STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Laquan Bush,
Department of Corrections

CSC Docket No. 2014-961
OAL Docket No. CSR 14630-13

ISSUED: SEP 03 2014 (WR)

The appeal of Laquan Bush, a Senior Correction Officer with South Woods State Prison, Department of Corrections, of his removal, on charges, was heard by Administrative Law Judge Sandra Ann Robinson (ALJ), who rendered her initial decision on July 10, 2014, and reversed the appellant's removal. Exceptions were filed on behalf of the appointing authority, and cross exceptions were filed on behalf of the appellant.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on August 13, 2014, did not adopt the ALJ's recommendation to reverse the removal. Rather, the Commission modified the removal to a 10 working day suspension.

DISCUSSION

The appellant was removed on charges of conduct unbecoming a public employee and other sufficient cause for violations of the appointing authority's Human Resources Bulletin 84-17: physical or mental abuse of an employee; verbal abuse of employee; inappropriate physical contact or mistreatment of an employee; fighting or creating a disturbance on State property; falsification; conduct unbecoming; and violation of a rule, regulation, policy, procedure; order or administrative action. Specifically, the appointing authority asserted that on July 4, 2013, the appellant assaulted Senior Correction Officer Rebeckah Nso by twisting her arm behind her back, placing her into a choke hold, and slamming her into a

podium while she was on her post. The appointing authority further alleged that the appellant was verbally abusive to Communications Officer Loretta Tymko and provided false statements during the subsequent investigation into the matter. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case.

In the initial decision, the ALJ noted that Nso testified that on July 4, 2013, she was working alone at the metal detector when the appellant attempted to enter the prison. As the appellant entered, she testified that she asked the appellant why he was entering, and the appellant replied using profane language that it was not her business. Nso stated that he then became agitated after he set off the metal detector, and that when she went to frisk him, she put her hands up and pushed him because she thought he was going to strike her. Nso claimed that the appellant responded "You want to play?" and pulled her arm behind her back, put her into a choke hold, and slammed her into a podium. Nso testified that she caught Tymko's attention by waving her arm. Nso gave inconsistent testimony regarding her actions toward the appellant's keys. On direct examination, she stated that she threw the appellant's keys into the key port to make noise so that someone would hear her. However, on cross examination, she claimed that she never threw the keys in the key port, rather it was Tymko who did so. Nevertheless, Nso testified that the appellant took his keys and spoke to her using profane language as he entered the prison. Nso testified that she did not ask for help from anyone after the incident because she was scared that the appellant was nearby. However, Nso also testified that she attempted to get the attention of a superior officer during the incident; contacted another superior officer a few minutes after the incident and told her union representative that she was okay.

Tymko testified that she saw the appellant put Nso's arm behind her back. However, she stated that she thought that the appellant and Nso were playing because they often joke around. After joining the appellant and Nso at the entrance, Tymko testified that the appellant became angry with her and used foul language because she gave his keys to Nso. However, on cross-examination, she testified that she put the appellant's key onto a window sill because she did not know the keys belonged to the appellant but after the appellant indicated they were his keys, she put them into the key port as there was no other way to hand the keys to the appellant. Tymko stated that she first realized that Nso was hurt when Nso went into the command center and appeared to be hurt. She claimed that she did not immediately report the incident to the shift commander because she saw he was "on and off the phone."

The appellant testified that he entered the prison because a superior officer wanted to talk with him. At the entrance, the appellant claimed Nso approached him and pushed him. To break his fall, the appellant stated that he caught himself on Nso. Thereafter, the appellant testified that Nso threw his keys and told Tymko,

who had just arrived, that the keys were his. The appellant stated that Tymko then called him a derogatory name. After the incident, the appellant said he returned to his post and did not report the matter because he believed that Nso was playing with him, as she often did. He stated that prior to this incident, he had had a good relationship with her. He claimed that he did not curse at Tymko.

As set forth in detail in her determination, the ALJ found the appellant to be a credible witness and determined that Nso and Tymko were not credible due to inconsistencies in their testimony and prior reports. However, the ALJ found the appellant's claim that he did not curse at Tymko "doubtful," and Nso's and Tymko's claims that he used some foul language believable and credible. Nevertheless, the ALJ concluded that the charge of conduct unbecoming against the appellant was not sustained and recommended reversal of the removal.

In its exceptions, the appointing authority contends that the ALJ should have sustained the charges against the appellant. The appointing authority asserts that the ALJ made inconsistent findings which resulted in an arbitrary and capricious determination. In this regard, the appointing authority claims that Nso's and Tymko's testimony was credible evidence that the appellant was physically abusive towards Nso. It states that the ALJ mistakenly relied upon Tymko's initial report and contends that her amended report is consistent with Nso's report. The appointing authority further argues that the ALJ committed a material error by dismissing the verbal abuse charge because she determined that the appellant's use of foul language was credible and the appellant's testimony that he did not use foul language was "doubtful." Accordingly, the appointing authority requests that the Commission reverse the ALJ's determination and remove the appellant or remand the present matter to the OAL for a new hearing.

In his cross exceptions, the appellant asserts that the appointing authority's statement of facts in its exceptions is contrary to the ALJ's findings and observes that the appointing authority does not cite to the record in its statement of facts. While conceding that he used foul language, the appellant claims that the ALJ correctly dismissed the verbal abuse charge because foul language is not necessarily abusive language and he did not use abusive language.

Upon its *de novo* review of the record, the Commission agrees that the charges relating to the allegations of physical abuse should be dismissed, but that the charge related to verbal abuse should be upheld. The Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v.*

Locurto, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. In this case, there is nothing in the record or in the appointing authority's exceptions which convinces the Commission that the ALJ's factual findings regarding the alleged physical abuse were not based on the evidence or were otherwise in error, or that her conclusions regarding the credibility of the witnesses were improper. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). The Commission agrees with the ALJ that Nso's and Tymko's testimony that the appellant was physically abusive was not credible. The ALJ found that there were multiple inconsistencies about the incident in Nso's and Tymko's testimony. For instance, Nso testified that she did not seek help from others during the incident, but also testified that she threw the appellant's keys to the ground to alert others and that she waved her arms to obtain Tymko's attention. Moreover, Nso testified that she placed the appellant's keys in the key port, but also testified that it was Tymko that did so. The ALJ also found that Nso's conduct after the appellant allegedly assaulted her contradicted her testimony that she was scared. Nso testified that she did not ask any one for help and she did not immediately report the incident.

Regarding the charges relating to the verbal abuse, the ALJ found that Nso's and Tymko's testimony that the appellant used foul language was credible and the appellant's testimony that he did not use inappropriate language "doubtful." Nevertheless, the ALJ inexplicably dismissed those charges. Whether the language used by the appellant involved cursing or was merely "foul," the record supports that he used inappropriate language. Accordingly, the credible evidence in the record supports the verbal abuse charge.

