

(MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, charges were sustained. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12(a)*, counsel fees must be denied.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the 30 working day suspension to a 15 working day suspension. The Commission further orders that appellant be granted 15 days of back pay, benefits, and seniority. Per *N.J.A.C. 4A:2-2.10*, the amount of back pay awarded is to be reduced and mitigated to the extent of any income earned by the appellant during this period. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Counsel fees are denied pursuant to *N.J.A.C. 4A:2-2.12*.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

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



Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 2000-17

AGENCY DKT. NO. 2017-2409

**IN THE MATTER OF YAMALIS DIAZ,
CAMDEN COUNTY DEPARTMENT OF
CORRECTIONS.**

William B. Hildebrand, Esq., for appellant (Law Offices of William B. Hildebrand, LLC)

Antonieta Paiva Rinaldi, Esq., Assistant County Counsel, for respondent
(Christopher A. Orlando, County Counsel)

Record Closed: November 30, 2017

Decided: January 16, 2018

BEFORE **MARY ANN BOGAN, ALJ:**

STATEMENT OF THE CASE

Respondent, the Camden County Department of Corrections, (CCDC) suspended appellant Yamalis Diaz for thirty-working days pursuant to N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause; C.C.C.F. Rules of Conduct: 1.1 Violations in General; 1.2 Conduct unbecoming; 4.1 Courtesy: General Orders #73, #74. CCDC alleges that appellant, a County correction officer, was involved in a domestic dispute with Anthony Bowen

(Bowen) at her residence, she was criminally charged by the Pennsauken Police Department, and a suspension for a period of thirty working days was appropriate. Appellant maintains that she was victimized by Bowen during an incident at her home, and because the Pennsauken Municipal Court dismissed all of the criminal charges against her, she should not be guilty of all the charges.

PROCEDURAL HISTORY

On February 4, 2016, the CCDC issued a Preliminary Notice of Disciplinary Action charging the appellant. (R-5. R-10 amended.) After a departmental hearing on November 21, 2016, CCDC issued a Final Notice of Disciplinary Action on January 20, 2017, (amended January 26, 2017) sustaining the charges in the Preliminary Notice, and the appellant was suspended from employment for thirty working days. (R-11.) Appellant appealed, and on February 8, 2017, the matter was filed at the Office of Administrative Law for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 14F-1 to 13. The matter was heard on November 30, 2017, and the record closed.

FACTUAL DISCUSSION AND FINDINGS

Testimony

John Jones (Jones) is a Sergeant at CCDC and works in the Internal Affairs Unit. Jones investigated and prepared an internal affairs report involving a domestic dispute at the home of appellant. (R-1.) Jones reviewed the Pennsauken Police Department Supplementary Incident Report wherein Bowen, the appellant's boyfriend, reported to the responding police officer that appellant assaulted him with a bowl, and a broom stick, then she exited the home, and struck his vehicle twenty times with a metal pole. Appellant reported to the Officer that Bowen held her against the wall, choked her, and then showed the officer a scratch on her chest, several inches below her neck. The report also indicated that appellant "deflected police questioning into complaints about her back."

Jones found Bowen's report of the incident consistent and credible and he found the appellant was not forthcoming when she deflected police questioning during the investigation. Appellant also admitted following Bowen to his vehicle, in an attempt to retrieve her cell phone, and hitting Bowen's vehicle with a bar. The bar that she used was later found in a recycling bin. Jones reviewed the general incident report prepared by the appellant, and her statements to the police, and found inconsistency. The incident report contained information that she was hit by Bowen several times while he was choking her, she fell backwards and broke the bowl. (R-4.)

Appellant is a sworn officer and must be accountable for her conduct while on and off duty. The appellant was arrested and held on \$26,000 bail. (R-2.) On February 1, 2016, the Office of the Camden County Prosecutor directed that appellant be prohibited from carrying a duty weapon and any personal weapons pending the investigation. (R-3.)

On September 16, 2016, the criminal charges were dismissed for lack of prosecution when Bowen failed to appear for the municipal court hearing. (R-6.) The Office of the Camden County Prosecutor remanded the action to the agency for administrative action. (R-7.)

Jones continued his investigation after the dismissal of the criminal charges. He reviewed the photographs of Bowen's damaged vehicle, the broken bowl, the two red grips and bar in the trash can, and the cleaned-up house, and determined that the photographs were consistent with Bowen's statement. (R-8.)

Jones did not interview appellant because her attorney did not permit her to be interviewed, and Bowen did not respond to his request for an interview.

