STATE OF NEW JERSEY

In the Matter of Jeffrey Benton, East Jersey State Prison, Department of Corrections CSC DKT. NO. 2018-3183 OAL DKT. NO. CSR 07291-18	**DECISION OF THE CIVIL SERVICE COMMISSION**

ISSUED: MARCH 29, 2023

The appeal of Jeffrey Benton, Senior Correctional Police Officer, East Jersey State Prison, Department of Corrections, removal, effective April 12, 2018, on charges, was heard by Acting Director and Chief Administrative Law Judge Barry E. Moscowitz (ALJ), who rendered his initial decision on February 16, 2023. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, including a thorough review of the exceptions and reply, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of March 29, 2023, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision and his recommendation to reverse the removal.

The Commission makes the following comments. As indicated above, the Commission thoroughly reviewed the exceptions filed by the appointing authority in this matter. In that regard, the Commission finds them unpersuasive and mostly unworthy of comment as the ALJ's findings and conclusions in reversing the charges and penalty imposed was based on his thorough assessment of the record and are not arbitrary, capricious or unreasonable.

The Commission notes that the ALJ specifically found the appellant's testimony "genuine" and certain appointing authority witnesses' testimony not credible. Upon its *de novo* review of the record, 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 the witnesses and common human experience that are not transmitted by the record." *See also, 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. 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 sufficient 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). In this matter, the exceptions filed by the appointing authority are not persuasive in demonstrating that the ALJ's credibility determinations, or his findings and conclusions based on those determinations, were arbitrary, capricious or unreasonable. As such, the Commission has no reason to question those determinations or the findings and conclusions made therefrom.

Specifically, the ALJ found two purported eye-witnesses to the alleged misconduct not credible. In regard to Senior Correctional Police Officers Victor Rivera and Robert Sorrell, the ALJ stated:

> Given this discussion of the facts—including the failure of Nelson to testify at the hearing and the adverse inference that I draw from it, coupled with the unreliability of the testimony both Sorrell and Rivera provided at the hearing and the genuineness of the testimony Benton provided—I **FIND** that the appointing authority has failed to prove by a preponderance of the evidence any of the specifications contained in its Final Notice of Disciplinary Action.

After its thorough review of the record, the Commission finds no persuasive evidence that these findings were in error.

Since the removal has been reversed, the appellant is entitled to be reinstated with mitigated back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10 from the first date of separation until the date of reinstatement. Moreover, as the removal has been reversed, the appellant is entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

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. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay or counsel fees 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 position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Jeffrey Benton. The Commission further orders that the appellant be granted back pay, benefits, and seniority from the first date of separation until the date of reinstatement. 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, and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for the appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees 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 and *N.J.A.C.* 4A:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees 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 shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 29TH DAY OF MARCH, 2023

Allison Chris Myers
Acting Chairperson
Civil Service Commission

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and
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 07291-18

JEFFREY BENTON,

Petitioner,

v.

EAST JERSEY STATE PRISON,

Respondent.

Stuart J. Alterman, Esq., for petitioner (Alterman & Associates, LLC, attorneys)

Kevin K. O. Sangster, Deputy Attorney General (Matthew Platkin, Attorney General of New Jersey, attorney)

Record Closed: January 17, 2023 Decided: February 16, 2023

BEFORE **BARRY E. MOSCOWITZ**, Acting Director and Chief ALJ:

STATEMENT OF THE CASE

On April 12, 2018, the New Jersey Department of Corrections (NJDOC) removed Jeffrey Benton from his position as a senior correction officer for allegedly engaging in inappropriate conversations with inmates and employees, which were sexual in nature. A preponderance of the evidence, however, does not exist that Benton engaged in such activity. Must Benton be removed from his position? No. The appointing authority bears

the burden of proof, N.J.A.C. 4A:2-1.4(a), by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

PROCEDURAL HISTORY

On December 6, 2017, the NJDOC served Benton with a Preliminary Notice of Disciplinary Action. In its notice, the NJDOC charged Benton with conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12), for having violated Human Resources Bulletin (HRB) 84-17. The notice specified that on November 29, 2017, the Special Investigations Division (SID) determined that between February 2017 and June 2017, Benton engaged in inappropriate conversations with inmates and employees, which were sexual in nature, and that such conversations with inmates and employees was conduct unbecoming a public employee, for which there is zero tolerance.