With regard to the penalty, the Commission's review is also *de novo*. In addition to considering the seriousness of the underlying incident, the Commission 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* 463, 465 (CSV) 1996. Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway,* 81 *N.J.* 571, 580 (1980). It is settled that the principle of progressive discipline is not "a fixed and immutable rule to be followed without question." Although the ALJ notes in the initial decision that the appellant's disciplinary record only evidenced

an official written reprimand, the record evidences that he also received a 10 day suspension in 2005. The appellant is a law enforcement employee who maintains safety and security in the potentially dangerous environment of a correctional facility, while promoting adherence to the law among inmates, and as such, is held to a higher standard of public duty. This standard includes upholding an image of utmost confidence and trust, since Senior Correction Officers, like municipal Police Officers, hold highly visible and sensitive positions within the community. The public expects and demands prison guards to follow orders and exhibit a respect for rules, regulations, procedures, and policies. *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). Thus, the appellant's interactions with other prison staff should be beyond reproach. The use of foul language in a prison setting diminishes morale, which can place everyone in danger. Accordingly, based on the appellant's prior record and the seriousness of his infraction, the Commission imposes a 10 working day suspension.

Since the penalty has been reduced, the appellant is entitled to back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10. 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, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, while the penalty was modified, the Commission has sustained the verbal abuse charge 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,* Docekt 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, decided 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).

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in

Phillips, *supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Commission finds that the appointing authority's action in removing Laquan Bush was not justified. Therefore, the Commission modifies the removal to a 10 working day suspension. The Commission further orders that the appellant be granted back pay, benefits, and seniority following the 10 working day suspension from the first date of separation without pay until his reinstatement to employment. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 13TH DAY OF AUGUST, 2014

Robert M. Czech
Commissioner
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
OAL DKT. NO. CSR 14630-13
AGENCY REF. NO. N/A
2014-961

IN THE MATTER OF LAQUAN BUSH,
NEW JERSEY DEPARTMENT OF CORRECTIONS,
EAST JERSEY STATE PRISON.

Jennifer Blum, Esq., for appellant (Law Office of Malcolm Blum, attorney)

Peter Jenkins, Deputy Attorney General, for respondent (John Jay Hoffman, Acting Attorney General of the State of New Jersey, attorney)

Record Closed: May 20, 2014 Decided: July 10, 2014

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE

On January 1, 1999, Laquan Bush, appellant, commenced working for respondent, New Jersey State Department of Corrections (DOC). During the most recent seven years, until October 5, 2013 appellant, a male, held the title of senior correction officer (SCO) at East Jersey State Prison (EJSP). Respondent alleges that appellant while on duty at EJSP perpetrated an assault against SCO Rebeckah Nso while she was on her post by twisting her arm behind her back and placing her in a choke hold. Respondent alleges that appellant demonstrated unbecoming conduct

and other sufficient cause for charges to be brought against him when he violated segments of the Human Resource Bulletin 84-17 (as amended) by physically, mentally, and verbally abusing an employee; by inappropriately physically contacting or mistreating an employee; by fighting or creating a disturbance on State property; by falsification; and by engaging in conduct unbecoming a public employee and by violating the rules, regulations, policies, procedures, orders or administrative decision as required by the DOC and State codes and statues. The Special Investigations Department (SID) investigation report determined that appellant had demonstrated conduct unbecoming a public employee with Nso, had been verbally abusive towards Loretta Tymko a Communications Operator, and had provided false statements during the SID investigation. Respondent terminated appellant effective October 5, 2013.

Respondent has charged appellant with conduct unbecoming a public employee and other charges as a result of an incident occurring on July 4, 2013.

Appellant appeals from the determination of DOC to remove him from his position as a SCO at EJSP on charges of conduct unbecoming a public employee and other sufficient causes, in violation of N.J.A.C. 4A:2-2.3(a)(6) and (12), and Human Resource Bulletin 84-17 (as amended). Appellant denies the charges and asserts that the DOC has failed to meet its burden of proving the charges.

PROCEDURAL HISTORY

On September 19, 2013, a Preliminary Notice of Disciplinary Action (PNDA) was filed seeking appellant's removal from his permanent civil service title of senior correction officer. Respondent suspended appellant effective August 15, 2013. On October 3, 2013, appellant wrote to respondent to withdraw his preliminary department appeal hearing and to request that the matter be moved to the Office of Administrative Law. On October 4, 2013, respondent issued a Final Notice of Disciplinary Action (FNDA) that sustained the disciplinary charges set forth below and removed appellant from his position with the Department of Corrections (DOC) effective October 5, 2013.

Appellant appealed the FNDA and the matter was filed simultaneously with the Civil Service Commission and the Office of Administrative Law (OAL), under the expedited procedures of P.L. 2009, c. 16, N.J.S.A. 40A:14-202(d), where it was stamped received on October 11, 2013, for a 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. The undersigned was assigned to the case on October 12, 2013. Peter H. Jenkins, Deputy Attorney General (DAG) was assigned to the case on October 15, 2013. Telephone status conferences (TSC) for the purpose of discussing discovery issues were scheduled for November 4 and 26, 2013, December 4, 2013, and February 5 and 12, 2014. Appellant's counsel submitted a letter memorandum in support of discovery demands for certain medical records, a site inspection, copies of images from the Frisk Machine, copies of inner-front door phone records, and the issuance of an OAL Order requiring respondent to produce records and images and allow prison access for the purpose of viewing the area of the alleged misconduct. The DAG submitted a letter memorandum in opposition to appellant's requests for discovery. On February 24, 2014, the undersigned issued a Letter Order, pertaining to discovery issues, specifically in pertinent part:

> Respondent has declined to release Officer Nso's medical records because Officer Nso's claim of injuries is not an element or factor of the charges in the instant case. Based on respondent's statements pertaining to Nso's relationship to the instant case, **IT IS HEREBY ORDERED** that testimony from Officer Nso will not include references to any injury Nso may have sustained.

Testimony was scheduled to commence on February 28, 2014, and continue on March 11, 2014, but was postponed due to the severe winter weather and the closing of courts and law offices. On March 4, 2014, DAG Jenkins provided appellant's counsel with information on how to request visits to East Jersey State Prison. On March 5, 2014, appellant's counsel wrote to Patrick Nogan, Prison Administrator. Testimony commenced on April 8, 2014, and was completed on May 1, 2014. The parties viewed a

video that included Tymko's remarks and comments about appellant. The hearing record was closed upon review of the testimony relative to the diagram of the inner front door on May 30, 2014.

ISSUES

Based on the evidence presented, is there sufficient credible evidence to sustain the charges against appellant, as set forth in the FNDA? If appellant is guilty of any or all of the charges, is the penalty of removal warranted?