Karen Taylor (Taylor) is a Captain at CCDC. She ensures compliance with departmental policies and issues employee discipline. Appellant was charged with violating policies and procedures pertaining to the rules of conduct. As a public employee, appellant is held to a higher standard of conduct both on and off the job. While off-duty, appellant conducted herself in a manner that was unbecoming when she

failed to adhere to the code of conduct while on and off duty. Instead of removing herself from the incident, she escalated the incident. She caused disrepute to the department by engaging in unbecoming conduct. Moreover, she violated the policies when she failed to control herself, left the safety of her home, and continued engaging in unbecoming conduct when she went outside and damaged the vehicle. Taylor drafted the charges and recommended suspension days on the information in the report prepared by the Office of Internal Affairs, and the Pennsauken Police Report.

The departmental policies set forth:

Department of Corrections, General Rules of Conduct sets forth that an employee, whether on or off duty, is expected to conduct themselves in a respectful manner and use good judgment. Appellant violated the policy and procedures when she failed to conduct herself in a respectful manner and use good judgment while off duty. (R-12.)

Department of Corrections, Personal Conduct of Employees sets forth that an employee, whether on or off duty, is expected to treat the public with respect and courtesy at all times. Appellant violated the policy and procedures when she failed to treat a member of the public with respect while off duty. (R-13.)

Department of Corrections, Professional Code of Conduct, sets forth that employees are expected to conduct themselves in a manner that is professional and ethical. The appellant failed to do so when she failed to treat Bowen with respect and courtesy at all times. (R-14.)

Taylor found a thirty-day suspension appropriate, because appellant, discredited the department, acknowledged that she damaged the vehicle, and was found not to be credible in her statements to the police. Taylor also took this action because appellant has been issued two reprimands, one involving a domestic dispute resulting in a report to the Pennsauken Police Department. Taylor acknowledged that she did not interview Bowen or the appellant.

Appellant administratively entered letters of commendation saying that Appellant was chosen as officer of the month in February 2009 and May 2014. (P-1 and P-2.)

Discussion

Appellant primarily contends that respondent relied entirely on hearsay and failed to produce a residuum of legally competent evidence, particularly as to Bowen's version of the incident. However, respondent's witnesses gave detailed, concise and informative testimony regarding the internal affairs investigation, and the policies and procedures applicable to corrections officers. The testimony as to the facts surrounding the incident came from statements set forth in documentary evidence. Moreover, appellant was the only witness with firsthand knowledge of the incident who attended the hearing, and although she was available, she did not testify. None of the other witnesses were present. Such out-of-court statements, if offered to prove the truth of the matters stated, are hearsay.

The Uniform Administrative Procedure Rules governing administrative agency proceedings codify this doctrine by requiring that "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(c). In assessing hearsay evidence, it should be accorded "whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability. N.J.A.C. 1:1-15.5(a).

This does not mean that each factual detail must be supported by legally competent evidence. Ruroede v. Borough of Hasbrouck Heights, 214 N.J. 338, 359 (1013). Legally competent means that the evidence would be admissible under the New Jersey Rules of Evidence. Evidence that falls within an exception to the hearsay rule, N.J.R.E. 802-803, is legally competent.

The evidence submitted on behalf of the respondent was mostly in the form of written documents. Jones prepared an incident report after reviewing the police report,

the warrant, and the appellant's general incident report. He testified to written statements made by the appellant, Bowen, and the responding police officer without any oral testimony from these witnesses, which constitutes hearsay. (See, also, State v. Lungsford, 167 N.J. Super. 296, 310, 400 A.2d 843 (App. Div. 1979), states that witness' statements embedded in police reports are not admissible under business record exception to the hearsay rule even though the report itself may be admissible). While Jones' testimony was credible and appeared accurate there was no proof that the version of the incident he relied upon was accurate.

A further review of the evidence indicates that the record includes competent evidence. Appellant admitted, in the general incident report that she prepared two days after the incident, "I hit him in the face and arms with an open hand, several times so he would stop choking me, but he did not. I grabbed a brush that was next to me at the time and used it to push him away from me. In an attempt to retrieve my cell phone and other items, I followed him to his vehicle. As I exited, my residence I grabbed a [] exercise bar that was near my front door just in case he attempted to assault me again. I knocked on the driver side window and door with the bar a few times . . ." Appellant also admits that she was placed under arrest and taken to the Pennsauken Police Department where she was charged with 2C:17-3A(1) criminal mischief, 2C:39-4D possession of weapons for unlawful purposes and 2C12-1B(7) aggravated assault. "I was cleared for incarceration then transported to the Camden County Correctional facility where I was booked and later bailed out on \$26,000 (10%) bail."

