

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4th DAY OF APRIL, 2018

Deirdre L. Webster Cobb

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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 17582-15

AGENCY DKT. NO. 2016-1430

**IN THE MATTER OF JERMAINE CURRY,
NEW JERSEY STATE PRISON,
DEPARTMENT OF CORRECTIONS.**

Peter Valenzano, Esq., for appellant (Mashel Law, LLC, attorneys)

**Tamara L. Rudow, Esq., Legal Specialist, Department of Corrections, Office of
Employee Relations, appearing for respondent pursuant to N.J.A.C. 1:1-
5.4(a)(2)**

Record Closed: November 9, 2017

Decided: February 9, 2018

BEFORE DOROTHY INCARVITO-GARRABRANT, ALJ:

STATEMENT OF THE CASE

Appellant, Jermaine Curry, a Senior Corrections Officer at New Jersey State Prison, (NJSP), Department of Corrections (respondent, NJSP DOC, or DOC), appeals disciplinary action seeking a suspension for sixty working days for conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11), specifically violations of Human Resource Bulletin (HRB) 84-17, as amended; C(11), conduct unbecoming an employee; C(24) threatening, intimidating, harassing, coercing or interfering with fellow employees on State property;

D(7) violation of administrative procedures and/or regulations involving safety and security; and E(2) intentional use or misuse of authority or position. (J-1.)

The appellant denies the allegations that he inappropriately restrained a civilian instructor, or that he verbally abused, harassed, intimidated and interfered with the instructor by locking him in a vegetable shop on March 26, 2015. He also contends that his actions were necessary for safety and security reasons.

PROCEDURAL HISTORY

On May 3, 2015, respondent issued a Preliminary Notice of Disciplinary Action setting forth the charges and specifications against appellant. Following a departmental hearing on September 11, 2015, the respondent issued a Final Notices of Disciplinary Action on September 17, 2015, sustaining the charges in the Preliminary Notice and suspending appellant from employment for sixty working days. (J-1.) Appellant filed a timely notice of appeal.

The matter was transmitted to the Office of Administrative Law on October 29, 2015 for hearing as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter commenced on February 7, 2017, May 1, 2017, and June 27, 2017.¹ The parties filed post-hearing briefs and the record closed on November 9, 2017.²

¹ Appellant was represented by Todd McConnell, New Jersey State PBA, Local 105 Representative, on February 7, 2017. He subsequently retained counsel, and Peter Velenzano, Esq. represented him on the remaining dates.

² An extension of time was granted for the filing of this initial Decision.

FACTUAL DISCUSSION

Testimony

For Respondent

Glen Trahan (Trahan) is the Assistant Regional Food Service Director at Northern State Prison. On March 26, 2015, he was the Institutional Trade Instructor (ITI) and Assistant Food Service Supervisor at NJSP. He is a civilian worker. He and appellant have had conflicts in the past, and appellant has filed special complaints and Equal Employment Division (EED) complaints against him.³ Trahan denied that those complaints had any bearing on what occurred in this incident. He stated that all of the EED complaints against him “turned out false.”

Trahan testified that during lunch mess service on March 26, 2015, he and ITI Calvin Bryant (Bryant) went downstairs into the cookhouse basement to prepare additional foods for mess and for delivery to certain inmates. Trahan was in possession of a commercial can opener. Trahan and Bryant were accompanied by two inmates who were tasked with opening cans in the vegetable shop and dividing the food into portions for each inmate. Trahan approached appellant and twice requested that he unlock the vegetable shop. Appellant was on his phone in the office. He did not respond and remained on his call. Trahan noticed that the vegetable shop was already unlocked, so he and the inmates entered the room. Trahan secured the can opener into the slot on the work counter. He then began instructing the inmates about dividing the contents of the cans. Bryant entered the shop and then left to retrieve more cans from another storeroom down the hall. At this point, no cans had yet been opened as they were being placed and organized on the table.

While Trahan was still giving instructions to the inmates on the division of the contents, appellant entered the vegetable shop, and ordered Trahan and the two inmates

³ Trahan and ITI Calvin Bryant had also filed EED complaints against Curry.

to leave the room. At this point, no cans had been opened. The two inmates left. However, before Trahan could exit the room, appellant slammed the door and locked it. Appellant said “[n]ow I got you, I’m going to lock you up like an inmate.” Appellant locked the door. Appellant began rapping to Trahan telling him that he was locked up like an inmate. Trahan testified that he asked appellant to open the door. Appellant refused. Trahan yelled to Bryant to get assistance from Officer Joseph Buckley (Buckley). Bryant immediately went upstairs to get assistance.

Trahan testified that he was locked in the vegetable shop for about fifteen to twenty minutes, until Sergeant Michael Keaton (Keaton) released him. During the time he was restrained, Trahan sat at the back of the shed and ate an orange, while appellant taunted him, and attempted to agitate him. Trahan testified that he did not engage appellant because he did not want to get into a verbal altercation with him. When Trahan was released, he went to Administration.