More specifically, the NJDOC charged Benton with mental abuse of inmates and employees in violation of section C.3 of the HRB, verbal abuse of inmates and employees in violation of section C.4 of the HRB, mistreatment of inmates and employees in violation of section C.5 of the HRB, conduct unbecoming an employee in violation of section C.11 of the HRB, continual use of obscene language in violation of section C.12 of the HRB, violation of administrative procedures and regulations involving safety and security in violation of section D.7 of the HRB, and violation of a rule, regulation, policy, procedure, order, or administrative decision in violation of section E.1 of the HRB.

As a result, the NJDOC suspended Benton and sought his removal.

On March 20, 2018, a departmental hearing was held; on March 28, 2018, the record was closed; and on April 12, 2018, all the charges and specifications were sustained.

Accordingly, on April 12, 2018, the NJDOC served Benton with the Final Notice of Disciplinary Action, memorializing that all the charges and specifications had been sustained, and removing Benton from his position as a senior correction officer.

On May 16, 2018, Benton appealed this determination directly to the Office of Administrative Law under N.J.S.A. 40A:14-202(d). On January 11, January 13, January 18, May 16, and May 19, 2022, I held the hearing. On January 13, 2023, the NJDOC submitted its closing brief; on January 17, 2023, Benton submitted his closing brief; and on that date, I closed the record.

DISCUSSION AND FINDINGS OF FACT

I

Omayra Ortega is a senior investigator at the NJDOC. She has been an investigator for nineteen years and has conducted approximately 180 investigations. Ortega did not initiate the investigation in this case; it was referred to her. As Ortega explained, the Equal Employment Division (EED) initiated the investigation, and as she later admitted, the EED dismissed all the charges concerning the alleged misconduct, except for the alleged misconduct in this case. To conduct her investigation, Ortega interviewed the complainant, other alleged witnesses, and Benton. All the interviews were recorded, which Ortega summarized in her report, and both the interviews and her report, which were reviewed at the hearing, were admitted into evidence. Since Ortega had no memory of her investigation beyond what is contained in those recordings and in her report, the following timeline is gleaned from her report.

A.

In April 2017 and again in June 2017, Lynn Nelson, a senior correction officer, alleged that on multiple occasions she had witnessed Benton engage in sexually explicit conversations with unidentified inmates. Nelson further alleged that other senior correction officers, namely, Robert Sorrell, Felicia Saunders, and Victor Rivera, also witnessed Benton engage in these sexually explicit conversations. Saunders later denied in a written statement that she witnessed any of the alleged misconduct; Sorrell and Rivera provided unreliable testimony at the hearing, and Nelson failed to testify at the

hearing in total. Her silence was deafening. As a result, I draw an adverse inference from her failure to testify at the hearing.

On October 20, 2017, the EED referred the case to the Special Investigations Division.

On October 25, 2017, Ortega interviewed Nelson and recorded it. In her report, Ortega wrote that the EED referred the case to the SID so the SID could investigate whether Benton had in fact engaged in sexually explicit conversations near the Inmate Dining Room (IDR) in violation of the Prison Rape Elimination Act (PREA). Ortega further wrote that Nelson alleged that these conversations also occurred in the tie-to. (The tie-to is the caged area between the rotunda and the IDR and is used as a holding area for the inmates before entering and after exiting the IDR.) Ortega wrote that Nelson alleged that Benton engaged in these conversations almost every day, and that he did so in her presence to agitate her:

> SCO Nelson stated that she is the GA-2 (General Assignment) officer assigned to the area to assist the Kitchen Officer. SCO Nelson asserted that almost daily, SCO Benton, the assigned Kitchen Officer, would have conversations with the kitchen detail inmates about an inmate inserting his dick in someone's butt, in one's mouth, or inmate fucking other inmates, mostly gay conversations.
>
> [R-11 at 1.]
>
> SCO Nelson added that SCO Benton would at times have conversations with inmates about females and would look at her (SCO Nelson) and turn to the inmates and say things such as "If you stick the head in and she says no you are already in, so it's not rape and it is up to you then to bang the shit out of her."
>
> . . . .
>
> SCO Nelson stated that she believes that SCO Benton was intentionally having these conversations with the inmates in her presence to agitate her.
>
> [Id. at 2.]