CHARGES SUSTAINED ON FNDA

N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee;

N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause;

Human Resources Bulletin 84-17 (as amended) C 3. Physical or mental abuse of an inmate, patient, client resident, or employee;

Human Resources Bulletin 84-17 (as amended) C 4. Verbal abuse of an inmate, patient, client, resident, or employee;

Human Resources Bulletin 84-17 (as amended) C 5. Inappropriate physical contact or mistreatment of an inmate, patient, client, resident, or employee;

Human Resources Bulletin 84-17 (as amended) C 7. Fighting or creating a disturbance on State property;

Human Resources Bulletin 84-17 (as amended) C 8. Falsification: Intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation or other proceeding;

Human Resources Bulletin 84-17 (as amended) C 11. Conduct unbecoming an employee;

Human Resources Bulletin 84-17 (as amended) E.1. Violation of a rule, regulation, policy, procedure, order or administrative decision.

SUMMARY OF TESTIMONY

(Rebeckah Nso)

Rebeckah Nso has been a SCO at EJSP for three years, with responsibilities of a General Assignment Officer (GA) for scanning persons entering and departing the prison.[1] Nso worked with appellant during her employ at EJSP. Nso testified as follows,

> I never had any problems with appellant, except on July 4, 2013, near the end of my 2:15pm to 10:15pm shift when an incident occurred around the inner front door.[2]
>
> When appellant went through the machine the alarm went off and he got somewhat of an attitude. I had asked him why he was coming inside since he had been in the tower all day. He responded, "Mind your fuck'n business. It is too hot for your bullshit ... fuck you." He then came towards me. I put my hand up to move him back and I pushed him. When he again said "Fuck you," he started charging. His demeanor and attitude was aggressive and I thought he was going to hit me. After I put my hand down he said, "You want to play." He brought my left arm around my back and pulled it up my back and pulled me back. My right arm was free. He slammed me into the podium. I waived my arm to get the attention of Loretta Tymko, who was the Center Podium Control Operator on July 4. Tymko saw me waiving. When appellant let me go I threw his key in the Keyport to make some noise for someone to hear. Appellant said to Tymko "Give me my fuck'n key. I don't fuck with her, old bitch, like that. They cost $500 and you will pay for it, if it's broken." She was pissed. Tymko opened another door and appellant entered the prison.
>
> When appellant was leaving and going back outside that is when he said, "I don't fuck with her that bitch, like that. I should have shook the shit out of you and left you laying on the ground."

---

[1] Nso operates the Frisk Machine, also known as a metal detector, which takes pictures and will show foreign objects on the body. When the machine produces an alarm sound the person must go back through the machine.

[2] On July 4 appellant was scheduled to work a third shift.

> On July 5, 2013, I prepared a Special Custody Report about the July 4 incident and submitted it to my superior. The report is done in my own handwriting without any help or advice from anyone.

On cross-examination Nso responded,

> Within a few minutes (less than one-half hour), after appellant left the first time, I called Sgt. Estevez. I waited for Officer Wright to return before I took a break. I was freaked-out when appellant choked me. My immediate report is Sgt. Star. However, Lieutenant (Lt.) Nardie was in Center Control on July 4 but I could not get his attention. I did not use the intercom to contact anyone because I remained scared while appellant was still around.
>
> About five minutes after entering the prison, appellant returned to the door to be let out. He must first exit door number three before exiting through door number two.
>
> Only one door can be opened at a time. The Rotunda officer can also open door number two and monitor who comes in and goes out. There is a summary sheet with the names of persons entering and leaving. The sheet is turned in to Center Control. I sometimes communicate with Center Control to open the door.
>
> Tymko saw the choking incident and I wanted to know why she didn't act. Tymko told me she thought appellant was playing. Tymko also told me she was going to write him (appellant) up. I did not ask Tymko to phone the Sgt. Estevez, I called him myself. I did not tell Lt. Nardi, L. Tymko or Sgt. Hamlet that I wanted help. Sgt Hamlet's rank is above my rank. The union representative asked me if I was okay.
>
> Prior to July 4, 2013, I never had an issue with appellant and always had a professional work relationship and talked together about family and work issues. I never asked appellant to train me.
>
> I never threw a key in the tray, L. Tymko said she threw the key. When I first frisked appellant, no one else was in there, the door was closed and we were in there together. The second time appellant came through and was frisked he put my hands up and I pushed him. The incident occurred about

> 8:15pm.[3] I thought appellant had a smug attitude meaning he acted stand-offish.

(Richard Salort)

Richard Salort has been a lieutenant at EJSP for twenty-seven years. His duties include formulating disciplinary actions, custody violations, recapitulation distribution of reports and other administrative assignments. Salort testified as follows,

> I know appellant and have been involved in other disciplinary concerns with him. Reports that were generated as a result of the July 4, 2013 incident were received by me. The Department of Corrections Law Enforcement Personnel Rules and Regulations provide criteria for employees to follow in regard to Violence In The Workplace and Professional Conduct. DOC does not tolerate Workplace violence because it diminishes the morale of the facility and such action places everyone in danger.

On cross-examination Salort responded,

> I assign-out requests for investigations to SID and when completed a penalty is established based on a cumulative decision with administrators and staff. The Office of Employee Relations submits a formal decision. In this matter there was a collaborative decision with SID that appellant should not be charged. However, he was charged because of the egregious nature of the conduct, the abusive language towards Tymko and the physical handling of Nso.
>
> My previous disciplinary matter with appellant in 2012 involved his failure to follow rules and regulations of DOC. Appellant was not properly dressed with his shirt out of his pants and the pants not bloused. Appellant was told to correct his dress, but failed to correct the situation. He received an Official Written Reprimand (OWR), in May 2012.

[3] The video scan showed appellant first entering the inner front door at 7:59 p.m.

(Loretta Tymko)

Loretta Tymko is a civilian control operator who has been employed at EJSP for six years. Her job duties include scheduling, monitoring sick cards, handling personnel matters, and opening the door for Central Control. Tymko testified as follows,

> The inner door officer gives Central Control a command to open door number one. The items a person is bringing in are placed on a metal machine for viewing. If there are no concerns a command is given to open door number two. If the person clears door number two, then door number three is opened.
>
> I know appellant because he works at EJSP. On July 4, 2013, appellant was very upset because I handed his key back to Nso. He said to me, "That is my key I want it back." Appellant went into the prison then came back out through door number three and then number two. He then started cursing at me, "You fuck'n . . . break my key . . . , fuck'n . . . old bitch." Then he closed door number one and went outside.
>
> I saw appellant with his arm around Nso's neck and he had her arm twisted behind her back.

On cross-examination, Tymko responded,

> On July 4 I opened door number one and I was curious about who was coming in. I saw appellant leave the Frisk Area, I saw his body walk through the machine. I never saw Nso do anything, but I know she jokes around. I did not think there was a threat. I gave him his key and he walked into the prison.
>
> When Nso came into Center Control with the Sgt., she was hurt and then I knew it was not fooling around. I did not report what I saw to the shift commander because he was on and off the phone.
>
> I put the key on the window sill because I did not know the key belonged to appellant. Appellant told me the key was his. I put the key in the key port because there is no way to just hand the key to someone.

> On July 4, 2013, I did a Special Custody Report and gave the report to Shift Commander Lt. West. I prepared the report because I heard Nso was hurt and I saw the incident. I did not speak with Nso about what happened. I have no problem with appellant or anyone at EJSP.