Trahan completed a special report on March 26, 2015, (J-5) and participated in an investigative interview on April 14, 2015. (J-17c.)

Calvin Bryant (Bryant) is an ITI II assigned to the cookhouse at NJSP. He is a civilian worker whose duties include giving food preparation instructions to inmates.

Bryant testified that the vegetable shop door was unsecured when Trahan, the inmates and he went downstairs to open cans. When they entered the vegetable shop, Trahan instructed the inmates about how much food to take from the cans and place into the pans. No cans had been opened.

Bryant left the vegetable shop to go down the short hallway to a storeroom to retrieve additional cans. While he was doing this, he heard appellant say “[y]ou can’t be in here. You all got to get out.” Bryant observed the inmates and Trahan begin to leave. The inmates exited the vegetable shop and the basement immediately. However, before

Trahan even had a chance to exit, appellant kicked the vegetable shop door shut on Trahan, and locked him in the shop.

Bryant testified that appellant then started rapping at Trahan like "Run DMC" and said, "[y]ou're locked up like an inmate now." Bryant went upstairs to get Buckley, but Buckley said that he could not leave his post during mess. Buckley also advised that Keaton had been contacted about the situation by appellant and would be responding.

Bryant was present when Trahan was released. Keaton told appellant to open the door. However, Keaton then had to take appellant's keys from him to release Trahan. Trahan stormed out stating he was going to talk to his lawyer. Trahan had been locked in the vegetable shop for ten to twelve minutes. In his special report dated March 26, 2015, Bryant wrote that Trahan was locked in the shop for six minutes. (J-4.) He participated in an investigative interview on April 10, 2015. (J-17e.)

Bryant described appellant as a "ticking time bomb," who could blow at any minute. He stated that appellant wanted to make his own rules and regulations.

Joseph Buckley (Buckley), Senior Corrections Officer, testified that he has been employed by the DOC for fifteen years and is currently assigned to the Officer's Dining Room at NJSP. On March 26, 2015, he was assigned to the cookhouse.

On that date, Buckley was at his post in the cookhouse during mess. He was approached by Bryant who advised that appellant had locked Trahan in the vegetable shop. Buckley advised Bryant that he was unable to leave his post during mess. He told Bryant to speak with Keaton and that he had heard a radio call from appellant to Keaton.

In the past, Buckley had been assigned to the cookhouse area in the basement. Buckley stated that it was against policy for an ITI to be in the vegetable shop with inmates while they were opening cans. Buckley testified that he never locked a civilian worker in the vegetable shop and that there "was no reason to do so." Buckley added that even if the ITIs were present in the vegetable shop with the inmates while they were opening

cans, he would not lock the civilians in the vegetable shop because the policy does not provide for that procedure.

Buckley had reviewed and was aware of Cook House Update #1, dated January 24, 2014, which codified procedures for inmates working in the vegetable shop. (J-10.)

Buckley completed a special report on March 26, 2015, (J-6) and an investigative interview on April 17, 2015. (J-17a.)

Michael Keaton (Keaton) testified that he has been employed by the DOC for twenty-one years and has been a Sergeant for the last ten years. He was appellant's supervisor for one year and gave him a good evaluation. On the date of the alleged incident, he was assigned to run mess.

Keaton received a call from appellant who advised that the inmates were opening cans and that Trahan would not leave the vegetable shop. Keaton could not leave his post and go to the cookhouse basement until mess ended. Once mess ended, Keaton went to the vegetable shop which took approximately fifteen minutes. Appellant advised that he had locked Trahan in the shop because he was opening cans with inmates. Keaton took appellant's keys and unlocked the door releasing Trahan, who stated that he was going to see Administration.

Keaton did not recall seeing any opened cans. Although an ITI could be locked in the vegetable shop for safety reasons, based on his observations, there was no reason for appellant to have locked Trahan in the vegetable shop.

Keaton completed a special report on March 26, 2015, (J-7) and an investigative interview on April 10, 2015. (J-17b.)

Michael Kubik (Kubik), Senior Investigator, testified that he has been assigned to the Special Investigations Division (SID) for nine years, and received special training in conducting investigations.

Kubik conducted an investigation into this alleged incident. As part of his investigation he reviewed all of the special reports and conducted interviews of appellant, Bryant, Trahan, Buckley, and Keaton. (J-2, 3, 4, 5, 6, and 7.) Kubik summarized the witnesses' statements contained in his report. (J-2.)

Kubik reviewed the Handbook of Information and Rules for employees of NJDOC (J-8), the Law Enforcement Personnel Rules and Regulations (J-9), Cook House Update #1 (J-10), Major Wayne Sanderson's memo permitting two or three inmates to work in the vegetable shop (J-10), and the March 26, 2015 cookhouse log book. (J-11.)