Ortega wrote that Nelson admitted that she and Benton used to be friends but were no longer friends when these incidents allegedly occurred:

> SCO Nelson was asked if she ever told SCO Benton to stop having the conversation with the inmates because she felt uncomfortable. SCO Nelson said that she told SCO Benton to leave her alone because at one time they were friends and she thought that SCO Benton was being disrespectful to certain females at work. SCO Nelson asserted that after that they stopped being friends. SCO Nelson added that prior to them not being friends she asked him not to ever disrespect her. SCO Nelson asserted that after they stopped being friends, SCO Benton told her to stay out of the ODR (Officers Dining Room) and the IDR (Inmate Dining Room) and she told him that it was not a problem and she also asked him to stay out of her area.
>
> [Ibid.]

Ortega wrote that Nelson also alleged that Benton made inappropriate comments when she would pat and frisk inmates:

> SCO Nelson indicated that there were other times where the inmates would be in the area who she would pat frisk and SCO Benton would say, "Oh there is my T.H.O.T, okay my T.H.O.T. is bending over." SCO Nelson explained that T.H.O.T. means "That Ho Over There." SCO Nelson added that SCO Benton would never say things directly to her, he would say things to the inmate, or he would tell the inmates things and the inmates would come back [and tell her] what he said to her.
>
> [Ibid.]

Ortega wrote that Nelson alleged that Benton threatened her:

> SCO Nelson said that there [were] also threats by SCO Benton. SCO Nelson sated that the inmates would come back and tell her things that SCO Benton had said about her. SCO Nelson said that incidents occurred with SCO Benton while he was working in the IDR and the ODR. SCO Nelson added

> that those were the areas SCO Benton was supposed to be working.
>
> [Ibid.]

Ortega wrote that Nelson alleged that Sorrell, Saunders, and Rivera witnessed some of these incidents, and that Benton fired the inmates who witnessed these conversations once they stood up for her:

> SCO Nelson stated that she believes that SCO Sorrell, SCO Saunders, and SCO Rivera were present when some of these incidents (SCO Benton & inmate conversations) occurred prior to morning mess movement in the Tie-To area. SCO Nelson said that she did not have the names of the inmates who worked in the kitchen and witnessed the incidents involving SCO Benton. SCO Nelson said that inmates that witnessed the incidents were fired by SCO Benton after they stood up for her.
>
> [Ibid.]

Ortega wrote that Nelson did not know the names of these inmates.

Ortega wrote that Nelson alleged that on June 6, 2017, at approximately 6:25 a.m., while in the tie-to area, Benton, who was seated behind her, engaged in explicit conversations with approximately four or five inmates about sex, including who is going to be "on top." Ortega further wrote that Nelson promised to provide her with the names of these inmates but never did. Nevertheless, Ortega wrote that Nelson alleged that Sorrell was present when this occurred but walked away because he could not take the talk.

Ortega wrote that Nelson further alleged that months before, on Easter Sunday, Benton told her to "suck his dick" but pretended he was talking to an inmate. Ortega further wrote that Nelson alleged that approximately nineteen officers were present when this occurred but could not specify who they were or what they heard. Regardless, Ortega wrote that Nelson said that neither this alleged incident from Easter nor the one from June was referred to the SID for investigation.

Still, Ortega wrote that Nelson believed that Benton was in violation of PREA for the alleged incidents from February and March, and that she knew she was obligated to report them, but that she chose not to because others were present, and she simply wanted Benton to leave her alone.

B.

On October 27, 2017, Ortega interviewed Sorrell and recorded it. In her report, Ortega wrote that Sorrell said that he witnessed Benton engage in conversations in the tie-to area concerning homosexual activity, but that he did not know with whom Benton had these conversations, that he did not know when Benton had these conversations, and that he did not know what Benton said during these conversations. Ortega wrote that all Sorrell knew was that on one occasion, he heard Benton use the term "T.H.O.T.," which Sorrell understood was an acronym for "That Ho Over There" or "That Homo Over There," depending on the referent, and that Sorrell admitted that he knew no specifics about its use by Benton on any occasion. Ortega wrote that Sorrell also admitted that no officer or inmate, including Nelson, ever complained to him about Benton, but that Sorrell later provided the name of William Range as an inmate who might have witnessed the alleged misconduct.

