

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF OCTOBER, 2021

Deirdre' L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 18909-16

AGENCY DKT. NO. 2017-1744

**IN THE MATTER OF JAMES JACKSON,
MERCER COUNTY CORRECTION CENTER,
DEPARTMENT OF CORRECTIONS.**

Arthur J. Murray, Esq., for appellant (Law Offices of Alterman & Associates, LLC)

Suzette Price, Deputy County Counsel, for respondent Mercer County (Paul R. Adezio,
County Counsel)

Record Closed: July 27, 2021

Decided: September 10, 2021

BEFORE MARY ANN BOGAN, ALJ:

STATEMENT OF THE CASE

Corrections Officer James Jackson (appellant) appeals the decision of his employer the Mercer County Correction Center, (MCCC), (respondent) who suspended appellant James Jackson for twenty-days for charges of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a) 7 Neglect of duty; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause; Violation of administrative procedure and/regulations involving safety and security (D6) step 1; B2 Neglect of duty, loafing, idleness or willful failure to devote attention to tasks which could result in causing danger to persons or property, B3 Sleeping while on duty; SOP 004 employee handbook 1.02.10 Sleeping on duty. Appellant maintains he was not sleeping while on

duty. He instead acknowledges that he was idle for a short time, and that it should not be determined that he was sleeping while on duty.

PROCEDURAL HISTORY

This matter arises from the appellant's appeal from the November 18, 2016, Final Notice of Disciplinary Action. On June 16, 2016, the County issued a Preliminary Notice of Disciplinary Action charging the appellant. After a departmental hearing the County issued a Final Notice of Disciplinary Action on November 18, 2016, sustaining the charges of N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)6 Neglect of duty, N.J.A.C. 4A:2-2.3(a)12 other sufficient cause; violation of administrative procedure and/regulations involving safety and security, B2 Neglect of duty, loafing, idleness or willful failure to devote attention to tasks which could result in causing danger to persons or property, B3 sleeping while on duty, SOP 004 employee handbook 1.02.10 Sleeping on duty. The appellant was suspended from employment for twenty working days. The matter was transmitted to the Office of Administrative Law (OAL), where it was received on December 16, 2017, and filed for determination 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.

A motion was filed by the appellant to grant a spoliation inference in favor of appellant and exclude all photos taken by the personal cell phone of Warden Charles Ellis (Warden), to bar any testimony related to those photos, and to compel production of the Warden's cell phone for examination. On February 27, 2019, an order was issued denying the motion in its entirety. Several hearing dates were adjourned at the request of the parties. The matter was heard on February 22, 2021. After the parties submitted post hearing submissions, the record closed on July 27, 2021.

FACTUAL DISCUSSION AND FINDINGS

Testimony

Phyliss Oliver (Oliver) is the retired Deputy Warden of MCCC. Prior to her retirement, Oliver was employed at MCCC for over thirty-three years. She was Deputy Warden for two

years. As Deputy Warden, Oliver was responsible for internal affairs and disciplinary actions for MCCC staff members, and she held this position on July 7, 2016. On July 7, 2016, Oliver arrived at work, and in her normal course of duties she scanned the security camera in her office and noticed Jackson leaning back in his chair partially blocked by the file cabinet. Oliver recorded the video for approximately fourteen minutes. She noticed that Jackson did not move. She acknowledged that Jackson's face could not be seen on the security camera footage. Oliver did not review the video from the entire eight-hour shift Jackson worked that day. After that Warden Ellis went to the northeast-2 living unit and took two snapshots of Jackson leaning back in the chair with his eyes closed. A book laid open on his chest. Oliver explained, sleeping during a work shift is a serious offense particularly because as a corrections officer, Jackson is responsible for the safety and security of the inmates who are housed at the northeast-2 living unit. Only one officer is on duty during the 11:00 pm to 7:00 am shift that Jackson worked that day. He is expected to remain alert and perform security checks every thirty minutes and record the checks in the logbook. Oliver did not review the logbook from that shift to see whether Jackson made rounds every thirty minutes. (R-7.)