Kubik noted that there was a discrepancy about the length of time Trahan was locked in the vegetable shop. The witness statements ranged from approximately five to fifteen minutes. Kubik explained that this was a common occurrence in stressful incidents when individuals are emotional. Based on his experience conducting similar investigations, he was not concerned about the discrepancies in the elapsed time because in such situations ten minutes may seem like fifteen and one minute may seem like four minutes to different individuals.

Kubik noted that appellant's statement to SID was inconsistent with the other witnesses' statements. Appellant stated that Trahan was only locked in the vegetable shop for less than one minute. Appellant stated that he, and not Keaton, let Trahan out of the vegetable shop.

Kubik's investigation concluded that appellant locked Trahan in the vegetable shop on March 26, 2015. Keaton had to be pulled away from his duties to attend to appellant's actions. There was a disparity between appellant's version of events and those of all the other witnesses. While there is no standard operating procedure for the vegetable shop, Kubik determined that "a civilian employee should not be involuntarily locked inside any

room within NJSP.” (J-2.) Kubik forwarded his final report to Administration for appropriate action.

Davin Borg (Borg) has been employed by DOC since 1999, and is the Administrative Major at NJSP. His duties include being responsible for disciplinary matters, policies, and daily operations. Borg testified that he was familiar with the facts of the alleged incident on March 26, 2015, and had reviewed the special reports, investigation report, PDNA, FNDA, and the other NJDOC documents related to the alleged incident and investigation.

The policy required that the vegetable shop be secured other than when instruction was being done. Borg stated that appellant was responsible for securing the vegetable shop at the beginning of his shift when he performed his inspection. If he had discovered that the vegetable shop was unlocked, then he should have reported that it was unsecured. Borg testified that during mess operations, no inmates are permitted in the vegetable shop.

Borg concluded that appellant violated several NJDOC policies. First, Borg testified that it is against NJDOC policy to secure a civilian inside a room. Second, the appellant violated the NJSP Internal Management Policy (IMP) #14 West Compound Mess Hall/Kitchen policy by failing to secure the vegetable shop door at the beginning of his shift. This policy required that “[a]ll doors are to be closed at all times. All doors with locking devices will remain locked except when in use, including the pantry, cells, sally ports, and doors.” (J-14.) Third, the appellant violated, IMP #402 Custody Staff policy, relative to staff conduct by failing to conduct himself in a profession manner by locking a civilian in a vegetable shop when it served no custodial interest.

Borg also testified that appellant’s conduct violated the Law Enforcement Personnel Rules and Regulations as follows:

1. Article I, Section 2, No Officer shall knowingly act in any way that might reasonably be expected to create an impression of suspicion among the public

that an officer may be engaged in conduct which violates the public trust as an officer.

2. Article I, Section 3, Officers shall be held responsible for the proper performance of duty and for strict adherence to these rules of conduct.
3. Article I, Section 5, Officers shall not willfully disobey any lawful verbal or written orders of any individual placed by competent authority in a position of supervisor over such officer.
4. Article II, Section 6, Officers must maintain a high degree of self-control at all times.
5. Article II, Section 7, No officer shall make, or cause to be made, any false or misleading statements. No officer shall intentionally omit or misrepresent facts or information known to the officer.
6. Article III, Section 3, No officer shall act or behave, either in an official or private capacity, to the officer's discredit, or the discredit of the Department. Officers are public servants twenty-four hours a day and will be held to the law enforcement higher standard both on and off-duty.
7. Article III, Section 4, An officer shall be civil, orderly, maintain decorum, control temper and be patient and use discretion in the performance of duty.

(J-9.)

During cross-examination, when asked if it was appropriate to release a civilian worker from confinement if they were directing racial slurs at the officer and were slamming a can opener against the door grating, Borg testified that involuntarily securing a civilian who is a DOC employee, who has not exhibited any signs of violence or threat, and who is not incarcerated by the State would be a violation of law and the IMPs. Borg stated that slamming a can opener on a door to get someone's attention or being called a racially derogatory name would not be sufficient to form a belief that that individual

would assault the officer. Inmates call officers similar names all the time and such situations do not result in an assault.

Finally, appellant had two prior C(11) charges for conduct unbecoming an employee. Based on the charges in the FDNA, Borg stated the appellant could have been removed. (J-15.)

Michael Ptaszenski (Ptaszenski) testified that he has been employed by the NJDOC for twenty-two years and is the Administrative Lieutenant at NJSP. His duties include being responsible for overseeing the policy, procedures, and discipline at NJSP. For four years during his employment, he was the cookhouse sergeant. Ptaszenski stated that the sergeant cannot leave the cage until mess is completed. Ptaszenski described the walk Keaton had to do from the sergeant's cage to the vegetable shop. He stated it would take three to five minutes to traverse the route.

Relative to the cookhouse officer's duties, there is no policy requiring that inmates be pat-frisked or wanded upon entering the cookhouse because inmates are subjected to those inspections in the rotunda before they head down the steps into the cookhouse.

No civilian should be locked in any room. The log book of events in the cookhouse is a document, which can be updated at any time during a shift by the officer assigned to the cookhouse. The entries are not made simultaneously with the corresponding event.