Parenthetically, in his statement to the EED, dated May 18, 2017, R-5, Sorrell acknowledged that he worked for Nelson outside of the DOC: "I do side work for her every now and again. I clean houses for her. She works for people who flip houses, and she asks me, and I do it (clean houses). It's extra money."

On cross-examination, Sorrell attempted to distance himself from this acknowledgement, but his attempt to do so was unconvincing. Nelson and Sorrell are friends both inside and outside of the NJDOC. Moreover, Sorrell works for Nelson outside of the NJDOC.

On October 31, 2017, Ortega interviewed Saunders. She also obtained her statement to the EED. Ortega wrote that Saunders denied that she witnessed any of the

misconduct that Nelson alleged; instead, Saunders speculated that Benton called an inmate a THOT "a while ago"—but never reported it because it only involved words and not conduct. Since Saunders denied that she had any personal knowledge of the alleged misconduct in this case, Saunders was not called to testify at the hearing.

On November 2, 2017, Ortega interviewed Rivera. She also obtained his statement to the EED recorded on video. Ortega wrote that Rivera said he told the EED that he did not witness Benton have conversations about rape or fellatio but that he did witness Benton telling an inmate, "When you are fucking him, once the head is in, even if they change their mind, they have the right to finish fucking." Ortega also wrote that Rivera said he told the EED that the conversation was not dirty; that it was about making love between a man and a woman; that he did feel uncomfortable about the conversation; that he did not feel uncomfortable enough about it to tell Benton; and that none of the inmates in the area complained. Ortega wrote that Rivera later identified Kenneth Damon and Arbin Hook as inmates who might have witnessed the alleged misconduct.

C.

On November 6, 2017, Ortega interviewed Range and obtained a written statement. Ortega wrote that Range said that he worked in the IDR and had worked with Benton in the IDR for the past five years. In short, Range denied every allegation about Benton that Ortega peppered him with and asserted that he had never had a problem with Benton.

On November 13, 2017, Ortega interviewed Damon and obtained a written statement. Ortega wrote that Damon said that he worked in the IDR and had worked with Benton in the IDR for the past eleven years. Like Range, Damon denied every allegation about Benton that Ortega peppered him with and asserted that he had never had a problem with Benton.

On November 13, 2017, Ortega also interviewed Hook and obtained a written statement from him. Ortega wrote that Hook said that he worked in the IDR and had worked with Benton in the IDR for the past three years. Like Range and Damon before

him, Hook denied every allegation about Benton that Ortega peppered him with and asserted that he had never had a problem with Benton.

D.

On November 24, 2017, Ortega interviewed Benton and recorded it. Ortega wrote that Benton had worked as a senior correction officer for eighteen years and had no history of any disciplinary action. Ortega further wrote that Benton denied all the misconduct that Nelson had alleged and explained that Nelson had alleged all this misconduct because Nelson had a problem with a Sergeant Martinez and had wanted Benton to "vouch" for her, but Benton refused to get embroiled in her troublemaking, so these allegations were his punishment and her retribution for his refusal to do so. To underscore the falsity of the allegations, Ortega wrote that Benton further explained that Nelson had filed earlier complaints about him to the EED, so it would have been "foolish" for him to have engaged in such alleged misconduct after the fact. As Benton would later testify, his decided strategy was to stay as far away from Nelson as possible as a matter of self-preservation.

Indeed, the recorded interview with Ortega reveals that Benton was truly surprised by these later allegations, and when Ortega vocalized them, Benton immediately denied them. His denial was both categorical and vehement, and from my review of both the video and his testimony, I believe him just as strongly. His reaction on the video was too quick to be anything other than genuine.

I note too that Nelson, who alleges that the misconduct began in September 2016, did not complain to the EED about it until seven months later in April 2017, and that the case was not referred to the SID until four months later in October 2017, a total of thirteen months after Nelson alleged the misconduct began, which belies the urgency with which Nelson alleges the misconduct, and the seriousness with which the NJDOC wrought its investigation. As noted above, the fact that Nelson did not testify at the hearing also undermines her case. Indeed, it proves fatal.