(Laquan Bush)

Laquan Bush, appellant, has an Associate's Degree in culinary arts from Johnson and Wales University, in Providence, Rhode Island (May 2001). He was the head cook at Northern State Prison for one year. Appellant studied at Corrections Corporation of American for one and one-half years to become a correction officer. His initial assignments involved detainees from other countries. In 2004, appellant entered a sixteen-week classroom and fire-arms training program at the Police Academy to become a correction officer. He worked for the Garden State Youth Corrections Program for twelve months, which allowed for hands-on training. He was transferred to Adult Diagnostic and Treatment Center in Avenel, New Jersey to accommodate family needs during his father's illness. In May 2006, appellant was transferred to EJSP as a correction officer and after four additional months of training he became a senior correction officer. Appellant testified as follows,

> On July 4, 2013, I worked the 2pm to 10pm second shift in Tower Three. I left Tower Three because Sgt. Estevez said relief was coming and then I should come and see him. I entered the inner front door around 8pm and was let in door number one by the security guard who pushed a button to release the door lock. Nso pushed me when I went around her. I almost fell to the floor, but caught onto Nso to break the fall. Nso was not pleased to work the inner front door. Nso threw my key and told Tymko that the car key belonged to me. Tymko said to me: "Fuck you, you fag."
>
> I returned to Tower Three at approximately 8:15pm or 8:20pm and remained there until my shift was over. I did not tell anyone about Nso pushing me because I thought she was playing around. She has pushed me before. She is always playful and a hands-on person. Finally, I told Lt. West what happened and reported to him that my left-side and hip hurt. I went to Rahway Hospital and received treatment in the form of pain pills and injections. The diagnosis was that my, left hip was strained. The hospital

discharge instructions required me to follow-up with the workers' compensation doctor in one to three days.

After leaving the hospital I returned to EJSP and prepared a report that was submitted at 1:30am in July 5, 2013. On July 5th I also completed an Accident Injury Report when arriving at the Worker's Compensation doctor's office. Dr. Goldstein the workers' compensation doctor also diagnosed my injury as a left hip strain. On July 5, 2013, I was required to take all paperwork to the personnel office and obtain a Patient Treatment Plan Form. I returned to Dr. Goldstein on July 9th but was not released to return to work. The Workers' Compensation Treatment Plan noted that on July 16th I was cleared to return to work. On July 17, 2013 I returned to work. I received compensation pay for the days I was out of work.

When I returned to work I was placed on the outside post only. I learned that Nso had pressed charges on me. I had to appear in court on a charge of Simple Assault. I also filed Simple Assault charged against Nso. In September 2013, Nso and I mutually agreed to drop the assault charges and Certified Dispositions were filed on September 18, 2013. When the assault charges were dismissed all documents were provided to personnel. I had to report to Lt. Salort at EJSP and he served me with disciplinary charges. Nso was not terminated, received a reprimand and is still working at EJSP.

I filed for unemployment benefits (UIB), but was denied. I have appealed the denial.

In July 2013, I filed an Equal Employment Division (EED) complaint against Tymko for calling me a fag. Tymko also filed an EED complaint against me for calling her an old bitch.

Prior to July 4, 2013, I had a good relationship with Nso. We talked together about our parent's sickness, family and work issues and we ate together. Nso's relationship changed after she returned to work in May or June from her automobile accident. Nso asked me to train her to exercise. After I said I could not train her her attitude changed and she got short with me and stopped talking to me. I believe the attitude change was retaliation because she was angry that I would not train her.

Every officer has a radio. On July 4, 2013, Lt. Nardi was working and Nso could have made a report to him. There is

> also a telephone at the officer's desk and a call-code 933-fight could have been made if an incident was happening. A civilan will announce the location codes. On July 4, 2013, Tymko was the control operator and could have used the Intercom to make an announcement.
>
> I didn't curse at Tymko or use abusive or inappropriate language.

On cross-examination appellant responded,

> On July 4, 2013, I didn't report that Nso pushed me until my shift was over. I pressed the Simple Assault charges against Nso in August 2013.
>
> Nso came back from her automobile accident in May or June 2013 and started not talking to me as much when I would not train her.

FINDINGS OF FACT

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

1. Appellant commenced working for DOC on January 1, 1999;

2. During the most recent seven years, until October 5, 2013, appellant held the title of SCO at EJSP;

3. Respondent alleges that appellant while on duty at EJSP on July 4, 2013, perpetrated an assault against SCO Nso while she was on her post;

4. Respondent alleges that appellant twisted Nso's arm behind her back and placed her in a choke hold, which if committed, is a display of conduct unbecoming a public employee;

5. Respondent alleges that on the same date appellant was verbally abusive to Loretta Tymko, a civilian communications operator,

6. Respondent alleges that appellant provided false statements during the SID investigation of the alleged July 4 incidents. The content of the alleged false statements were never revealed during the hearing;

7. Respondent alleges that appellant's conduct violated State codes and statues and the requirements of the DOC Human Resource Bulletin 84-17 (as amended);

8. Respondent charged appellant with conduct unbecoming a public employee and other charges as a result of the July 4, 2013, incidents;

9. Respondent terminated appellant's employment effective October 5, 2013;

10. An appeal of respondent's determination to terminate appellant employment with EJSP as a SCO was filed on October 11, 2013;

11. Nso is a SCO who has worked at EJSP for three years and continues to be employed there as GA to scan persons entering and departing the prison;

12. Nso worked with appellant at all times until appellant's termination;

13. Nso's testimony that she never had any problems with appellant before the allegations of the July 4, 2013, incident, is credible;

14. Nso's testimony that she and appellant ate together and talked about family and the job, is credible;

15. Nso's testimony that on July 4 when appellant went through the security machine the alarm went off and he got somewhat of an attitude, is not disputed;

16. Nso's testimony that when she first frisked appellant, no one else was in the area and the door was closed while they were in there together, is not disputed;

17. Nso's testimony that when she asked appellant why he was coming inside that he responded to her by saying, "It is none of your fuck'n business," is believable;;

18. Nso's testimony that when appellant had to come back through the security machine a second time and be frisked that she (Nso) put her hands as appellant walked towards her, is believable;

19. Nso's testimony that after she put her hands up she pushed appellant away from her, is not disputed;

21. Nso's testimony that she thought appellant was going to hit her, is incredible;

22. Appellant's testimony that he caught onto Nso to break his fall is credible;

23. Nso's testimony that appellant stated ""You want to play" and then he brought her left arm around her back and pulled the arm up her back and pulled her back, is incredible;

24. Nso's Special Custody Report statement that appellant placed her in a choke hold and threw her in a podium, is incredible;

25. Nso's testimony that appellant placed her in a choke hold and threw her against a poll, is inconsistent and incredible;

26. Nso's testimony that appellant slammed her into the poll is not supported by the evidence and is incredible;

27. Nso's testimony that she (Nso) waived her arm to obtain the attention of the Center Podium Control Operator Loretta Tymko, is incredible and inconsistent with her own testimony that she (Nso) did not seek help from anyone;