For Petitioner

Stephen Gass (Gass), Retired Senior Corrections Officer, testified relative to the policies and procedures in place at the time of the incident.⁴ Gass retired from the NJDOC with twenty-eight years of service. He had worked in the cookhouse for more than six years. He was a contributor to the project to establish the vegetable shop as the only location in which canned goods were permitted to be opened in the cookhouse. Gass

⁴ Appellant offered SCO (Ret.) Stephen Gass as an expert; however, Gass was not qualified or accepted as an expert. He was permitted to testify as a witness.

testified that appellant should not have been in the basement while mess was running because the officer was supposed to be observing the food trays going out of the ports.

Gass stated that entries in the log book are to be made contemporaneously with the events. However, he acknowledged that appellant was in exclusive control of the log book at all times material and relevant to this incident.

Gass stated that if an ITI had asked him to open the vegetable shop his first action would be to search the room for contraband. He would then secure the door and proceed to the utensil room, if required, to retrieve the can opener. Gass could not identify any written policy requiring that inmates be pat-frisked upon entering the vegetable shop. Gass would then reopen the vegetable shop, count the cans that needed to be opened, place the can opener in the worktable and secure the inmate in the vegetable room. The ITI could instruct the inmates from outside the secured shop door.

After the inmates opened the cans, the cans were rinsed, smashed, and counted. Prior to exiting the room, Gass would take the can opener and place it back in the utensil room. The cans and lids would be counted. The inmate would be patted down, taken out of the room and the cans and lids would be placed in a secure location.

When asked what action should be taken if an ITI refused to leave the vegetable shop while cans were being opened, Gass testified that the sergeant should be called pursuant to Section 5 of the NJDOC, Law Enforcement Personnel Rules and Regulations, which requires that any incident in progress be reported. If the ITI still did not leave the room, then he should be separated from the inmates so that the inmates could be frisked in a neutral area to make sure they had not concealed any contraband. Then the door could be secured, while the cans are opened.

Finally, Gass testified that it would be appropriate to call the sergeant to de-escalate a situation with an ITI who slammed a can opener on the door's grate.

Jermaine Curry, appellant, testified that on March 26, 2015, he was assigned as the Cookhouse Relief Officer II and was in the basement of the cookhouse during lunch mess service. Trahan and Bryant asked appellant to open the butcher and vegetable shops. Appellant admitted it was a violation of procedure for him to leave his post in the cookhouse and go into the basement. Appellant testified that he did a sweep of the butcher shop and proceeded to the vegetable shop. However, he was unable to sweep it because Trahan and the inmates had entered the vegetable shop with cans. Trahan had the can opener in his hand when they entered the vegetable shop.

According to appellant, this was contrary to procedure. The best practice is for inmates to be physically pat-frisked and wanded with a handheld metal detector to make sure they do not have any contraband before they enter the vegetable shop. The officer then takes a physical count of all the cans before the inmates enter the vegetable shop, to prevent any contraband from entering or leaving the cookhouse. Appellant stated that it is important for the inmates to remain outside the vegetable shop during this process so that the officer does not become distracted.

While appellant was pat-frisking one of the inmates, he heard the slamming of cans on the work station behind him in the vegetable shop. He then observed cans being opened by Trahan.

At this point, appellant radioed Keaton and directed Trahan to stop. Appellant explained that opening cans with the inmates was a violation of the safety and security procedures. Appellant told Trahan to exit the room. Instead, Trahan shouted expletives at him and ignored his directions. Trahan continued to open cans. As a result, appellant ordered the inmates to leave, called for the sergeant, and locked Trahan in the vegetable shop because he was acting in a hostile and insubordinate manner. Appellant further stated that he secured Trahan for safety and security reasons to separate him from the inmates, the canned goods, and any possible weapons. He secured the inmates in a separate maintenance room to pat-frisk them.

Appellant returned to the vegetable shop, and began to unlock the door, when Trahan called him a "f*****g mooley" and slammed the can opener against the door's metal grate. Believing that Trahan was a safety and security threat to him, appellant did not release him. Appellant contacted Keaton for a second time. This time he did not radio Keaton. Instead, he called Keaton by telephone. Keaton responded that he would be there in two to three minutes.

Keaton and Lieutenant Kennedy arrived at the vegetable shop two to three minutes later. Appellant maintained this was consistent with the log book, which shows an interval of four minutes between contacting Keaton and his arrival at the vegetable shop. (J-12.) Appellant admitted he made the entries in the log book after the incident and not simultaneously with the events. Keaton unlocked the vegetable shop releasing Trahan, who stated he was going to administration.

Appellant stated he returned to the vegetable shop and found several can lids, which he saved in a plastic bag pursuant to appropriate procedures. However, Lieutenant Kennedy told him not to worry about them. Kennedy told him to report to administration to file his special custody report.