E.

On cross-examination, Ortega acknowledged that Nelson did, in fact, complain of other alleged misconduct to the EED, and all those charges were, in fact, dismissed by the EED, with only this charge ("SCO Benton engages in discussions with inmates involving male-on-male sex acts (including oral sex), male-on-male sexual positions, and rape") referred to the SID for investigation. In addition, the letter from the EED dated September 25, 2017, dismissing those other charges reveals that two of those charges were dismissed not because the alleged misconduct could not be proven but because the behavior was either permissible or appropriate under the circumstances. In particular, Nelson alleged that Benton would stick his tongue through his teeth at her, but the investigation revealed that Benton had a missing tooth, and his sticking his tongue through the resulting space was a long-established, unconscious habit, not something intended for Nelson. Likewise, Nelson alleged that Benton had discussed an EED investigation with another senior correction officer in violation of DOC policy when the investigation revealed that the conversation was wholly appropriate under DOC policy because the other senior correction officer was the union representative. As such, these two false allegations should have served as an immediate caution for Ortega that Nelson might have been looking to cause trouble for Benton—that Nelson might have been lying—but Ortega never reviewed the results of the EED investigation or considered the possibility during her own.

As cross-examination continued, the nature of the investigation took greater shape: Ortega engaged in a highly bureaucratic, skewed, and incomplete investigation in which Ortega followed Nelson's lead and ignored Benton's defenses. First, Ortega did not know what Benton was alleged to have said on any of the dates or during any of the times Nelson accused him of having engaged in inappropriate conversations. The inappropriate conversations were alleged to have occurred in the tie-to, the IDR, and the kitchen office, but Ortega never looked at the video from any of those areas to discern whether Benton even had a conversation with anyone in those areas, let alone on those dates or during those times. In fact, Ortega admitted that no such evidence exists.

Ortega also admitted that no inmate corroborated any of the alleged conversations, that only Saunders and Sorrell claimed to have overheard them, and that she never followed up with Nelson about them. To be sure, Ortega never pulled the list of the ninety-six inmates for whom Benton was responsible to interview any of them. Instead, Ortega waited for Nelson, Sorrell, and Rivera to provide names.

Third, Ortega never followed up with a supervisor. Ortega admitted that Nelson had alleged that these conversations had occurred in front of four supervisors, yet Ortega interviewed none of them, and her excuse that she was never given the name of a supervisor is rejected. Even if a supervisor was required to have filed a report before Ortega could have interviewed a supervisor, then the inference that must be drawn is that no inappropriate conversation occurred for which a supervisor could have filed any such report. To be sure, no correction officer other than Nelson even complained to a supervisor about any such conversation.

Fourth, Ortega never interviewed any institutional helpers in the kitchen either. As with the inmates and the supervisors, Ortega excused her failure to interview any because none were named. In fact, Ortega admitted that she did not even know any institutional helpers worked in the kitchen until it was brought to her attention during the interviews she conducted.

Fifth, Ortega never investigated why Nelson might have lied about these conversations. Ortega admitted that Benton denied all allegations, that he was forthright in answering all her questions, and that he explained why Nelson might have lied about these conversations. Ortega also admitted that she is trained to investigate all allegations—including the allegations about why Nelson might have lied—but that she failed to investigate those allegations, and her excuse that Benton failed to file a formal complaint as her reason why is rejected, as is her explanation that an affirmative defense is not part of an investigation. Ortega also admitted that she failed to investigate whether Nelson had complained about anyone else during her career or how often she complained about others during her career. Ultimately, Ortega admitted that this investigation was her first investigation through which charges were brought, and the fact that Ortega did

not investigate any affirmative defenses, coupled with the fact that Nelson did not testify at the hearing, undermines both the investigation and its conclusion.

Finally, Ortega admitted that DOC policy required both Sorrell and Rivera to report their allegations, that both Sorrell and Rivera failed to report their allegations, and that the DOC failed to charge either Sorrell or Rivera for their failure to do so.

