferences, symposia, or judicial opinions accepting the methodology. *Ibid.* (citation omitted). Courts also may consider testimony from other experts in the field who use similar methodologies. Rubanick, supra, 125 N.J. at 449-50. The

appropriate inquiry is not whether the court thinks the expert's reliance on the underlying data was reasonable, but rather whether comparable "experts in the field [would] actually rely on that information." Ryan v. KDI Sylvan Pools, 121 N.J. 276, 289 (1990).

In the present matter, there was testimony from two experts on appellant's psychological fitness for duty which stand in stark contrast to each other. I **FIND** that the testimony and report of Dr. Gallina is entitled to greater weight than that of Dr. Kanen. While expert testimony is permitted to consider and opine on the ultimate issue, especially where there is no lay jury whose consideration might be unduly influenced by such, State v. Reeds, 197 N.J. 280, 292 (2009), nevertheless, that expert opinion must be grounded on supporting data and not "inadequately explored legal criteria."

While Fed. Ev. Rule 704 and N.J. Evid. R. 56(3) both allow the expert's opinion to "embrace the ultimate issue" to be decided, neither rule allows a bare conclusion which lacks supporting data and rationale leading to that conclusion. The sole justification and purpose of expert testimony is to assist the trier of fact to find a solid path through an unfamiliar and esoteric field.

[Tabatchnick v. G. D. Searle & Co., 67 F.R.D. 49, 55 (1975)]

Here, Dr. Kanen appears to have substituted himself into the role of administrator of the department rather than that of an objective psychologist and reached a conclusion barren of supporting medical information. I **FIND** that Dr. Gallina's evaluation was more thorough and premised upon an actual and thorough evaluation while I **FIND** that Dr. Kanen did not conduct any evaluation and had no basis upon which to form a psychological opinion. Dr. Kanen's conclusions based upon a five or ten minute encounter with appellant was not in line with the professional standards that should have governed his role on May 17, 2012. In sum, an expert in the field of psychology is not needed or appropriate when he is essentially presented only to add emphasis to the significance of events that are otherwise in the record through lay testimony. Dr.

Kanen's conclusion that appellant is psychologically unfit for duty or for any employment by the County must be disregarded and I so determine.

### **ANALYSIS AND 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 an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (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). Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, the County bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, I must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and

W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

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. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. See Bock, supra, 38 N.J. at 523-24. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

Prior to the filing of these charges, appellant had previously been disciplined with a five-day suspension which also stemmed from an incident of an off-duty fight. In the interim, appellant had undergone a half-day anger management lecture. While the first incident in front of the barber shop clearly arose out of self-defense, the second incident involved the mother of his very young child. Appellant regrets the incident, has been appropriately introspective about it since, and has learned from it. He is now living with this woman and their child. Any initial charges or orders stemming from the incident have all since been dismissed. Nevertheless, I **CONCLUDE** that the penalty of a 132-day suspension for the altercation with Ms. Roby on December 18, 2011, was authorized and supported. While it is a significant jump in penalty from the previous

five-day suspension for the conduct relating to the Grant attack, it was not so disproportionate to the alleged incident as to warrant a reduction.

On the more serious penalty of removal, the DOC argues that appellant is not only unfit for duty but that his removal was premised upon his lack of cooperation with Dr. Kanen resulting in charges of neglect of duty, insubordination and conduct unbecoming a public employee. These alternative charges cannot be sustained on the basis of this record. As compared to the underlying incident of domestic violence, for which appellant has been suspended for 132 work days, the failure to get along with Dr. Kanen during the initial ten minutes of an evaluation falls so short of an incident for which the consequences of removal is appropriate as to be shocking. It was Dr. Kanen who pulled the plug on the evaluation. Appellant did not storm out or throw things or get physical with the psychologist. He questioned the appropriateness of delving into issues of DYFS and sought an opportunity to consult with his attorney. Removal for psychological unfitness for duty would be appropriate and necessary if the County had proven its case that appellant was genuinely unfit to be a Corrections Officer but Dr. Kanen's truncated ten-minute interview and three-paragraph conclusory report constitute a woefully insufficient, unprofessional and medically unsustainable basis for such a drastic result.