28. Nso's testimony that Tymko saw her waiving is inconsistent with Tymko's testimony and with Nso's previous testimony about not seeking help from anyone;

29. Nso's testimony that within a few minutes, less than one-half hour, after appellant left the first time, that she called Sgt. Estevez, is incredible and inconsistent with testimony that she did not seek help from anyone and that it was after she was on break that she approached a superior;

30. Nso's testimony that when appellant let go of her she threw his key in the key port to make some noise so someone could hear, is inconsistent with her previous testimony that she did nothing to seek help because appellant was still in the area, is contradictory to Tymko's testimony that appellant handed her (Tymko) the key, and is contradictory to the three descriptions in Nso's Special Custody Report about where the key was and who had the key;

31. Nso's testimony that she threw appellant's key in the key port is inconsistent with her (Nso's) testimony that when the key was handed to Tymko, appellant said to Tymko "Give me my fuck'n key. I don't fuck with her, old bitch, like that. They cost $500 and you will pay for it, if it breaks";

32. Nso's testimony that Tymko was "pissed" with the way appellant spoke to her is believable;

33. Nso's reversal of her own prior testimony during cross-examination presents a credibility concern in regard to the accuracy and truthfulness of Nso's testimony: "It was when [appellant] was leaving and going back outside that he said, 'I don't fuck with her that bitch, like that'";

34. Nso's testimony that Lt. Nardie was in Center Control on July 4 but that she could not get his attention, is incredible and inconsistent with earlier testimony that she (Nso) did not seek help from anyone;

35. Nso's testimony that she did not use the intercom to contact anyone because she remained scared while appellant was still around, was not disputed in regard to the use of the intercom;

36. Nso's Special Custody Report on page 5 of 6 indicates that as appellant was leaving the prison to return to the Tower, Nso approached appellant one-on-one and aggressively questioned his earlier actions. The aggressive approach described by Nso diminishes her accusation that she remained scared of appellant;

37. Nso's testimony that Tymko actually saw appellant choking her (Nso) was never proven. The content of Tymko's Special Custody Report indicates that to Tymko it appeared appellant had Nso in choke hold, not that he had her in a chock hold;

38. Nso's testimony that Tymko said to her "I thought you and [appellant] were playing," is not disputed and is supported by Tymko's testimony;

39. Nso's testimony that Tymko said to her "I am going to write-up [appellant] for his abusive language," is believable;

40. Nso's testimony that she did not ask Tymko to phone Sgt. Estevez and did not tell Tymko, Lt. Nardie or Sgt. Hamlet that she wanted help, is not disputed;

41. Nso's testimony that her union representative asked if she (Nso) was okay and that she (Nso) responded she was okay, is not disputed;

42. Tymko's testimony that on July 4, 2013, when she handed appellant's key to Nso appellant got upset, is not disputed;

43. Tymko's testimony that appellant said to her: "That is my key I want it back" is believable;

44. Tymko's testimony that appellant went into the prison then came back out through door number three and then number two and then started cursing at her, "You fuck'n . . . break my key . . . , fuck'n . . . old bitch" is contradictory to previous testimony, which describes an incident happening right after appellant goes through the metal detector a second time on his way into the prison;

45. Tymko's testimony that she saw appellant with his arm around Nso's neck and that he had her arm twisted behind her back was not written on Tymko's initial Special Custody Report. Tymko wrote that she saw appellant spinning Nso around and putting his arm around her throat. Tymko's Special Custody Report is void of information about appellant twisting Nso's arm;

46. Tymko's Special Custody Report makes no mention of Nso being pushed in a poll or podium by appellant;

47. Tymko's testimony on cross-examination that she saw appellant when he was coming in the prison and she saw him leave the Frisk Area and saw his body walk through the machine, is not disputed;

48. Tymko's testimony that she never saw Nso do anything, but that she (Tymko) knows that Nso jokes around, so she did not think there was a threat, was not disputed;

49. Tymko's testimony that her first realization that Nso was hurt was when Nso came into Center Control with the Sgt., is not supported by the evidence and is incredible;

50. Tymko's testimony that she did not report what she saw to the shift commander because he was on and off the phone, is incredible;

51. Tymko's testimony that she prepared a report because she heard Nso was hurt and saw the incident, is believable only in regard to hearing that Nso was hurt. In

regard to seeing the incident Tymko reported and testified that she thought Nso and appellant were playing around because Nso is always playful;

52. Tymko's testimony that she put the key on the window sill because she did not know the key belonged to appellant and that it was appellant who told her the key was his, is inconsistent with Nso's testimonial and Special Custody Report versions of who had the key and where the key was placed, thrown, or laid;

53. Tymko's testimony that she put the key in the Keyport because there is no way to just hand the key to someone, is believable;

54. On July 4, 2013, appellant worked the 2 p.m. to 10 p.m. second shift in Tower Three;

55. On July 4 at approximately 8 p.m. appellant left the Tower at Sgt. Estevez's instruction for a meeting with Estevez in the prison;

56. Appellant entered the inner front door number one of the prison when the security-guard pushed a button to release the door lock;

57. Appellant was pushed by Nso after he went through the security machine a second time and went around Nso after she frisked him;

58. Appellant almost fell to the floor, but caught onto Nso to break the fall;

59. Nso threw appellant's key to Tymko and told her the car key belonged to him;

60. Appellant left the prison and returned to the Tower around 8:20 p.m. and remained there until his shift was over;

61. Appellant's testimony that he did not report to anyone that Nso had pushed him because he thought she was playing around is supported by Tymko's testimony and Special Custody Report;

62. Appellant's testimony that Nso had pushed appellant before and is always playful and a hands-on person, is supported by Tymko's testimony and report and is credible;

63. Appellant's testimony that after his shift was over on July 4 he reported the incident to Lt. West because his (appellant's) left-side and hip continued to hurt, is credible;

64. Appellant's testimony that he received treatment at Rahway Hospital on July 4 and thereafter was referred to the Workers' Compensation doctor for treatment, is not disputed;

65. Appellant's testimony that he was prescribed pills and injections for the pain, is not disputed;

66. Appellant's diagnosis of a left hip strain is supported by documentation from the hospital and worker's compensation doctor and is not disputed;

67. Appellant was discharged from the hospital after midnight and he immediately returned to the EJSP to prepare and submit reports;

68. On July 5 appellant went to the Workers' Compensation doctor's office and completed an Accident Injury Report;

69. Appellant's Workers' Compensation doctor also diagnosed his injury as a left hip strain;

70. On July 5, 2013, appellant took his paperwork to the personnel office and obtain a Patient Treatment Plan Form;

71. On July 9 appellant returned to the Workers' Compensation doctor, but was not released to return to work;

72. Appellant's Workers' Compensation Treatment Plan noted that on July 16 he would be cleared to return to work;

73. Appellant received compensation pay for the days he was out of work;

74. On July 17, 2013, appellant returned to work and was placed on the outside post only;

75. Upon appellant's return to work he learned that Nso had pressed simple assault charges against him;

76. Appellant filed simple assault charged against Nso;

77. During July 2013, appellant filed an EED complaint against Tymko for calling him a fag;

78. Tymko also filed an EED complaint against appellant for calling her an old bitch;

79. During September 2013, Nso and appellant agreed to drop the assault charges and Certified Dispositions were filed on September 18, 2013;