So, from her interviews with Sorrell, Saunders, and Rivera, all Sorrell, Saunders, and Rivera told Ortega were the following and nothing more:

- Sorrell told Ortega that Benton said, "THOT."
- Saunders denied that she witnessed any of the misconduct that Nelson alleged but acknowledged that she had told the EED that she had heard Benton refer to inmates as "girls" and "homos" and talk about "inmates sleeping together."
- Rivera told Ortega that Benton said, "When you are fucking him, once the head is in, even if they change their mind, they have the right to finish fucking."

F.

The statements Sorrell, Saunders, and Rivera had provided earlier to the EED contained little else or nothing more. In his statement to the EED, dated May 18, 2017, R-5, Sorrell acknowledged that Benton would talk to the inmates in the cage area about "homosexual acts" and "the inmates having sex with each other" and that the inmates would "hold a conversation with him about it." Sorrell added that "[Benton] does like to talk a lot about sucking dick." R-5. Later, in his statement to the EED dated July 13, 2017, R-6, Sorrell acknowledged that he did not know that Benton had said "THOT," admitted that he did not know what Benton had been saying, and believed that Benton had said "that." "I hear him talking to the inmates, but I don't know what he's saying to [them] and then the inmates start laughing." R-6.

In her statement to the EED, dated May 10, 2017, R-7, Saunders acknowledged nothing more.

In his statement to the EED, dated May 25, 2017, R-4, Rivera acknowledged nothing more.

On cross-examination, Ortega admitted that she noticed inconsistencies between these statements to the EED and statements made to her, but she continued that she did not memorialize them in her report because the statements to the EED meant nothing to her.

II

At the hearing, neither Sorrell nor Rivera distinguished himself. Sorrell testified that he heard Benton use the word "THOT," and make the statement, "Leave my THOT alone," but he could not provide a date or time when he heard Benton use the word or make the statement. He could only generalize that he heard it in the tie-to by the podium and near the caged area during pat down, and his testimony that he heard Benton make the statement, "Leave my THOT alone," was something new. He did not say that he heard Benton make that statement during his interview with Ortega or the EED.

On cross-examination, Sorrell admitted that he has been charged with PREA violations in the past and that he too has been a target of SID investigations. He approximated that he has been charged with twelve PREA violations but said that he did not know how many times he has been the target of an SID investigation. I find that hard to believe. Indeed, I found most of what Sorrell said hard to believe. Even though Sorrell reviewed his statement to the EED and his interview with the SID in preparation for his testimony, Sorrell still had poor recall of both his statement and his interview, and at times it seemed as if he was guessing or simply making things up. In short, Sorrell was not a trustworthy witness upon whose testimony I could rely.

Rivera testified that he heard the comment, "When you are fucking him, once the head is in, even if they change their mind, they have the right to finish fucking," when he

was taking count of the inmates in the IDR. Rivera explained that Benton made the comment in the office of the IDR, and that he heard the comment through the doorway and through the window. Rivera continued that he was "shocked" by the comment and believed that he was required to report it. Yet he failed to do so. "I did not think it was necessary," he said. This thought process is incongruous. Either Benton made a statement that necessitated its reporting, or it did not occur at all. It cannot be both.

Meanwhile, on cross-examination, Rivera admitted that his interaction with Benton was limited—that it was only for five minutes twice a week (on Sundays and Mondays, over a period of two years, as he was Benton's relief during that time)—and that he could not recall anything else that was inappropriate. Regarding the allegedly lone, shocking, comment, "When you are fucking him, once the head is in, even if they change their mind, they have the right to finish fucking," Rivera could not recall the date or time it occurred or the names of the inmates who allegedly witnessed it. In fact, Rivera admitted that he merely picked three inmates out of a possible eight or ten who could have witnessed the comment and provided their names to the SID, and when those three inmates were then questioned, all three denied witnessing anything inappropriate. In response, Rivera suggested that the inmates denied witnessing the comment because they did not want to cause trouble for themselves.