### **ORDER**

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action of Hudson County (CSV 7692-12) against appellant Ah'Kaleem Ford for conduct unbecoming resulting from an allegation of simple assault against his girlfriend and resulting in a suspension of 132 work days or six calendar months is hereby **AFFIRMED**.

It is further **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action of Hudson County (CSR 15066-12) against appellant Ah'Kaleem Ford for psychological unfitness for duty and other charges is hereby **REVERSED**. It is further **ORDERED** that Hudson County Department of Corrections shall reinstate

appellant Ah'Kaleen Ford to his position of Senior Corrections Officer with back pay from June 22, 2012.

It is further **ORDERED** that counsel fees should be awarded to the appellant as the prevailing party on the major charges of the second Final Notice of Disciplinary Action, subject to submittal of an affidavit of services, with a 25% discount for legal services provided on the unsuccessful appeal, and supporting documentation to the appointing agency, if settlement of fees is not successful, in accordance with N.J.A.C. 4A:2-2.12.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 22, 2013

*Gail M. Cookson*

\_\_\_\_\_  
DATE

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GAIL M. COOKSON, ALJ

Date Received at Agency:

5/22/13

Date Mailed to Parties:

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**APPENDIX**

**LIST OF WITNESSES**

**For Appellant:**

David J. Gallina, M.D.

Ah'Kaleem Ford

**For Respondent:**

Thaddeus Caldwell

Kirk Eady

Orlando Trinidad

Jose Alicea

James Romano

Sean Schwindt

Robert Kanen, Psy.D.

**LIST OF EXHIBITS IN EVIDENCE**

**For Appellant:**

A-1 [not in evidence]

A-2 Neuropsychiatric Evaluation, David J. Gallina, M.D., dated September 16, 2012

A-3 Order of TRO Dismissal, Superior Court - Family Part, dated December 22, 2011

A-4 Proof of Dismissal of Bloomfield Charge for Lack of Prosecution, dated February 3, 2012

A-5 Sprint Call Details for January 30 – February 1, 2012

A-6 Sprint Call Details for May 14 – May 17, 2012

A-7 Sprint Call details for May 24 – May 25, 2012

A-8 Arrest Report, Incident Report and Complaint against Teyan Grant, dated December 8, 2011

**For Respondent:**

- R-1 Preliminary Notice of Disciplinary Action with Notice of Immediate Suspension, dated December 20, 2011**
- R-2 Bloomfield Police Department, Incident Report, dated December 18, 2011**
- R-3 Preliminary Notice of Disciplinary Action with Custody Staff Rules and Regulations Manual (December 2009, portions), dated July 17, 2012**
- R-4 Rossi Psychological Group, Robert Kanen, Psy.D., Confidential Psychological Evaluation Fitness for Duty Evaluation**
- R-5 General Agreement and Release for Robert Kanen, Psy.D. Examination, signed by Ah'Kaleem Ford May 17, 2012**
- R-6 Jersey City Police Department Investigation Report, dated November 30, 2010**
- R-7 Certificate of Completion for Anger Management Class, dated June 10, 2011**



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INTERLOCUTORY ORDER**  
**ON SALARY PAYMENT**

**IN THE MATTER OF AH'KALEEM FORD,  
HUDSON COUNTY DEPARTMENT  
OF CORRECTIONS.**

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OAL DKT. NO. CSV 7692-12  
AGENCY DKT. NO. 2012-3290

**IN THE MATTER OF AH'KALEEM FORD,  
HUDSON COUNTY DEPARTMENT  
OF CORRECTIONS.**

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OAL DKT. NO. CSR 15066-12  
AGENCY DKT. NO. N/A

**James D. Addis, Esq.**, for appellant Ah'Kaleem Ford (Galnatucci & Patuto,  
attorneys)

**John C. Collins**, Assistant County Counsel, for Hudson County Department of  
Corrections (Donato J. Battista, County Counsel, attorneys)

