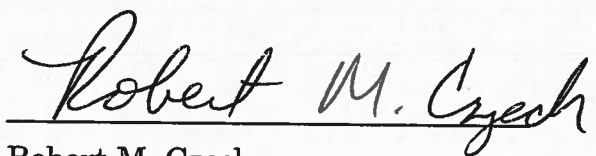


Re: Kenneth Bynum

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
OCTOBER 1, 2014



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 12403-13
AGENCY DKT. NO. 2014-500

**IN THE MATTER OF KENNETH BYNUM,
MERCER COUNTY DEPARTMENT OF
PUBLIC SAFETY.**

Jeffrey S. Ziegelheim, Esq., for Kenneth Bynum, appellant (Alterman & Associates, LLC, attorneys)

Kristina E. Chubenko, Assistant County Counsel, for Mercer County Department of Public Safety, respondent (Arthur R. Sypek, Jr., Esq., County of Mercer, County Counsel, attorney)

Record Closed: July 17, 2014

Decided: September 2, 2014

BEFORE JOSEPH A. ASCIONE, ALJ:

STATEMENT OF THE CASE

On August 23, 2013, appellant, Correction Officer (CO) Kenneth Bynum (Bynum), timely appealed his August 13, 2013, ten-day suspension by the Mercer County Department of Public Safety (MDPS), Corrections Center (CC) for sleeping at post while on duty, and other sufficient cause all occurring on December 31, 2010. The August 13, 2013, Final Notice of Disciplinary Action, (FNDA), (J-1), sustained charges of violation of N.J.A.C. 4A:2-2.3(a)(11), Other Sufficient Cause - violation of a rule,

regulation, policy, procedure, order or administrative decision specifically, Standard Operating Procedure (SOP) 004 (D-15) on the Mercer County Table of Offenses; violation of N.J.A.C. 4A:2-2.3(a)(11), Other Sufficient Cause - neglect of duty, loafing, idleness or willful failure to devote attention to tasks which would result in danger to persons or property (B-2) on the Mercer County Table of Offenses; violation of N.J.A.C. 4A:2-2.3(a)(11), Other Sufficient Cause-Sleeping on Duty (B-3), on the Mercer County Table of Offenses; and violation of N.J.A.C. 4A:2-2.3(a)(6), Conduct Unbecoming a public employee. Appellant denies sleeping on duty, the predicate for the issuance of these violations.

PROCEDURAL HISTORY

On January 4, 2011, a Preliminary Notice of Disciplinary Action (PNDA)(R-2) issued against Bynum, with an additional separate specification of violation of N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty, the remaining violations the same violations identified in the August 13, 2013, Final Notice of Disciplinary Action (FNDA). On July 22, 2013, Bynum received his disciplinary hearing on the PNDA. This matter was transmitted to and filed with the Office of Administrative Law on August 29, 2013, by the Civil Service Commission 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 hearing was held on April 3, 2014. At that time, the parties requested the transcript prior to setting a date for the issuance of written closing statements and legal memorandum. The record closed on July 17, 2014, upon the receipt of the post-hearing submissions

FINDINGS OF FACT

The parties submitted a joint stipulation of facts J-1, from that stipulation, material facts are undisputed, I **FIND** the following **FACTS**:

1. Bynum has been employed with the County of Mercer since March 2, 2009 in the position of correction officer.

2. On December 31, 2010, Bynum was working his bidded post as the living unit officer for the Northeast One unit on A-Tour (11p.m. to 7a.m.).
3. On December 31, 2010, Lieutenant Farah Fiorvanti (Fiorvanti) was employed in the position of Correction Sergeant with the County of Mercer.
4. On December 31, 2010, Fiorvanti was assigned to Internal Affairs.
5. On December 31, 2010, Fiorvanti ordered Bynum to write an incident report why he was sleeping on duty.
6. On or about January 4, 2011, and August 13, 2013, a PNDA and FNDA previously identified above were respectively issued.