In a general incident report prepared by the appellant on September 15, 2016, she acknowledges that she appeared at Pennsauken Municipal Court for trial, and was found not guilty of the charges.

N.J.R.E. 803(b)(1) establishes an exception to the hearsay rule for admissions. Hearsay exception by party-opponent is a statement offered a party which is:

(1) the party's own statement, made either in an individual or in a representative capacity . . .

Appellant's unchallenged admissions, memorialized in a general incident report she prepared, falls within an exception to the rule against hearsay, and I FIND this admission provides a residuum of legal and competent evidence. Accordingly, I FIND the following **FACTS** appellant engaged in an altercation with Bowen inside her home on January 31, 2016, requiring a response by the Pennsauken Police Department. Appellant also left the home with a bar in her hand, followed Bowen to his vehicle, and hit the vehicle with the bar. Appellant was placed under arrest, incarcerated and held on \$26,000 bail.

Furthermore, viewing the record as a whole, this finding is supported by multiple reports and statements contained in official written reports, including records submitted by the police department, the internal affairs division, and an official incident report, prepared by a public employee. Therefore, given the nature of these documents, while some are hearsay, they are reliable, credible and competent, and the appellant did not contradict the statement by live testimony.

LEGAL ANALYSIS AND CONCLUSIONS

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. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant, and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). The preponderance may also be described as the greater weight of credible evidence in a case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Testimony, to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 554–55 (1954). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

An appeal to the Civil Service Commission requires the Office of Administrative Law to conduct a de novo hearing and to determine the appellant's guilt or innocence, as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987); Cliff v. Morris Cnty. Bd. of Soc. Servs., 197 N.J. Super. 307 (App. Div. 1984).

As a corrections officer, appellant is held 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).

The respondent has sustained the charges of 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)(12), and appellant was charged with violation of C.C.C.F. Rules of Conduct: V1.1 Violations in General; 1.2 Conduct unbecoming; 4.1 Courtesy: General Orders #73, #74.

N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee is often described as an elastic phrase that includes any conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for governmental employees and confidence in public entities. 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). A finding or conclusion that a public employee engaged in unbecoming conduct need not be based upon the violation of a particular rule or regulation, and may be based upon the violation of the implicit standard of good behavior governing public employees consistent with public policy. City of Asbury Park v. Dep't of Civil Serv., 17 N.J. 419,429 (1955); Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992).

I **CONCLUDE** that appellant's conduct did rise to a level of conduct unbecoming a public employee. The basis for the charge of conduct unbecoming was because she engaged in an altercation with Bowen at her home which required a response by the local police department. She hit his car with an object, she was arrested and taken into

custody until bail was posted. Appellant's conduct was such that it could adversely affect the morale or efficiency of a governmental unit or destroy public respect in the delivery of governmental services. Such behavior does not reflect the implicit standard of good behavior governing public employees consistent with public policy. Therefore, as to this charge, respondent has met its burden of proof that appellant did commit an act of unbecoming conduct.

Appellant was 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 to the charge of other sufficient cause, appellant conducted herself in a manner that violated standards of good behavior. As such, I **CONCLUDE** that the respondent has met its burden of proof on this issue.

Department of Corrections, General Rules of Conduct sets forth that an employee, whether on or off duty, is expected to conduct themselves in a respectful manner and use good judgment. As to this charge, respondent has met its burden of proof that appellant violated this policy when she failed to conduct herself in a respectful manner, and she failed to use good judgment when she escalated the incident. Accordingly, I **CONCLUDE** that the respondent has met its burden of proof on this issue.

Department of Corrections, Personal Conduct of Employees, sets forth that employees are expected to treat members of the public with respect and courtesy at all times. As to this charge, respondent has met its burden of proof that appellant violated this policy when she failed to treat Bowen with respect and courtesy at all times. Accordingly, I **CONCLUDE** that the respondent has met its burden of proof on this issue.

Department of Corrections, Professional Code of Conduct, sets forth that employees are expected to conduct themselves in manner that is professional and ethical. As to this charge, respondent has met its burden of proof that appellant violated

this policy when she failed to conduct herself in a professional manner. Accordingly, I **CONCLUDE** that respondent has met its burden of proof on this issue.

PENALTY

A civil service employee who commits a wrongful act related to his duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). As previously set forth, this is a de novo review of appellant's disciplinary action. 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). The question to be resolved is whether the discipline imposed in this case is appropriate.