**BEFORE GAIL M. COOKSON, ALJ:**

These two matters were each filed as appeals by Ah'Kaleem Ford (appellant) from disciplinary actions filed against him by Hudson County Department of Corrections (County) with respect to his position as a Senior Corrections Officer. The first disciplinary action imposed a 132-day suspension on appellant stemming from his arrest on charges of simple assault for an alleged domestic violence incident on December 18, 2011. That suspension has already been served. The second disciplinary action sought appellant's removal for his alleged failure to satisfactorily pass or lack of cooperation with respect to a psychological fitness for duty evaluation

established as a pre-condition to his returning to employment after completion of the prior suspension. The Final Notice of Disciplinary Action was filed on October 25, 2012. Thus, the second disciplinary action qualifies appellant for the protections afforded to law enforcement personnel under the Law Enforcement and Fire Fighter Pay Act, P.L. 2009, c. 16, which amended N.J.S.A. 40A:14-150 and 40A:14-22 (Act), and provides for payment of salary to a law enforcement officer or firefighter who has been suspended pending termination for more than 180 days. N.J.S.A. 40A:14-200 *et seq.* Because the plenary hearing on the removal matter has not yet concluded and the clock is approaching the 180-day mark, I have determined that the procedural record must be reviewed to determine if any tolling of the re-commencement of pay under the Act is appropriate in order to advise the appointing authority accordingly.

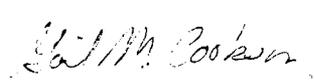
This appeal was perfected at the OAL on November 8, 2012. It was assigned to me on November 29, 2012. On December 4, 2012, my office arranged for a telephonic status conference on the case to take place on December 17, 2012. By that date, hearings had already been scheduled on the earlier-filed suspension disciplinary action for April 3 and 4, 2013. During the December 17 teleconference, hearing dates for February 25 and March 4, 2013, were added to the then-consolidated matters. On Tuesday, February 19, 2013, County Counsel requested an adjournment of the first two days of hearings due to the unavailability of four Bloomfield Police Officers, over whom Hudson County had no control or authority, who were not being released that day to testify. Appellant's attorney consented to the request. Both counsel assured me that the plenary hearings would be completed with the two hearing dates in April.

On or about March 26, 2013, County Counsel advised me that the four Bloomfield Police Officers were also not available for testimony on April 3, 2013, but that they would be available on April 4, 2013. I advised counsel that they should be prepared to continue the hearings on April 26, 2013, if the hearings did not conclude on April 4, 2013. I also advised that I would not toll the Law Enforcement and Fire Fighter Pay Act provisions for that interim period. On April 3, 2013, respondent presented two witnesses. On April 4, 2013, respondent presented its remaining five witnesses, including the Bloomfield Police Officers. Counsel agreed that appellant would

commence his case on April 26, 2013, at 1:30 p.m. The time was selected in part to avoid a court conflict for County Counsel. On April 26, 2013, appellant presented his expert witness but did not have time to complete his case with the presentation of appellant's testimony. The matter is now scheduled for a last day of hearing on May 14, 2013. Counsel were advised that only oral closing statements would be permitted on that date without leave to submit post-hearing briefs. The record would close therefore on May 14, 2013, and I would prepare my Initial Decision expeditiously.

With respect to the period between February 25 and April 3, 2013, when this matter was adjourned on consent of both parties, I **CONCLUDE** that such period will toll the reinstatement of appellant's pay under the Act for thirty-seven (37) days. For the period from April 4 to April 26, 2013, I **CONCLUDE** that the Act shall not be tolled because appellant did not request or consent to this additional adjournment necessitated by the presentation of respondent's case. With respect to the period between April 26 and May 14, 2013, I **CONCLUDE** that same shall toll the reinstatement of pay under the Act for an additional eighteen (18) days because it is essentially at the appellant's request in order for him to conclude the presentation of his case. In sum, the 180-day period which would have expired on May 8, 2013, and on which date appellant would have had to be reinstated to pay pending a final decision, shall be extended a total of fifty-five (55) days.

Accordingly, pursuant to N.J.S.A. 40A:14-203(b), I **ORDER** the appointing authority to begin paying appellant's base salary on **June 24, 2013**, subject to reimbursement if appellant's removal is ultimately upheld. Payment shall continue in accordance herewith pending a final determination in this matter by the Civil Service Commission. This Order is effective immediately and shall continue in effect until issuance of the Final Decision in this matter by the Civil Service Commission. Nothing herein shall be construed to authorize an award of back pay before a final decision is issued.



May 1, 2013  
DATE

GAIL M. COOKSON, ALJ