Appellant noted that he and Trahan have had other conflicts. Appellant testified about Trahan and Bryant's history of insubordinate conduct toward him and undue familiarity with the inmates, which subverted appellant's authority over the inmates. Appellant stated that Trahan and Bryant told the inmates that the ITIs were their friends and appellant was not because appellant was an officer; that they disregard appellant's directions; and that they gave the inmates extra food to win their support against appellant. Appellant emphatically testified that Trahan had repeatedly "defied and undermined [appellant's] authority in the eyes of the inmates." Appellant believed these behaviors made his work environment unsafe. Appellant had previously filed an EED complaint against Trahan and special custody reports against Trahan and Bryant. Appellant believed Trahan and Bryant exaggerated the instant incident in retaliation for the prior complaints.

Credibility

Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), cert. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Cmty. Affairs Dep't, 182 N.J. Super. 415, 421 (App. Div. 1981).

After reviewing the evidence, I make the following **FINDINGS of FACT**:

The testimony presented by Trahan, Bryant, Buckley, and Keaton about their actions on March 26, 2015, their observations of Trahan's demeanor, the absence of opened cans in the shop, appellant's behavior, and their statements in their special reports were consistent. Collectively, their testimony of the events of the incident made sense and hung together to describe what occurred. It was undisputed that appellant involuntarily restrained Trahan in the vegetable shop.

Buckley and Keaton expressed no pre-existing issues with or animosity towards appellant, which made their testimony believable. Keaton even indicated that when he had been appellant's supervisor he had given appellant a good evaluation.

While appellant maintained that Trahan and Buckley exaggerated the incident in retaliation for special and EED complaints he had filed against them, there was no competent evidence presented to substantiate this allegation. The fact that Trahan and Bryant disliked appellant did not prove that they exaggerated appellant's actions during this incident. It also did not support appellant's position that he acted appropriately to protect Trahan's or his own safety and security. It further did not demonstrate that appellant's rendition of the facts was believable. To the contrary, the other witnesses' renditions of the disputed facts have a greater "ring of truth," than the scenario offered by appellant, who plainly had a greater interest in the outcome of this proceeding.

I **FIND** that there were no opened cans in the vegetable shop.

Additionally, I accept Kubik's testimony about his investigation and conclusions. His experience from past investigations about errors in estimations of time by different individuals involved in a stressful, emotional situation was credible. Ten minutes could appear to be fifteen minutes and one minute could be four minutes during this event. The discrepancies in time between forty-five seconds to four minutes, according to appellant, and fifteen minutes, according to the other witnesses, were not problematic in light of Kubik's and the other witnesses' testimonies about the events. I **FIND** that appellant involuntarily restrained Trahan in the vegetable shop for a period of time.

Appellant's demeanor during the hearing and rendition of the events lacked a ring of truth that undermined his credibility. During the hearing, appellant was agitated, defensive, and combative.⁵ Also, appellant was overly emphatic, when stating that Trahan had repeatedly "defied and undermined [appellant's] authority in the eyes of the inmates." Appellant's perception that his authority over the inmates was subverted by

⁵ Appellant exhibited the same demeanor during a telephone conference call held on March 10, 2017.

Trahan was misplaced, based on his own version of Trahan's past actions towards him. The significant personal offense taken by appellant to his rendition of Trahan's past conduct was a disproportionate and troubling reaction. In this regard, appellant's behavior and perceptions were more consistent with Bryant's opinion that appellant was a "ticking time bomb."

Similarly, appellant was insistent that it was the best practice and policy to pat-frisk and wand the inmates upon their entry into the vegetable shop. As Ptaszenski testified, inmates were searched in the rotunda when entering the cookhouse. There was no need for an additional search in the basement when entering the vegetable shop and no such policy requiring same existed. Even appellant's witness, Gass, was unable to identify any policy that required inmates be pat-frisked upon entering the vegetable shop. This behavior was consistent with Bryant's testimony that appellant wanted to make his own rules and regulations. It also undermined appellant's credibility because this baseless search was his justification for involuntarily securing Trahan in the shop.

Additionally, appellant's rendition of events did not hang together or support his alleged justification for his actions. Appellant maintained that he had to temporarily lock Trahan in the vegetable shop for safety, and that he secured the inmates in a maintenance room for purposes of searching them for contraband and weapons after releasing Trahan. However, appellant never testified whether he returned to the inmates to frisk them. He never stated whether he released them. In fact, he never included any statement in this regard in his Special Custody Report or his interview with Kubik. This lent credibility to Bryant's testimony that the inmates immediately vacated the vegetable shop and the basement pursuant to appellant's order. Appellant's omissions undermined his testimony and made his safety and security justifications untenable. The inmates were not secured or searched.

Similarly, the log book entries authored by appellant on March 26, 2015, appeared to be an attempt to bolster his version of the facts and to minimize the amount of time that Trahan was involuntarily and inappropriately restrained. The entries were made after the events and after no opened cans were found. This made the entries suspect. Additionally, appellant did not indicate in his Special Custody Report or during his

interview with Kubik that he had discovered or placed any opened cans in bags to secure them for disposal or that he gave them to Lieutenant Kennedy.