TESTIMONY

LIEUTENANT FARAH FIORVANTI (Fiorvanti)

Fiorvanti testified she currently is a lieutenant at the CC, and held that title for the last year and a half (T8-3 to 6). On December 31, 2010, her title was sergeant with the Internal Affairs (IA) of the CC (T8-3 to 6). Part of her regular duties as an IA sergeant included performance of security checks during the A-Tour (11:00 p.m. to 7:00 a.m. shift) (T9-17 to 22). On December 31, 2010, at approximately 3:32 a.m., during the course of her security check of Northeast One Living Unit, she observed appellant asleep at his desk with his hat pulled down and his chin in his chest (T10-6 to 13). She proceeded to conduct her security check. This included walking a catwalk approximately thirty feet, checking on the rear doors and then walking back to appellant's desk (T10-19 to 23). Fiorvanti testified that she signed the log by removing it from in front of appellant and returning it to its place after signing it at 3:33 a.m. (T10-23 to 25)(R-4). Fiorvanti observed that appellant did not move or open his eyes, and still appeared to be asleep with his mouth open (T10-25 to T11-2). She then proceeded up to Northeast Two Living Unit, she observed the correction officer there also asleep. She conducted her security check there, signed the log book for the Northeast Two

Living Unit and then on the stairwell stomped her feet loudly on the first two steps up (T14-21 to T15-7). This woke both appellant and the other correction officer (T15-12 to 23). Fiorvanti observed appellant's head react to the stomp (T16-2 to 6). Fiorvanti testified that she stomped on the steps to wake the officers. Ventilation fans were on, but she stomped loud enough to wake both officers (T15-12 to 23). Fiorvanti then advised both officers to walk around (T15-24 to T16-1). Some time later, she directed appellant to write an incident report (T16-23 to 25)(R-3). Fiorvanti reviewed the incident report prepared by Bynum, she asked Bynum whether he wished to submit the report because of its inaccuracy. Fiorvanti disputed Bynum's report regarding his claim, "I was not sleeping." Fiorvanti testified that she pulled the logbook away from him, and Bynum did not acknowledge Fiorvanti's presence or action (T37). Fiorvanti testified that she did not have to remove the logbook from Bynum's person or possession (T38-6 to 14). Fiorvanti commented, "I had to be close to him to slide it away from him, and it's not a quiet process when you slide a log book, it's not a little piece of paper, it's a thick long book and if somebody's that close in your vicinity, especially working in a jail, you would move."

Fiorvanti testified that Bynum violated SOP 4, specifically, 1.02.10 Sleeping on duty will be considered gross neglect of duty and will not be tolerated.

DISCUSSION

Fiorvanti's testimony is concise and relates the events as she observed them on December 31, 2010. She expresses no doubt in her observations that at approximately 3:32 a.m., Bynum slept while Fiorvanti performed her inspection of his responsibility area, living unit Northeast One A-Tour. Her action in performing her inspection gave her the time to observe Bynum, not only at the time she arrived at Northeast One, but also for a short period of time thereafter. She made an entry into the Northeast One logbook, after sliding it across the desk, within close proximity to Bynum. He did not react. Her waiting to stomp on the steps to awaken Bynum, afforded her the time to observe Bynum, and completed her responsibility to rectify the situation by requiring Bynum to walk around, become more alert, and fulfill his responsibilities.

Contrary to appellant's closing argument that Fiorvanti observed Bynum for only a matter of seconds, she observed him prior to performing her inspection and while she completed her log in entry. She noticed the difference as Bynum's mouth open on her return to his desk (T36-2 to 15). Appellant's closing argument questions why Fiorvanti did not take immediate corrective action on arrival, or upon signing the log entry. Appellant had the opportunity to question Fiorvanti at the hearing as to this, but did not pursue that line of questioning. Respondent's counsel did elicit from Fiorvanti, that discipline issues of corrections officers would be done outside the presence of the inmates. Appellant's closing argument also notes that three ventilations fans were on, due to the high temperatures in Northeast One, creating a noise issue, which prevented appellant from hearing Fiorvanti on the unit. The noise issue should have created an equal obligation on Bynum's part to be more alert to activities on the unit. His incident report (R-5) reflected his eyes were closed and he did not hear Fiorvanti come onto the unit. Appellant's closing argument questions the absence of physical evidence to support sleeping. The argument incorrectly characterizes Fiorvanti's testimony as a "mere impression." Her testimony is credible. Appellant's argument suggests a successful violation of sleeping on duty requires more than an observation over the period of two minutes. This tribunal cannot accept that argument. The last of appellant's arguments is that an inference should be drawn that Bynum's incident report is accurate because he was not charged with falsification of a report. There was no development of this position at the hearing, there are numerous reasons during the deliberative process of what charges are brought or not brought. No inference can be made from the decision not to charge falsification of records or submitting a false report. Appellant has provided no legal support for this position.

Respondent has also sought a factual inference from the absence of the appellant taking the stand. This is an administrative hearing, at times, such an inference may be appropriate. Here though appellant is within his rights to rely solely on his incident report and compel respondent to its burden of proof. Respondent's proofs are sufficient without the need for any inference. If testimony were sought to be elicited from appellant, respondent could have requested he take the stand.