Other than this speculation, Rivera provided nothing new during his testimony, and the manner in which he testified instilled no confidence, as he seemed unsure or confused throughout his testimony. There were even times when he seemed lost or bewildered. Mostly, Rivera was hesitant, and when he did seem to remember something, he strained. Worse, Rivera's testimony and Nelson's allegations did not fit. For example, Rivera told the EED that Nelson was not present when Benton is alleged to have made the comment, "When you are fucking him, once the head is in, even if they change their mind, they have the right to finish fucking," and at the hearing, Rivera said that he never mentioned this comment to Nelson, which is consistent with his statement to the EED, but Nelson had identified Rivera as a witness to the comment, which begets the question, "How did Nelson know that Benton made the comment?" Either Nelson was present when Benton made the comment, or Rivera did mention it to Nelson. Both cannot be true. To explain this, Rivera testified that he learned Nelson was angry with Benton, which suggests that

Rivera did tell Nelson about the comment, but Rivera later testified that in addition to him not telling Nelson about the comment, Nelson did not tell him about the comment. Again, both cannot be true. In short, Rivera made it impossible for me to rely on anything he said. As a result, I give his testimony no weight.

III

Robert LaPenta is a lieutenant with the DOC and has been with the DOC for the past thirty years. LaPenta currently serves in the standards unit for the Correctional Staff Training Academy in Sea Girt, New Jersey, where he provides in-service training for correction officers. Although LaPenta did not provide the PREA training to Benton in this case, LaPenta is familiar with Benton, having supervised Benton in the past. LaPenta opined that Benton is a "good officer," and he could not recall any problems with him.

Sylvia Brunson is a civilian employee who has been with the NJDOC for the past thirty-one years. Brunson currently serves as the regional food service supervisor at East Jersey State Prison in Rahway, New Jersey, where she supervises the institutional trade instructors (ITIs). The ITIs are the ones who supervise the inmates who work in the kitchen. In this role, Brunson works indirectly with Benton. Brunson testified that she would be in the kitchen with Benton approximately once a month, and that she never heard anything about Benton that would have been violative of any policy during this time. In fact, Brunson said that in October 2019, Benton asked her out on a date, and today, they are engaged to be married.

Yvonne Lee is an ITI who worked in the kitchen with Benton during the 4-a.m.-to-12:30-p.m. shift. She testified that she had a "good working relationship" with Benton, that they had a "good rapport," and that they sometimes texted one another outside of work. She explained that they had been working together on this shift five days a week for the past nine years and that she had never seen Benton interact with either inmates or ITIs inappropriately. She also said that she had never heard of a correction officer—including Nelson, Sorrell, Saunders, and Rivera—complain about Benton. According to Lee, Benton is "a gentlemen" and "a standup-guy."

IV

Benton testified that he has worked for the NJDOC for approximately nineteen years and has been working in the IDR at East Jersey State Prison for the past four years, where he was responsible for its security and supervision. Benton was later transferred to Northern State Prison because this case was filed and is pending. Benton explained that he did not supervise the ITIs; rather, he worked with them. Benton said that he had no problem with Sorrell (who was a "brother officer"), Saunders (whom he did not know well), or Rivera (who would often come in late to relieve him). Benton, however, had a problem with Nelson—because Nelson had a problem with him. Benton testified that Nelson had a problem with Martinez, and when Benton chastised them for arguing in front of the inmates, Nelson wanted to "write up" Martinez. Benton explained that when Nelson asked him to contribute to the write up, he said "no"—which is when Nelson threatened him. "You'll see," he said she said, and the EED complaint followed.

Benton testified that he did not engage in any inappropriate conversations with inmates and employees that were sexual in nature. He also denied that he said any of the specific statements Nelson, Sorrel, Saunders, and Rivera attributed to him. In fact, Benton testified that he did not even know what a THOT was or what it meant when he first heard it. Indeed, Benton explained that he even joked about not knowing what a THOT was or what it meant because he called himself one when he first heard it. Moreover, Benton reviewed his recorded interview and written statement and agreed with both of them. Finally, Benton confirmed that he had never been disciplined before this case, that he had begun work with the NJDOC on April 1, 2001, and that he wanted to finish out his career so he could take care of his ailing sister.