80. Respondent served appellant with disciplinary action documents after the assault charges were dismissed;

81. Appellant filed for UIB, but was denied. The denial is in appeal;

82. Appellant's testimony that prior to the July4 incident he had a good relationship with Nso and that they talked together about parents and family and ate together, is not disputed;

83. Appellant's testimony that his and Nso's relationship changed after she returned to work in May or June from her automobile accident, was not disputed or refuted;

84. Appellant's testimony that after Nso asked him to train her to exercise after her accident, and appellant said he could not do it, her attitude changed and she got short with him and stopped talking to him as frequently, is believable and was not disputed or refuted;

85. Appellant's testimony that Nso's attitude changed because she was retaliating since he would not train her, is reasonable and was not disputed or refuted;

86. Nso's testimony that she never asked appellant to train her is incredible;

87. Appellant's testimony that Nso was in no danger from him on July 4, 2013, and that she took no measures to prevent any harm to herself because she did not radio or use the intercom to seek help from anyone, nor did she make a phone call from the officer's desk, or implement a call-code 933 that signals a fight, was not disputed;

88. Appellant's testimony that Lt. Nardie was working on July 4, 2013, and that Nso could have made a report to him, was not disputed

89. Appellant's testimony that he did not curse at Tymko, is credible;

90. Appellant's testimony that he did not use some inappropriate language, is doubtful;

91. Appellant's testimony that Nso was not terminated but did receive a reprimand and is still working at EJSP, is undisputed;

92. Richard Salort is a lieutenant at EJSP and has been employed there for twenty-seven years;

93. Salort is responsible for formulating disciplinary actions;

94. Salort's testimony that he knows appellant from another Disciplinary and from reports generated as a result of the July 4, 2013, incident, which he received, is not disputed;

95. Salort's testimony that DOC does not tolerate workplace violence because it diminishes the moral of the facility and such action places everyone in danger, is not disputed;

96. Salort's testimony that in appellant's case there was a collaborative decision with SID that appellant should not be charged, was not disputed;

97. Salort's testimony that in appellant's case he was charged because of the egregious nature of the conduct, the abusive language towards Tymko, and the physical handling of Nso are the issues being weighed in this appeal;

98. Salort's testimony that his previous disciplinary matter with appellant in 2012 involved appellant's failure to follow rules and regulations of DOC by correcting his improper dress with his shirt out of his pants and the pants not bloused, was not disputed;

99. Salort's testimony that appellant received an Official Written Reprimand due to his improper dress, was not disputed;

100. Nso's and Tymko's testimony regarding appellant having Nso in a choke hold, is incredible;

101. Nso's and Tymko's testimony regarding appellant being verbally abusive, is incredible;

101. Nso's and Tymko's testimony that appellant cursed, is incredible;

102. Nso's and Tymko's testimony that appellant used some foul language, is credible;

103. The testimonies and reports to recapture the July 4 incident are contradictory;

104. The charges and specifications as set forth on the FNDA and as described in the testimonies concern two employees who worked, played, ate and got along without any negative incidents for a significant period, at least two years, and on July 4 engaged in horseplay that resulted in a reprimand for one worker and removal for the other worker who never had a major or minor disciplinary action at EJSP;

105. The weight of the evidence strongly points to a situation of retaliation because one worker refused to accommodate a request from the other worker to provide a personal service.

106. The penalty imposed by respondent is not in proportion to the violations alleged, and especially so when the allegations are not supported by sight-seen and in-hands evidence.

LEGAL ANALYSIS AND DISCUSSION

A civil service employee's rights and duties are governed by the Civil Service Act and the regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to -12-6 and N.J.A.C. 4A:1-1.1 to 4A:2-6.2. 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 DOC Park Comm'n, 46 N.J. 138,

147 (1965). Governmental employers also have delineated rights and obligations. A public employee who is protected by the provisions of the Act may be subject to major discipline for a wide variety of offenses connected to his employment. N.J.A.C. 4A:2-2.2(a) provides the penalties for a major discipline of removal or suspension for more than five working days at any one time. 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), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, 2-2.3(a).

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 duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6. 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, which 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 DOC 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).

It is well-recognized that the State correctional facilities operate through a rigidly hierarchical paramilitary structure. Lockley v. Dep't of Corr., 177 N.J. 413, 425 (2003). In the instant matter, the respondent emphasizes conduct unbecoming for an employee providing services in a correctional facility who is responsible for maintaining discipline and order. Respondent argues that abusive and foul language and acts of physical and mental aggression cannot be tolerated. Here, both parties are required to keep the order of the inmate population and maintain the safety of the facility.

(Conduct Unbecoming A Public Employee)

The charges set forth in the DOC's disciplinary action includes various acts of conduct unbecoming a public employee. Conduct unbecoming a public employee has been described as any conduct which adversely affects the morale or efficiency of a

department; conduct which has a tendency to destroy respect for public employees and their departments; or conduct which destroys confidence in public service. See In re Emmons, 63 N.J. Super. 136, 140-42 (App. Div. 1960); cf. Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). There is no precise definition for conduct unbecoming a public employee, and the question of whether conduct is unbecoming is made on a case-by-case basis, N.J.A.C. 4A:2-2.3(a)(6). King v. County of Mercer, CSV 2768-02, Initial Decision (February 24, 2003), adopted, Merit Sys. Bd. (April 9, 2003), http://njlaw.rutgers.edu/collections/oal/; see Jones v. Essex County, CSV 3552-98, Initial Decision (May 16, 2001), adopted, Merit System Board (June 26, 2001), http://njlaw.rutgers.edu/collections/oal/.

The New Jersey Department of Personnel's Administrative Code does not specifically define unbecoming conduct. Unbecoming conduct is not precisely defined in N.J.S.A. 11A or N.J.A.C. 4A. See e.g., Emmons, supra, 63 N.J. Super. at 140. The term unbecoming conduct has been applied in case law to cover a broad range of conduct, including misconduct. The court in Pfitzinger v. Board of Trustees, PERS, 62 N.J. Super. 589 (Law Div. 1960) in attempting to define conduct unbecoming or misconduct, stated, "[T]here is no specified definition for what conduct falls into these categories. Each case must be decided on its own merits in the light of the public position held by the individual involved." Id. at 602. In Hartmann v. Police Department of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992), the court held that a finding of misconduct need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior, which devolves upon one who stands in the public eye as an upholder of that, which is morally and legally correct. Unbecoming conduct may include behavior, which is improper under the circumstances. The conduct may be less serious than a violation of the law, but is inappropriate on the part of a public employee because it is disruptive of governmental operations. Depending upon the incident complained of and the employee's past record, major discipline may include removal for conduct unbecoming a public employee. W. New York v. Bock, 38 N.J. 500, 522-24 (1962).