On December 30, 2010, Bynum completed an incident report at 5:37 a.m. (R-5). The incident report reflected his eyes were closed, the unit was warm, and the ventilation fans were on at the time Fiorvanti came on to the unit. He did not see her or hear her when she came on the unit. He first observed her standing on the steps. In the report, Bynum denies Fiorvanti's view that he was sleeping. He denies sleeping. The statement that he was not sleeping cannot be accepted as fact. He states that he did not see her when she came on the unit. His eyes were closed, and the unit was warm and the ventilation fans were on.

Fiorvanti's duty to perform security checks motivated her activities. There is no indication that her testimony was motivated for other reasons. She observed Bynum asleep. She pursued her direct duties and continued to observe Bynum at various times during her security inspection. Had Bynum been alert there would be no disciplinary proceeding. At the end of her security inspection, she woke Bynum by stomping on the steps. She acted appropriately, observing Bynum, over a short period of time, but at the conclusion of her duties, she did not leave the unit without waking Bynum. She then had a duty to require him to fill out an incident report and to do so herself (R-3).

ADDITIONAL FINDINGS OF FACT

As a result of the testimony and documentary evidence, I **FIND** the following additional **FACTS**:

1. On December 31, 2010, at approximately 3:32 a.m. Fiorvanti observed Bynum with his cap pulled down over his head, his chin resting to his chest asleep at the desk of Northeast One living unit.
2. Fiorvanti proceeded to perform her inspection duties and returned to the desk at Northeast One living unit. She again observed Bynum asleep, at this time with his mouth open, cap still on, and chin to his chest.

3. She proceeded to slide the large logbook from a position facing Bynum to herself, and made her log entry at 3:33 a.m. Bynum still asleep did not react to her presence.
4. Fiorvanti proceeded to the stairs performed the security inspection at Northeast Two and upon completion, proceeded to the stairs made two stomping sounds with her boots in an effort to wake Bynum and another corrections officer. The action had the anticipated results and Bynum awoke.
5. Fiorvanti directed Bynum to walk around .
6. Fiorvanti directed Bynum to complete an incident report, he completed it at 5:37 a.m. (R-5). The incident report reflected his eyes were closed, the unit was warm, and the ventilation fans were on at the time Fiorvanti came on to the unit.
7. On December 31, 2014, Fiorvanti completed an internal affairs incident report (R-3) at the instruction of her supervisor. Upon review of the Bynum incident report, she inquired of Bynum whether he wanted to submit his report considering its inaccuracy. Bynum stated, "yes."
8. Bynum's sleeping on duty places in danger the persons and property of other inmates and staff at the CC.
9. Bynum received and signed for the SOP on March 4, 2009 (R-7).

LEGAL ANALYSIS AND CONCLUSION

Civil service employees's rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil service law, a public entity should not be burdened

with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 11A:1-2(a). Such an employee 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).

An appeal to the Civil Service Commission requires the OAL to conduct a de novo hearing to determine the employee's guilt or innocence, as well as the appropriate penalty if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987).

The burden of persuasion falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The appointing authority must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

I **CONCLUDE** that respondent has met its proof by a preponderance of the evidence that Bynum slept while on duty, a violation of N.J.A.C. 4A:2-2.3(a)(11), section reference has changed since the date of the offense now N.J.A.C. 4A:2-2.3(a)(12), specifically, violation of a rule, regulation, policy, procedure, order or administrative decision, Standard Operating Procedure (SOP) 004 (D-15) on the Mercer County Table of Offenses.

I further **CONCLUDE** that respondent has met its proof by a preponderance of the evidence that Bynum slept while on duty and placed the property and persons of the other inmates and staff in danger, a violation of N.J.A.C. 4A:2-2.3(a)(11), Other Sufficient Cause - neglect of duty, loafing, idleness or willful failure to devote attention

to tasks which would result in danger to persons or property (B-2) on the Mercer County Table of Offenses.

I further **CONCLUDE** that respondent has met its proof by a preponderance of the evidence that Bynum slept while on duty, a violation N.J.A.C. 4A:2-2.3(a)(11), Other Sufficient Cause specifically violation of Standard Operating Procedure (SOP) 004 (B-3) on the Mercer County Table of Offenses.

I further **CONCLUDE** that respondent has met its proof by a preponderance of the evidence that Bynum slept while on duty, a violation of N.J.A.C. 4A:2-2.3(a)(6), Conduct Unbecoming a public employee. This is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Because I have concluded that respondent proved that Bynum slept while on duty, a violation of the prior sections, I must also conclude that his actions violated this standard of good behavior.