On cross-examination, Benton testified that the two inmates from whom he first heard the term THOT were inmates whom he had known for fourteen years and who were being released to a halfway house. Benton explained that they were teasing him, using the word THOT, and after Benton called himself one in response to their teasing, he asked them what it meant. Benton said that it was the only time that he ever used the word, and that he told the inmates that they were lucky they were leaving the prison because he would have reported them for using such a word. Benton further explained that he had a

good rapport with the inmates, and that they called him "By-the-Book Benton," which is why he had never been disciplined. Moreover, Benton explained that when the EED got involved, he stayed clear of Nelson—which is why he never called her a "bitch," or anything else for that matter. He did not even know the nature of her dispute with Martinez; he simply wanted to remain uninvolved.

Given this discussion of the facts—including the failure of Nelson to testify at the hearing and the adverse inference that I draw from it, coupled with the unreliability of the testimony both Sorrell and Rivera provided at the hearing and the genuineness of the testimony Benton provided—I **FIND** that the appointing authority has failed to prove by a preponderance of the evidence any of the specifications contained in its Final Notice of Disciplinary Action.

CONCLUSIONS OF LAW

In appeals concerning major disciplinary action, the appointing authority bears the burden of proof. N.J.A.C. 4A:2-1.4(a). The burden of proof is by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), and the hearing is de novo, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980). On such appeals, the Civil Service Commission may increase or decrease the penalty, N.J.S.A. 11A:2-19, and the concept of progressive discipline guides that determination, In re Carter, 191 N.J. 474, 483–86 (2007). In this case, I found that the appointing authority failed to prove by a preponderance of the evidence any of the specifications contained in its Final Notice of Disciplinary Action. Therefore, I must **CONCLUDE** that the appointing authority has failed to prove any of the charges contained in its Final Notice of Disciplinary Action and that this case against Benton must be dismissed.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that this case against Benton be **DISMISSED**, that Benton be **REINSTATED** to his position of senior correction officer, and that Benton be **AWARDED** all requisite back pay, benefits, attorney fees, and costs associated with this case.

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. 40A:14-204.

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

February 16, 2023
DATE

BARRY E. MOSCOWITZ
Acting Director and Chief ALJ

Date Received at Agency: February 16, 2023

Date Mailed to Parties: February 16, 2023

dr

APPENDIX

Witnesses

For Petitioner:

Sylvia Brunson

Yvonne Lee

Jeffrey Benton

For Respondent:

Omayra Ortega

Robert Sorrell

Robert LaPenta

Victor Rivera

Documents

For Petitioner:

P-1	Letter from NJDOC to Lynne Nelson dated September 25, 2017
P-2	Interview of Sorrell dated October 7, 2017
P-3	Not in Evidence
P-4	Interview of Rivera dated November 2, 2017
P-5 to P-11	Not in Evidence
P-12	Informal Pre-Termination Hearing Decision dated December 7, 2017
P-13 to P-19	Not in Evidence
P-20	Statement of William Range dated November 16, 2017
P-21	Statement of Arbin Hook dated November 13, 2017
P-22	Statement of Kenneth Damon dated November 13, 2017
P-23	NJDOC Evaluations dated January 12, 2013

For Respondent:

R-1	Final Notice of Disciplinary Action dated April 12, 2018
R-2	NJDOC Internal Management Procedure IMM.001.PSA.001, Zero Tolerance of Prison Sexual Assault, effective July 1, 2013, revised May 24, 2016
R-3	NJDOC Prison Rape Elimination Act Overview and Pamphlet
R-4	Written Statement of Rivera dated May 25, 2017
R-5	Written Statement by Sorrell dated May 18, 2017
R-6	Written Statement by Sorrell dated July 13, 2017
R-7	Written Statement by Felicia Saunders dated May 10, 2017
R-8 to R-10	Not in Evidence
R-11	Report by Ortega dated November 29, 2017
R-12	Basic Course for State Correction Officers, Prison Rape Elimination Act, revised January 2011
R-13	Not in Evidence
R-14	Sign-Out Attendance Form dated January 12, 2017
R-15	Individual Training Summary Report dated December 21, 2017
R-16	NJDOC Rules and Regulations Receipt dated May 1, 2001
R-17	NJDOC Law Enforcement Personnel Rules and Regulations Revised January 2012
R-18	NJDOC Human Resources Bulletin 84-17, Disciplinary Action, undated
R-19	Work History for Benton, from January 1, 1985, to November 15, 2021