Appellant has been previously issued two written reprimands, one for domestic violence that required a police response. She has no minor or major suspensions.

For her 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" and N.J.A.C. 4A:2-2.3(a)(11), "Other sufficient cause." In addition, appellant has been found guilty of violations of the policies and procedures of the department specifically as to rules of conduct, personal conduct of employees, and the professional code of conduct. Appellant was given a thirty-day suspension.

This suspension is not consistent with the disciplinary process. After having considered all of the proofs offered in this matter, and the impact upon the institution regarding the 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 a reasonable calculation of progressive discipline in the presence of

the prior disciplinary actions, the conduct of the appellant, and the current violation is a fifteen-day suspension.

I **CONCLUDE** that a fifteen-day suspension is appropriate and consistent with progressive discipline.

ORDER

It is **ORDERED** that the charges against the appellant for violations of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause; C.C.C.F. Rules of Conduct: 1.1 Violations in General; 1.2 Conduct unbecoming; 4.1 Courtesy; General Order #73, #74 are **AFFIRMED**. Accordingly, I **ORDER** that the action of the Appointing Authority is **MODIFIED**. Appellant will receive a fifteen-day suspension.

Since the penalty has been modified, I **ORDER** that appellant is entitled to back pay, benefits, and seniority pursuant to N.J.A.C. 4A:2-2.10. The amount of back pay awarded is to be reduced and mitigated for that period of time when back pay was waived. However, the appellant is not entitled to counsel fees. Pursuant to N.J.A.C. 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. 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. A-1489-02T2 (App. Div. March 18, 2004); In the Matter of Robert Dean (MSB, September 21, 1989). In the case at hand, while the penalty was modified, the Commission has sustained all of the charges and imposed major discipline. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. See In the Matter of Bazyt Bergus (MSB, decided December 19, 2000), aff'd, Bazyt Bergus v. City of Newark, Docket No. A-3382-00T5 (App. Div. June 3, 2002); In the Matter of Mario Simmons (MSB, decided October 26, 1999). See also, In the Matter of Mario Simmons (MSB, October 26, 1999). See also, In the Matter of Kathleen Rhoads (MSB, decided September 10, 2002) (Counsel fees

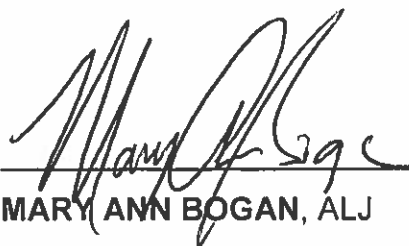
denied where removal on charges of insubordination, inability to perform duties, conduct unbecoming a public employee and neglect of duty was modified to a 15-day suspension on the charge of neglect of duty).

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.

January 16, 2018
DATE



MARY ANN BOGAN, ALJ

Date Received at Agency:

January 16, 2018

Date Mailed to Parties:

January 16, 2018

MAB/cb

APPENDIX

WITNESSES

For Appellant:

Yamalis Diaz, Appellant

For Respondent:

Sergeant John Jones

Captain Karen Taylor

EXHIBITS

For Appellant:

- P-1 Camden County memo re: April Officer of the Month, dated May 16, 2014
- P-2 Camden County memo re: Employee of the Month for December 2008; dated February 4, 2009

For Respondent:

- R-1 Internal Affairs Report authored by Sgt. John Jones
- R-2 Pennsauken Police Report with charges, dated January 31, 2016
- R-3 Letter from Prosecutor's office, dated February 1, 2016
- R-4 General Incident Report by C/O Yamalis Diaz, dated February 2, 2016
- R-5 Preliminary Notice of Disciplinary Action (31A), dated February 4, 2016
- R-6 General Incident Report by C/O Yamalis Diaz, dated September 17, 2016 with Pennsauken Twp. charge disposition inquiry
- R-7 Letter from Prosecutor's office, dated September 26, 2016
- R-8 Photos of car and house with evidence reports and documents
- R-9 Not Admitted
- R-10 Preliminary Notice of Disciplinary Action (31A) Amended, dated October 3, 2016
- R-11 Final Notice of Disciplinary Action (31B), dated January 20, 2017; Final Notice of Disciplinary Action (31B) Amended, dated January 26, 2017

- R-12 Camden County Department of Corrections Rules of Conduct
- R-13 Camden County Department of Corrections General Order #073 Personal Conduct of Employees
- R-14 Camden County Department of Corrections General Order #074 Professional Code of Conduct
- R-15 C/O Yamalis Diaz Chronology of Discipline