In the instant case, appellant's alleged assault on Nso and alleged abusive and foul language towards Tymko was deemed by respondent to constitute conduct unbecoming a public employee.

(Credibility)

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. Credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story in light of its rationality, consistency, how it comports with other evidence and the manner in which it hangs together with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963), cert. denied, Palermo v. United States, 377 U.S. 953, 84 S. Ct. 1625, 12 L. Ed. 2d 498 (1964); see In re Polk, 90 N.J. 550 (1982). Credibility findings are often influenced by matters such as observations of the character and demeanor of witnesses and common human experiences that are not transmitted by the record. State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).

The finder and trier of facts is not bound to believe the testimony of any witness, and credibility does not automatically rest on the side of the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). Where facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings as to the disputed facts.

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). A decision must favor 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). Credibility and credible testimony 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).

In the instant case, I have considered the strength of the consistent testimony, the demeanor, as well as the possible conflicting position(s) of witnesses, prior to finalizing an Order. I have noted that testimonies referring to the July 4, 2013, incident vary or are often contradictory. The variations of testimony, inconsistencies and contradictions have been noted in the findings of fact and within the section addressing mitigation.

(Preponderance Of The Evidence)

Where an employee is charged with an offense, the employer must prove its case by a preponderance of the credible evidence, which is the standard in proceedings before an administrative agency. Atkinson v. Parsekian, 37 N.J. 143 (1962). The preponderance may also be described as the greater weight of credible evidence in a case, not dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). The purpose of Civil Service legislation is to secure for county, state and municipal governments efficient public service and to advance the welfare of people as a whole, not specifically or exclusively just the welfare of the civil servant. N.J.S.A. 11A:1-2(b); Park Ridge v. Salimone, 21 N.J. 28 (1956). In order to carry out this policy, the Civil Service Act includes provisions authorizing the discipline and termination of public employees. N.J.A.C. 4A:2-2.3(a).

In disciplinary cases the appointing authority has both the burden of persuasion and production and must demonstrate by a preponderance of the competent, relevant and credible evidence that it had just cause to discipline the officer and file charges. See Coleman v. E. Jersey State Prison, CSV 1571-03, Initial Decision (February 25, 2004), http://lawlibrary.rutgers.edu/oal/search.html (citations omitted); see also N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); In re Polk, 90 N.J. 550, 560 (1982); In re Darcy, 114 N.J. Super. 454, 458 (App. Div. 1971); N.J.S.A. 11A:2-6(a)(2), -21; N.J.A.C. 1:1-2.1; N.J.A.C. 4A:2-1.4. A preponderance of evidence has been defined as that evidence which generates belief that the tendered hypothesis is in all human likelihood the fact.

Martinez v. Jersey City Police Dep't, CSV 7553-02, Initial Decision (October 27, 2003), http://njlaw.rutgers.edu/oal/ (quoting Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959)).

There is a duty of the trier of facts to decide in favor of the party on whose side the weight of the evidence preponderates, in accordance with a reasonable probability of truth. Evidence is said to preponderate if it establishes the reasonable probability of the fact. 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).

(Progressive Discipline)

Disciplinary Record

Once a determination is made that an employee violated a statute, rule, regulation, or policy concerning his employment, the concept of progressive discipline must be considered. W. New York v. Bock, 38 N.J. 500, 522-24 (1962). 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. The penalty of removal for the charges against an appellant is authorized by the New Jersey Administrative Code. Some penalties are a low as five days while others warrant removal. Henry v. Rahway State Prison, 81 N.J. 571 (1980); Churchwell v. Police Dep't of Parsippany-Troy Hills, CSV 3939-97, Initial Decision (February 11, 1998), adopted, Merit Sys. Bd. (May 19, 1998), <http://njlaw.rutgers.edu/collections/oal/>, aff'd, A-6696-97T5 (App. Div. January 4, 2000), <http://njlaw.rutgers.edu/collections/courts>.

In regard to issuing an appropriate sanction, the State utilizes the concept of progressive discipline, which is the imposition of penalties of increasing severity. An employee's past disciplinary record may be reviewed to determine the appropriate penalty for the current specific offense and the reasonableness of the penalty to be imposed. See Bock, supra, 38 N.J. at 523, 524. In addition to considering an employee's prior disciplinary history when imposing a disciplinary penalty, other

appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid.

In the instant case appellant has a slight disciplinary history and was disciplined on one prior occasion at EJSP, in 2012, for not being in full appropriate uniform, for which he received an Official Written Reprimand.

(Penalty)

Unless the penalty is unreasonable, arbitrary, or offensively excessive, it should be permitted to stand. Ducher v. Dep't of Civil Serv., 7 N.J. Super. 156 (App. Div. 1950). Appellant's entire record of performance must be considered when attempting to determine if the judgment of the appointing authority was unreasonable, arbitrary or capricious. See Bock, supra, 38 N.J. 500.

Here, the record reflects that over the course of seven years, the full time appellant worked at EJSP, he received one Official Written Reprimand for not being dressed in full appropriate uniform. He has no minor or major disciplinary actions.

Consideration was given to the fact that appellant was a seasoned employee with knowledge of his job responsibilities and the policies, rules and procedures of the corrections facility and had performed the same duties for seven years without complaints from administrators, supervisors or other personnel. Consideration was given to the fact that appellant successfully performed his job for many years without allegations of violating rules and regulations of DOC, State Code and Statutes, or of any incident of conduct unbecoming a public employee.

In regard to penalty and discipline, In Golaine v. Cardinale, 142 N.J. Super. 385 (Law Div.1976), aff'd o.b., 163 N.J. Super. 453, 396 (App. Div. 1978), the court said:

> Where the dereliction charged, therefore, is not of such intrinsically reprehensible character, the determination of whether a specific act or omission constitutes cause for removal requires an evaluation of the conduct in terms of its

> relationship to the nature of the office itself, and, in that context, and appraisal of the actual or potential impairment of the public interest which may be expected to result from the conduct in question.

There are several cases which yield significant enlightenment on the type and nature of removal cases that have been converted to suspensions. An employee with six prior disciplinary infractions and found guilty of neglect of duty was given a six-month suspension; termination was reversed even though he previously was cited for an infraction of taking bribes. In Steinel v Jersey City, 193 N.J. Super. 629 (App. Div. 1984), aff'd., 99 N.J. 1 (1985). The court wrote, The leap from a five-day suspension to removal is just too great. Id at 634. An employee who intentionally engaged in misconduct was given a sixty-day suspension; termination was reversed. Belleville v Coppola, 187 N.J. Super. 147 (App. Div. 1982).

Based on an assessment of the type, nature and extent of the alleged infractions presented in the instant matter, the penalty imposed by respondent is not in proportion to the violations alleged. Appellant has a slight disciplinary history, with no minor or major disciplinary actions and only one Official Written Reprimand in seven years of employment. The extent and severity of the charges and specifications as set forth on the Final Notice of Disciplinary Action, and as described in the testimonies leaves me to believe that the penalty of removal is inappropriate.