The security camera video recording was played from 6:47:40 a.m. and ended at about 7:01:31 a.m.. Upon checking the video, Oliver observed the chair swivel at 6:52 a.m. After that she observed Jackson leaning back in his chair, not moving. (R-7.)

Prior to drafting the disciplinary charges, Oliver reviewed several incident statements including one from Warden Ellis. This statement sets forth that Jackson was sitting at the unit desk with a book in his lap asleep. (R-1.) Sergeant Grier who was at the northeast-2 living unit when Warden Ellis took the pictures, recorded in his incident statement that he observed Jackson sleeping in the chair with a book on his chest. He and Warden Ellis observed Jackson in this position for about one minute. Jackson did not respond until Officer Grier began talking and Jackson opened his eyes. (R-2.) Jackson also submitted an incident statement which stated, "I was ordered to write a report by my area Sergeant as I was observed what appear me to be asleep as the area Sergeant and the Warden walked up the stairs." Oliver pointed out that Jackson did not attempt to deny that he was sleeping when he wrote the statement. (R-3.)

Oliver also referred to the Table of Offenses when she drafted the charges.¹ (R-1) She explained that in addition to being charged with sleeping on duty, Jackson was also charged with neglect of duty because he did not perform his job duties when he was sleeping on duty. He was also charged with violation of the employee handbook because he violated the rule in the handbook that does not allow sleeping on duty. Jackson was also charged with conduct unbecoming because as a public employee his conduct of sleeping while on duty is unbecoming. The penalty offenses assessed were step one charges and each offense has its own penalty. She explained the ten suspension days is for sleeping, five suspension days is for conduct unbecoming, and five suspension days is for neglect of duty.

Charles Ellis (Ellis) is the Warden at MCCC. After viewing video footage of Jackson, from the security camera in Oliver's office, he went upstairs to view Jackson in person. He snapped two pictures of Jackson sitting in the chair with a book on his chest and his eyes closed, sleeping. He believes that the only video footage he viewed was a rear view of Jackson and that the two still photographs that he took are the only front views of Jackson. He confirmed that at 7:01 am he snapped two pictures of Jackson with his personal cell phone camera. Jackson did not react to the two flashes from his camera when the pictures were taken. Sgt. Grier was standing behind him. When Ellis started talking to Grier, Jackson opened his eyes, "startled" and said, "oh shit." After taking the pictures Ellis walked downstairs and emailed the pictures to Oliver, who printed them out. (R-4,5). The pictures depict, Jackson sitting with a "book resting on his stomach and his lap" "sleeping" "with his chin slightly down." Warden Ellis also completed an investigative report. (R-1.) Even though Ellis could not observe Jackson's face on the camera when he viewed the video, he identified himself in the video taking the pictures with Sgt. Grier nearby. Ellis explained that sleeping is one of the "most egregious [behaviors] an officer can do . . . especially when [he is] supervising a housing unit."

Jackson is responsible for ensuring the safety of the facility including the inmate's safety. As the officer on duty, he is in plain view of the inmates when he is sitting in the desk chair where the pictures were taken, and he was seen on the security camera in a sleeping posture. If the inmates were to see that an officer was sleeping, they are likely to become disruptive.

¹ Jackson conceded that he was idle and submits that his conduct warrants a five day suspension.

James Jackson (Jackson) appellant has worked at MCCC since January 2003. He was working the 11:00 p.m. to 7:00 a.m. shift on July 7, 2016, and he was assigned to be in the north-2 section which houses about thirty to thirty-five inmates. His duties include maintaining the safety and security of the institution. Jackson ensures that inmates are accounted for, and that there is no harm to any inmate or damage to the surrounding areas. He performs security checks every thirty minutes. Jackson explained, even though his shift ended at 7:00 a.m. that day the actual end time could be 7:05 to 7:15 a.m. depending on when the next officer arrives. He gets paid until 7:15 a.m.