The discrepancies in appellant's testimony and changing rendition of facts made appellant's testimony unbelievable. On the contrary, the testimony presented by the other witnesses was consistent and credible.

FINDINGS OF FACT

After carefully reviewing the exhibits and documentary evidence presented during the hearing, and after having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I FIND the following to also be relevant and credible **FACTS** in this matter:

On March 26, 2015, appellant was assigned to NJSP as the Cookhouse Relief Officer II. He was required to do a sweep of the cookhouse areas including the vegetable shop at the beginning of his shift. Appellant did not report that the vegetable shop was unlocked or that he had to secure it. During the lunch mess movement, he was in the basement of the cookhouse contrary to NJSP policy.

Accompanied by two inmates, Trahan and Bryant descended into the basement to work in the vegetable shop where they would open cans and divide the food product into portions for inmates' meals. Trahan asked appellant to open the vegetable shop twice, then realized that the shop door was already unlocked and unsecured. Appellant, who was on his phone, ignored the requests. There had been multiple, past, special complaints and even EED complaints filed by Trahan and Bryant against appellant, and *vice versa*, which created an adversarial relationship among the parties.

After Trahan and the inmates entered the shop, Bryant went to another storeroom down the hall to retrieve additional cans. Trahan secured the can opener in the work-counter slot and began instructing the inmates about how to divide the product. No cans had been opened at this point.

Then, appellant ordered everyone out of the vegetable shop on the pretense that he had not been able to pat-frisk and wand the inmates before they entered the shop and that he had to secure Trahan's and his safety. Specifically, appellant said "[y]ou can't be in here. You all got to get out." This was heard by Bryant, who was down the hallway. Inmate instruction was occurring, and no cans had yet been opened. Additionally, no policy existed requiring that inmates be frisked and wanded as they entered the vegetable shop. The inmates had already been wanded in the rotunda upon their entry to the cookhouse. To the contrary, such limited searches were only required upon their departure of the shop by NJSP policy.

Pursuant to appellant's order, the inmates immediately exited the vegetable shop and the cookhouse basement. Appellant did not search them or secure them in any other room. Trahan attempted to comply with appellant's instructions to leave the shop. However, as soon as the inmates exited, appellant kicked the door shut and locked Trahan in the shop, which prevented him from complying with appellant's order. Appellant involuntarily restrained Trahan. Appellant began rapping "[y]ou're locked up like an inmate now" and otherwise taunting Trahan. All of this was heard or seen by Bryant.

Trahan asked Bryant to get Buckley to help with the situation and Bryant went upstairs to notify Buckley. Appellant radioed Keaton and advised that Trahan was opening cans in the vegetable shop with the inmates. Buckley advised Bryant that he could not leave his post during mess and that he had heard a radio call by appellant to Keaton. Buckley told Bryant he could contact Keaton, and that he believed Keaton would be down as soon as mess ended.

Throughout this time, Trahan sat in the back of the vegetable shop waiting for the door to be unlocked. After mess ended, Keaton walked across the mess and cookhouse areas to the basement of the cookhouse, a route which took at least four minutes to traverse. He was followed into the basement by Bryant. Keaton told appellant to open the door. Appellant did not follow this direction. Ultimately, Keaton took appellant's keys and opened the door. Trahan left and went to administration. No opened cans were discovered in the vegetable shop.

LEGAL ANALYSIS AND CONCLUSIONS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The appointing authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, 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, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Appellant's status as a correction's officer subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We

can take judicial notice that such facilities, if not properly operated, have a capacity to become "tinderboxes."

Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

N.J.A.C. 4A:2-2.3(a)(6)

Appellant was charged with "conduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

The basis for the charge of conduct unbecoming was appellant's intentional restraint of Trahan's freedom and the verbally abusive and harassing manner in which appellant mocked and spoke to Trahan after he was locked in the vegetable shop. Appellant's conduct was such that it adversely affected the morale or efficiency of a governmental unit and would have a tendency to destroy public respect in the delivery of governmental services.

As a corrections officer, appellant had a duty to recognize and appreciate that individuals incarcerated in NJSP had lost their freedom, and that he was entrusted to protect the inmates' limited rights and their dignity in that environment. He also had a duty to treat his civilian co-workers with respect. His actions touting that he had the power

or authority to take Trahan's freedom and mocking him by comparing him to an inmate was disrespectful and egregious conduct which served no legitimate purpose. It was violative of his obligations in a position of public trust. It offends publicly accepted standards of respect and decency.

Whether appellant misused his authority and took Trahan's freedom for four minutes or fifteen minutes is of no moment. No circumstances existed warranting Trahan's restraint for any length of time. Appellant presented no competent evidence that Trahan was a safety risk to him or that the inmates posed a safety risk to Trahan. Assuming, *arguendo*, that Trahan had made racial slurs or expletives at appellant as he alleged, such actions still would not have justified appellant locking Trahan in the vegetable shop.