(Mitigation)

Mitigating circumstances must be taken into consideration when determining whether there is just cause for the penalty imposed. The evidence presented and the credibility of the witnesses will assist in resolving whether the charges and discipline imposed should be sustained; or whether there are mitigating circumstances, which should impact the charges and the penalty. The following mitigating circumstances have been taken into consideration:

1. Appellant has been an employee of EJSP for seven years;
2. Appellant has never previously been charged with a major disciplinary action;

3. Appellant has never previously been charges with a minor disciplinary action;
4. Appellant received one Official Written Warning for not being properly dressed in uniform;
5. Appellant has never received another Official Written Warning for anything;
6. Appellant has never received a complaint about his job performance or inappropriate conduct towards inmates, other employees and/or supervisors;
7. Nso acknowledged during testimony that she pushed appellant;
8. The weight of the evidence supports believability that when Nso pushed appellant, appellant grabbed onto Nso to break his fall;
9. Tymko's first Special Custody Report only dealt with appellant's use of mean words to Tymko, the report did not contain any information about Tymko seeing or knowing about an altercation between Nso and appellant;
10. The weight of the evidence supports believability that Tymko thought Nso was fooling-around and participating in horse-play with appellant because Nso always plays around and is a hands-on person;
11. The weight of the evidence supports believability that Tymko only prepared a Special Custody Report after learning that Nso may have been injured;
12. The testimony of Nso and Tymko have significant inconsistencies in regard to when the alleged assault happened, when Tymko was verbally abused (on appellant's way in or on the way out of the prison, Nso said it happened on the way in and Tymko said it happened on the way out;
13. The testimony of Nso and Tymko have significant inconsistencies in regard to whether appellant's key was thrown at all, or thrown in the Keyport, or placed on a ledge/sill or handed to appellant; and in regard to who did the throwing, placing or handing;
14. Nso's testimony that she threw the key to get Tymko's attention is inconsistent with her other version of handing the key to Tymko with appellant standing near;
15. Nso's testimony that Tymko was watching is inconsistent with her (Nso's) other testimony that she could or did not get Tymko's attention;
16. There is no actual evidence that appellant engaged in conduct unbecoming a public employee towards Nso or Tymko. Tymko's Special Custody Report indicates it looked like appellant had Nso in choke hold, but she was not certain.

Tymko did not include anything about Nso's alleged assault in the first Special Custody Report;

17. Appellant and Nso had their Simple Assault charges against each other dropped and a Certified Disposition of Charges, dated September 9, 2103 was issued by the Municipal Court and filed with DOC.

18. The preponderance and weight of the evidence does not support a finding that appellant physically, mentally, or verbally abused an employee of EJSP; or that he actually made an inappropriate physical contact or mistreatment an employee; or that he was fighting or creating a disturbance on State property; or that he falsified information during the SID investigation; or that he made an intentional misstatement of material fact in connection with work or in any record, report, investigation, or other proceeding; or that he violated a rule, regulation, policy, procedure, order or administrative decision; or that he exhibited conduct unbecoming an employee that was so egregious as to warrant removal.

CONCLUSION

Based on all of the above, I **CONCLUDE** that respondent has not met the burden of proving by a preponderance of the evidence that appellant's action rose to the level of conduct unbecoming to a public employee that warrants a termination from his employment position with respondent as a senior corrections officer. I **CONCLUDE** that this case is ripe for the implementation of progressive discipline in determining the reasonableness of the penalty. Here, petitioner is without any minor or major disciplinary actions while employed at EJSP. I **CONCLUDE** that appellant's alleged misconduct of cursing and using foul language was not proven, but had there been proof an outburst on July 4, 2013, the evidence presented fails to prove there was an act so egregious to warrant termination of employment. I **CONCLUDE** that the evidence does not support an allegation that on July 4, 2013, the conduct of appellant, Nso, and Tymko had a negative impact on the inmate population, the public or other

employees. I **CONCLUDE** that no evidence was presented to support the charge against appellant for falsification of information he provided during the SID investigation.

I **CONCLUDE** finally that after careful consideration of all of the foregoing and pursuant to applicable law that respondent has not established by a preponderance of credible evidence the charges against appellant.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action of the Department of Corrections for East Jersey State Prison against appellant is hereby **REVERSED**.

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

I further **ORDER** appellant be awarded back pay, benefits and seniority in accordance with N.J.A.C. 4A:2-2.10 and reasonable counsel fees in accordance with N.J.A.C. 4A:2-2.12.

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. 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.

July 10, 2013
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

Date Received at Agency: July 10, 2014

Mailed to Parties: JUL 14 2014

Laura Parsons
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

LIST OF WITNESSES

For Appellant:

Laquan Bush

For Respondent:

SCO Rebeckah Nso

Lt. Richard Salort

Loretta Tymko, Control Operator

LIST OF EXHIBITS IN EVIDENCE

Joint Exhibits:

J-1 Special Custody Report by Loretta Tymko, dated July 4, 2013

J-2 Diagram of inner front door area of prison

J-3 Preliminary Notice of Disciplinary Action, dated September 19, 2013

J-4 Final Notice of Disciplinary Action, dated October 4, 2013

For Appellant:

A-1 Rahway Hospital Discharge Papers, for Laquan Bush, dated July 4, 2013

A-2 Workers' Compensation Remittance Form, for Laquan Bush, dated July 5, 2013

A-3 Workers' Compensation Remittance Form, for Laquan Bush, dated July 9, 2013

A-4 Workers' Compensation Remittance Form, for Laquan Bush, dated July 16, 2013

A-5 Employees Accident report of Laquan Bush, dated July 5, 2013

A-6 Remittance slip for Workers' Compensation payment dated August 9, 2013

A-7 Special Custody Report Submitted by Laquan Bush, with both criminal summonses attached as (7)(a) and (7)(b)

A-8 Decision of Loudermill Hearing, dated August 19, 2103

A-9 Certified Disposition of Charges, dated September 9, 2103

A-10 Decision of the Equal Employment Division Investigation, dated October 24, 2013

A-11 Decision of Appeal Tribunal granting appellant unemployment benefits, dated December 9, 2013

A-12 Police Investigation Report of Motor Vehicle Accident, dated September 3, 2012

A-13 Special Custody Report by Communications Operator Loretta Tymko, date of incident July 4, 2013

For Respondent:

R-1/J-3 Preliminary Notice of Disciplinary Action, dated September 19, 2013;

R-2/J-4 Final Notice of Disciplinary Action, dated October 4, 2013;

R-3 Special Custody Report by SCO Rebeckah Nso, dated July 5, 2013;

R-4 Law Enforcement Personnel Rules and Regulations (DOC 102-123);

R-5 Work History for Laquan Bush, from January 1, 1999, to August 9, 2013;

R-6/J-1 Special Custody Report by Loretta Tymko, dated July 4, 2013