PENALTY

When dealing with the question of penalty in a de novo review of a disciplinary action against a civil service employee, the proofs and penalty on appeal based on the charges presented must be evaluated. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962). Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. West New York v. Bock, supra, 38 N.J. at 522-24. Major discipline may include removal, disciplinary demotion, suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions evaluated by progressively

increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

Turning to Bynum's prior disciplinary record (R-9), it reflects one prior action within the two years preceding this offense. The prior action is for unsatisfactory attendance on March 7, March 28, and April 5, 2010, and resulted in an Official Written Reprimand (OWR). Also, see J-1, item 8.

Bynum's proposed suspension in this matter is ten days from the FNDA. The respondent initially sought in the PNDA a fifteen-day suspension. A violation of Standard Operating Procedure (SOP) 004 (D-15) on the Mercer County Table of Offenses provides for a range of discipline from OWR to Removal. A violation of Standard Operating Procedure (SOP) 004 (B-2) on the Mercer County Table of Offenses provides for a range of discipline from five days to Removal. A violation of Standard Operating Procedure (SOP) 004 (B-3) on the Mercer County Table of Offenses provides for a discipline of ten days to Removal. No discipline guideline appears for the violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming.

Respondent seeks against this appellant a greater discipline penalty than the ten days appellant previously determined. Such application is not without merit. Hon. Edgar Holmes, ALJ, observed that a typical first offender received a thirty-day suspension for sleeping on duty. Stevens v. Atl. County, 96 N.J.A.R.2d (CSV) 348 (citing Abercrombie v. DOC, 93 N.J.A.R.2d (CSV) 608); Allgood v. N.J. Training School, Jamesburg, 94 N.J.A.R.2d (CSV) 592; Dirmeitis v. E. Jersey State Prison Corr., 95 N.J.A.R.2d (CSV) 171.

Had the respondent initially sought such a discipline, this tribunal would not likely disturb such discipline. Here, however, the respondent made a determination, for whatever reason, that the discipline penalty of the appellant even at the time of the PNDA, should only be fifteen days. The respondent then determined a FNDA should be ten days. A reasonable calculation of progressive discipline in the presence of the prior OWR, the actions of the respondent, and the current four violations is ten days.

Accordingly, I **CONCLUDE** that the respondent's imposition of a ten-day penalty is appropriate.

ORDER

For the reasons stated above, I hereby **ORDER** that Bynum violated N.J.A.C. 4A:2-2.3(a)(11), specifically, violation of a rule, regulation, policy, procedure, order or administrative decision, Standard Operating Procedure (SOP) 004 (D-15) on the Mercer County Table of Offenses.

I further **ORDER** that Bynum violated N.J.A.C. 4A:2-2.3(a)(11), Other Sufficient Cause - neglect of duty, loafing, idleness or willful failure to devote attention to tasks which would result in danger to persons or property (B-2) on the Mercer County Table of Offenses.

I further **ORDER** that Bynum violated N.J.A.C. 4A:2-2.3(a)(11), Other Sufficient Cause specifically violation of Standard Operating Procedure (SOP) 004 (B-3) on the Mercer County Table of Offenses.

I further **ORDER** that Bynum violated N.J.A.C. 4A:2-2.3(a)(6), Conduct Unbecoming a public employee.

I further **ORDER** that Bynum's appeal is **DENIED** in all respects.

I further **ORDER** that the ten-day suspension against Bynum is **AFFIRMED** in all respects.


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 2, 2014
DATE



JOSEPH A. ASCIONE, ALJ

Date Received at Agency:

9/2/14

Date Mailed to Parties:

9/2/14

lam

APPENDIX
LIST OF WITNESSES

For Appellant:

None

For Respondent:

Lieutenant Farah Fiorventi, Internal Affairs, Mercer County Corrections Center

LIST OF EXHIBITS

Joint

J-1 Joint Stipulation of Facts executed by the parties, dated March 27, 2014

For Appellant:

None

For Respondent:

R-1 August 13, 2013, FNDA
R-2 January 4, 2011, PNDA
R-3 December 31, 2010, Internal Affairs Report
R-4 December 31, 2010, Log Sheet Bynum
R-5 December 31, 2010, Incident Report Bynum
R-6 SOP 004
R-7 SOP 004 Acknowledgement
R-8 Table of Offenses and Penalties
R-9 August 25, 2010, Final Notice of Minor Disciplinary Action