Appellant's justifications are without merit. If appellant's genuine motive and justification for restraining Trahan was safety and security concerns, then appellant could have directed Trahan out of the vegetable shop. He could have secured the inmates temporarily in the shop and then wanded them. This would have ensured Trahan and appellant's safety and security. Under the circumstances presented here, appellant displayed a significant lack of judgment which violated his obligations and duties. I **CONCLUDE** that appellant's behavior did rise to a level of conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6).

Appellant has also been charged with violating HRB 84-17, as amended; C(11) conduct unbecoming an employee; C(24) threatening, intimidating, harassing, coercing or interfering with fellow employees on State property; D(7) violation of administrative procedures and/or regulations involving safety and security; and E(2) intentional misuse of authority or position.

Human Resource Bulletin (HRB) 84-17

HRB 84-17, as amended, provides in pertinent part as follows:

In any disciplinary matter, reference must always be made to the collective bargaining agreement covering the disciplined employee, relevant Department of Personnel Rules, appropriate Department bulletins or memoranda, the Handbook of Information and Rules for Employees of New Jersey Department of Corrections, and/or the Law Enforcement Personnel Rules and Regulations.

D(7) Violation of administrative procedures and/or regulations involving safety and security, and IMP #14, West Compound Mess Hall/Kitchen policy

First, pursuant to HRB 84-17, as amended, the appellant was required to follow the IMPs established for the NJSP. IMP #14 West Compound Mess Hall/Kitchen policy required that “[a]ll doors are to be closed at all times. All doors with locking devices will remain locked except when in use, including the pantry, cells, sally ports, and doors.” Appellant violated this safety policy by failing to secure the vegetable shop door at the beginning of his shift to prevent any contraband items being taken by the inmates and used as a weapon. It is required policy that the vegetable shop be secured other than when instruction was being done.

I **CONCLUDE** that appellant violated HRB 84-17, as amended by failing to discharge his duties in accordance with D(7) administrative procedures and regulations involving safety and security and IMP #14.

Law Enforcement Personnel Rules and Regulations and IMP #402, Custody Staff policy

Second, appellant violated IMP #402 Custody Staff policy by failing to conduct himself in a professional manner by locking a Trahan in the vegetable shop, when it served no custodial or security interest. Appellant also violated IMP #402, by his inappropriate restraint of Trahan and mocking of Trahan's lack of power and freedom.

Third, appellant violated the Law Enforcement Personnel Rules and Regulations as follows. The following rules and regulations relate to the officer's conduct. Article I, Section 2, provides that no Officer shall knowingly act in any way that might reasonably be expected to create an impression of suspicion among the public that an officer may be engaged in conduct which violates the public trust as an officer.

Article I, Section 3, provides that an Officer shall be held responsible for the proper performance of duty and for strict adherence to these rules of conduct. Article II, Section 6, provides that Officers must maintain a high degree of self-control at all times.

Additionally, Article III, Section 3, provides that no officer shall act or behave, either in an official or private capacity, to the officer's discredit, or the discredit of the Department. Officers are public servants twenty-four hours a day and will be held to the law enforcement higher standard both on and off-duty. Finally, Article III, Section 4, provides that an officer shall be civil, orderly, maintain decorum, control temper and be patient and use discretion in the performance of duty.

I **CONCLUDE** that appellant's conduct violated HRB 84-17, as amended, IMP #402, Law Enforcement Personnel Rules and Regulations, Article I, Sections 2 and 3, Article II, Section 6, and Article III, Sections 3 and 4 as he did not conduct himself in a professional manner while on duty and acted in a way that violated the public trust.

Article II, Section 7, provides that no officer shall make, or cause to be made, any false or misleading statements. No officer shall intentionally omit or misrepresent facts or information known to the officer. Appellant's statements that he secured and packaged all of the opened cans in a plastic bag after the incident, that Lieutenant Kennedy told him not to worry about them, and that Trahan was threatening him by banging the vegetable shop door with the can opener was contrary to the weight of the evidence presented by all of the other fact witnesses. Trahan, Bryant, Keaton, and Kubik testified consistently

that no cans had been opened before Trahan was locked in the vegetable shop, that there were no opened cans in the shop when Trahan was released, and that Trahan was calm. Appellant's self-serving statements and log book entries were misleading and only meant to justify his actions after the fact. I **CONCLUDE** that appellant's conduct violated Article II, Section 7.

C(24) Intimidating, Harassing, and Interfering with fellow employees on State Property and E(2) Intentional Misuse of Authority or Position

Appellant's conduct rose to the level of intimidating, harassing, and interfering with fellow employees on State property in violation of C(24), when he involuntarily restrained Trahan in the vegetable shop for no legitimate reason. Therefore, I **CONCLUDE** respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's conduct violated C(24) by intimidating, harassing and interfering with a fellow employee on State property and E(2) because he intentionally misused his authority and position.

N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause

Finally, appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. As detailed above, appellant's conduct was such that he violated this standard of good behavior. As such, I **CONCLUDE** that the respondent has met its burden of proof on this issue.