Jackson looked at the two photographs that were taken on the day in question. (R-4,5). He acknowledged that he was not performing all his job duties the moment the photographs were taken because “[he] wasn’t all the way attentive at the time.” In the pictures he identified a book he had that he was reading prior to leaning back in the chair. He acknowledges that his eyes appear to be closed but that he was not sleeping. Jackson denies that he was sleeping on duty at any time. He concedes that he was not fully attentive to his duties on July 7, 2016 and should be issued a five-day suspension.

Jackson acknowledged the incident statement he wrote on July 7, 2016, to the Warden. (R-3.)

FACTUAL FINDINGS

It is my obligation and responsibility to weigh the credibility of the witnesses in order to make a determination. Credibility is the value that a fact-finder gives to a witness’ testimony. The word contemplates an overall assessment of a witness’ story in light of its rationality, internal consistency, and manner in which it “hangs together” with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Credible testimony has been defined as testimony that must proceed from the mouth of a credible witness, and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955) [quoting In re Perrone’s Estate, 5 N.J. 514, 522 (1950)]. In assessing credibility, the interests, motives, or bias of a witness is relevant, and a fact-

finder is expected to base decisions of credibility on his or her common sense, intuition, or experience. Barnes v. United States, 412 U.S. 837 (1973). Credibility does not depend on the number of witnesses, and the finder of fact is not bound to believe the testimony of any witness. In re Perrone's Estate, 5 N.J. 514.

The appellant mostly agrees with the facts set forth by the respondent and does not dispute that a penalty should be issued for his actions on July 7, 2016, while on duty as a corrections officer at MCCC. He suggests that he was idle and not "all the way attentive" for a time period that morning, while admitting that his eyes were closed. He further urges that a five-day suspension is more appropriate than a twenty-day suspension. Appellant firmly denies he was sleeping while on duty.

Appellant's attempt to minimize his conduct while on duty that morning is less than persuasive and not credible.

Having had the opportunity to observe the appearance and demeanor of the witnesses, and having reviewed the security camera video, I **FIND** on the morning of July 7, 2016, appellant was asleep in the chair at his desk at the northeast-2 unit while on duty as a corrections officer at MCCC. For more than ten minutes appellant sat motionless leaning back in his chair with his eyes closed with a book on his chest. The appellant did not react to the two flashes from the camera when Ellis snapped two front view pictures of the appellant, while standing in close range of him. When Ellis, and Grier, who stood just behind Ellis, began talking, the appellant awoke "startled" and stated, "oh shit". Appellant did not deny in his report to the Warden written on the day of the incident that he was sleeping on duty.

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).

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. Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) [quoting City of Asbury Park v. Dep't of Civil Serv., 17 N.J. 419,429 (1955)].

As a corrections officer, appellant is held to a higher standard of conduct than other public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). Corrections officers 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). A corrections officer who fails in their professional duty by falling asleep on-duty can put their

fellow corrections officers and the inmates in their charge at great risk of harm. Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

This higher standard of conduct and behavior is necessary because,

[t]he need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not properly operated, have a capacity to become tinderboxes.

Bowden v. Bayside State Prison, 268 N.J. Super. 301, 306 (App. Div. 1933), certif. denied, 135 N.J. 469 (1994).

Here, appellant was responsible for the safety and security of thirty to thirty-five inmates who were housed in the unit he was charged with ensuring its safety. To fulfill his duties appellant was required to be always alert. Sleeping while on duty, even for a short time created a serious risk to the safety of himself, the inmates and his fellow corrections officers. I **CONCLUDE** that appellant's conduct on July 7, 2016, did rise to a level of conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6) and the respondent has met its burden of proof to sustain this charge. See also, In the Matter of Robert Cusick, Middlesex County Department of Adult Corrections, CSV-5461-10, Initial Decision (November 3, 2010) <http://lawlibrary.rutgers.edu/oal/search.html> (finding corrections officer sleeping on duty constitutes conduct unbecoming a public employee); In the Matter of Kenneth Bynum, Mercer County Department of Public Safety, CSV 12403-13, Initial Decision (September 2, 2014), adopted, Civil Service Commission (October 1, 2014), <http://lawlibrary.rutgers.edu/oal/search.html> (finding corrections officer sleeping on duty "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").

Appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(7), neglect of duty. While not specifically defined by the regulations, this generally means that a person is not performing his or her job. The person may have failed to perform an act that the job requires or

may have been negligent in the discharge of a duty. See, Angela O'Kafor v. Riverfront State Prison, CSV-6349-99, Initial Decision (November 19, 2001), adopted, Merit System Board (March 19, 2002) <http://lawlibrary.rutgers.edu/oal/search.html>. Appellant was expected to be alert and maintain the safety and security during his shift. By falling asleep on-duty on the morning of July 7, 2016, I **CONCLUDE** that appellant was negligent in discharging the duties of his job and that the respondent has met its burden of proof to sustain this charge.

Appellant was further charged with violating, N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause; Violation of administrative procedure and regulations involving safety and security (D6) step1; B2 Neglect of duty, loafing, idleness or willful failure to devote attention to tasks which could result in causing danger to persons or property, B.3. Sleeping while on duty; SOP 004 employee handbook 1.02.10 Sleeping on duty. Having found that appellant was on duty at MCCC and while on duty he was asleep in his chair at his desk, I **CONCLUDE** that the 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. The application of progressive discipline is not always required when the conduct is severe. See, In re Carter, 191 N.J. 474 at 486 (2007), (principle of progressive discipline did not apply to police officer sleeping on duty notwithstanding his unblemished record making removal appropriate).

Appellant has no minor suspension and has one major suspension.

For his actions arising out of this incident, appellant has been found to have violated N.J.A.C. 4A:2-2.3(a)(6), "Conduct unbecoming a public employee" N.J.A.C. 4A:2-2.3(a) 7 Neglect of duty, 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. Appellant was given a twenty-day suspension.

The appellant in its closing brief, argues that appellant should be disciplined for a step one violation of other sufficient for being "idle" and be issued a five-day suspension. At most, appellant asserts that the Table of Offenses and Penalties sets forth that the charge of sleeping on duty is a discrete offense, that warrants a ten-day suspension for the first offense. This argument is unpersuasive.

The twenty-day suspension is consistent with the disciplinary process. After having considered all the proofs offered in this matter, the impact upon the institution regarding the behavior by appellant herein, the risk of safety created, 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 the conduct of the appellant, and the current violation is a twenty-day suspension.

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; N.J.A.C. 4A:2-2.3(a) 7 Neglect of duty and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause; Violation of administrative procedure and /regulations involving safety and security (D6) step1; B2 Neglect of duty, loafing, idleness or willful failure to devote attention to tasks which could result in causing danger to persons or property, B.3. Sleeping while on duty; SOP 004 employee handbook 1.02.10 Sleeping on duty are **AFFIRMED**. Accordingly, I **ORDER** that the action of the Appointing Authority is **AFFIRMED**. Appellant will receive a twenty-day suspension.

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.

September 10, 2021

DATE



MARY ANN BOGAN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

MAB/nd

APPENDIX

WITNESSES

For Appellant:

James Jackson

For Respondent:

Phyllis Oliver

Charles Ellis

EXHIBITS

Joint:

- J-1 FNDA , dated November 18, 2016
- J-2 PNDA, dated June 16, 2016
- J-3 Table of Offenses and Penalties
- J-4 Disciplinary Record

Appellant Exhibits:

None

Respondent Exhibits:

- R-1 Incident Report (Warden Ellis)
- R-2 Incident Report (Sgt. Grier)
- R-3 Incident Report (Officer Jackson)
- R-4 Picture 1
- R-5 Picture 2
- R-6 SOP 004
- R-7 Security Video