PENALTY

In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523-24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983).

However, where the charged dereliction is an act which, in view of the duties and obligations of the position, substantially disadvantages the public, good cause exists for removal. See Golaine v. Cardinale, 142 N.J. Super. 385 (Law Div. 1976), aff'd, 163 N.J. Super. 453 (App. Div. 1978); In re Herrmann, 192 N.J. 19 (2007). The question to be resolved is whether the discipline imposed in this case is appropriate.

For his actions arising out of this incident, appellant has been found to have violated N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause, and NJDOC rules, regulations and policies. Appellant was charged with a sixty-working-day suspension. This suspension is consistent with the disciplinary process outlined in NJDOC's table of offenses. (J-15.)

In this matter, no mitigating factors were present.

To the contrary, the aggravating factors are significant: There was no justification for appellant's behavior; it involved involuntarily restraining and taking the freedom of a fellow employee; it involved a misuse of appellant's position and his authority as an officer; it involved being disrespectful, intimidating, verbally abusing, and harassing a fellow employee; it involved violating the direction of his superior officer to release his fellow employee; and it involved violating the public trust. Additionally, appellant had two prior C(11) charges for conduct unbecoming an employee. Such conduct is egregious and requires the appropriate penalty of major discipline of the appellant.

After having considered all of the proofs offered in this matter, and the impact upon the institution regarding the egregious behavior by appellant herein, and after having given due deference to the impact of and the role to be considered by and relative to progressive discipline, I **CONCLUDE** that appellant's violations are significantly sufficient to warrant a penalty, which, in part, is meant to impress upon him, as well as others, the seriousness of any further infractions by him in that regard.

Here, the respondent is not seeking removal, but rather, the imposition of a sixty day suspension. A sixty day penalty serves to impress the importance of the seriousness of these infractions and significance of the duties required of the appellant, and others, in

the position of Senior Corrections Officer. Given the conduct exhibited here, I **CONCLUDE** that the imposition of the sixty working day suspension was appropriate and consistent with the penalties specified in NJDOC's table of offenses.

ORDER

I ORDER that the respondent has sustained its burden of proof as to the charges of violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause; and HRB 84-17, as amended by failing to discharge his duties in accordance with D(7) administrative procedures and regulations involving safety and security, IMP #14, west compound mess hall/kitchen policy, IMP #402, custody staff policy, Law Enforcement Personnel Rules and Regulations, Article I, Sections 2 and 3, Article II, Sections 6 and 7, and Article III, Sections 3 and 4, and by C(24) intimidating, harassing, and interfering with fellow employees on state property and E(2) intentional misuse of authority or position.

I ORDER that the action of the appointing authority in imposing a sixty working day suspension on appellant is **AFFIRMED**.

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

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



February 9, 2018

DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency:

2/9/18

Date Mailed to Parties:

2/9/18

tat/lam

APPENDIX
LIST OF WITNESSES

For Appellant:

Senior Corrections Officer Jermaine Curry, Appellant
Stephen Gass, Retired Senior Corrections Officer

For Respondent:

Institutional Trade Instructor Glen Trahan
Institutional Trade Instructor Calvin Bryant
Senior Corrections Officer Joseph Buckley
Sergeant Michael Keaton
Senior Investigator Michael Kubik
Major Davin Borg
Lieutenant Michael Ptaszenki

LIST OF EXHIBITS

Joint Exhibits:

- J-1 Preliminary Notice of Disciplinary Action, dated May 3, 2015 and Final Notice of Disciplinary Action, dated September 17, 2015
- J-2 Confidential SID Investigation by Michael Kubik
- J-3 Special Report, SCO J. Curry, dated March 26, 2015
- J-4 Special Report, ITI C. Bryant, dated March 26, 2015
- J-5 Special Report, ITI Trahan, dated March 26, 2015
- J-6 Special Report, SCO J. Buckley, dated March 26, 2015
- J-7 Special Report, Sgt. M. Keaton, dated March 26, 2015
- J-8 Handbook of Information and Rules
- J-9 Law Enforcement Personnel Rules and Regulations
- J-10 Cook House Update #1, dated January 24, 2014

- J-11 Cook House Update #2, dated October 31, 2014
- J-12 Log Book Unit B, dated March 26, 2015
- J-13 Level III Custody Staff—General Information IMP.NJSP.402, Revised 8/11
- J-14 Level III West Compound Mess Hall/Kitchen #314, Revised 5/08
- J-15 HRB 84-17
- J-16 Appellant's Work History
- J-17a DVD SCO Buckley interview, dated April 17, 2015
- J-17b DVD Sgt. Keaton interview, dated April 10, 2015
- J-17c DVD ITI Trahan interview, dated April 14, 2015
- J-17d DVD SCO Curry interview, dated May 7, 2015
- J-17e DVD ITI Bryant interview, dated April 10, 2015

For Appellant:

- P-25 Resume of Stephen Gass