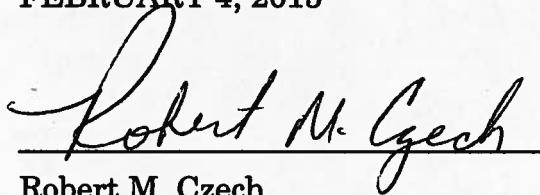


Re: Venus Young

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
FEBRUARY 4, 2015

A handwritten signature in cursive script that reads "Robert M. Czech". The signature is written in black ink and is positioned above a horizontal line.

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 14671-13

CSL 2014-819

**IN THE MATTER OF VENUS YOUNG,
EAST JERSEY STATE PRISON,
DEPARTMENT OF CORRECTIONS.**

Gina Mendola Longargo, Esq., for appellant (Law Offices of Gina Mendola Longarzo, LLC, attorneys)

Susan C. Sautner, Legal Specialist, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: June 26, 2014

Decided: December 29, 2014

BEFORE MUMTAZ BARI-BROWN, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Appointing Authority East Jersey State Prison, Department of Corrections (Department) charged Senior Correction Officer Venus Young (Appellant) with Neglect of Duty, Conduct Unbecoming a Public Employee and other sufficient cause, for which she received a 20-day suspension. Appellant appealed the discipline.

On October 11, 2011, the matter was transmitted to the Office of Administrative Law (OAL) 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 May 12, 2014. Upon receipt of post-hearing documents the record closed on June 26, 2014. Based on the administrative law judge's voluminous caseload extensions of time to complete the initial decision were granted. N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-18.8.

THE CHARGES

Charges:

N.J.A.C. 4A:2-2.3(a)7. Neglect of duty, Human Resources Bulletin 84-17 (as amended) B7. Serious mistake due to carelessness but not resulting in danger to person or property.

NJAC 4A:2-2.3(a)12. Other sufficient cause, Human Resources Bulletin 84-17 (as amended) D6b. Loss or careless control of radio, mace or handcuffs

NJAC 4A:2-2.3(a)12. Conduct unbecoming a public employee; Human Resources Bulletin 84-17 (as amended) C11. Conduct unbecoming a public employee.

NJAC 4A:2-2.3(a)12. Other sufficient cause, Human Resources Bulletin 84-17 (as amended) E.1. Violation of rule, regulation, policy, procedure, order or administrative decision.

Incident(S) giving rise to the charge(s) and date on which it/they occurred.

On August 07, 2013 you reported that your departmentally assigned OC spray canister was stolen from your vehicle. You stated that you secured the OC spray inside your vehicle on 08-03-13 and went inside your home to use the bathroom. When you arrived back to your vehicle your rear car window was fund broken and your utility belt containing your canister of OC spray was stolen. An investigation was conducted which you revealed you inaccurately reported the theft of your mace and failed to properly and safely store your OC spray as per policy.

[R-1.]

SUMMARY OF TESTIMONY

The Department presented Sergeant Patricia McGill, who investigated the reported theft of Young's "Oleoresin Capsicum" (OC Spray or mace). McGill testified that officers are provided "security equipment" items, such as mace, protective vests, handguns, handcuffs and keys, which are used in performing their duties. "Security equipment" items must be used, handled and secured pursuant to the Department's policy. (R-7.) While on duty, OC Spray or mace is placed in a pouch and secured onto the officer's duty belt. Mace is carried only while on duty and in transport between the officer's home and workplace. When the officer is off-duty or home, the mace must be stored in a secure place. (R-7, R-8.)

On August 8, 2013, Young filed a report with the Newark Police Department, which revealed that on August 6, at 10:00 pm, she exited and locked her vehicle before entering her home. The next day, she prepared to drive to work and discovered that someone had broken into her vehicle and stole several items, including her mace and utility belt. (R-3.) McGill further testified that Young provided a different account of the incident in her "Special Custody Report". (R-4.) Contrary to the police report, Young reported that on August 7, 2013, "the officer placed items in the vehicle in preparation for reporting to work. The officer went in the house to use the bathroom. When the officer returned to the vehicle that was parked and locked in a secure driveway, someone broke into the vehicle and stole a utility belt with mace along with other items." (R-4.) McGill discussed the discrepancies between the two reports with Young's Union Representative and on August 21, 2013, McGill interviewed Young. (R-2.) Young maintained that she was in her car getting ready to drive to work and went back inside her home to use the restroom, leaving her utility belt in the car. Young told McGill that she was in the house for fifteen minutes. Young recalled hearing the sound of a window "smash" outside her home and shortly thereafter she learned that it was her car. McGill was not able to reconcile the discrepancy between Young's statements in the Newark Police Report (the items were in the car for fifteen hours, over night, R-3) and the Department's Operation Report (the items were in the car for fifteen minutes, R-4). During her interview with McGill, Young maintained that the incident occurred as she reported in the "Special Custody Report", R-4.

McGill concluded, however, "Either way it is against policy and procedure because if it went the first way, which she ran into the house to use the restroom, the belt should have went with her because the proper storage did not exist with that, that's not considered proper storage of your mace". Under cross examination, McGill acknowledged the penalty for loss or theft of security equipment, e.g., mace, is a ten-day suspension. However, the employer retains discretion to impose a lesser or greater penalty. McGill's testimony was credible and straight forward.

The Department presented Richard Salort, Administrative Lieutenant. Salort's duties include handling Performance Reports, personnel, custody attendance, security infractions, assigning administrative investigations and reviewing the completed investigation reports. Employee discipline for infractions or wrongdoing is handled through a collaborative review by the Administrator Major. Salort assigned Sgt. McGill to investigate Young's loss of mace. However, he drafted the Preliminary Notice of Disciplinary Action. Salort explained the reasons to impose the 20-day suspension. Officers must secure their equipment at all times, which includes keeping it on their person when on duty. Security equipment includes OC spray (mace), hand guns, hand cuffs, radios and batons. Officers began carrying OC spray in 2012 and received training on its use and storage. Salort further testified that officers must keep their OC spray in their presence at all times, even when traveling to and from work. This includes any stops during the commute, e.g., to use the bathroom. Due to the harmful consequences of mace getting into possession of unauthorized persons or criminals, the officer's failure to properly store her mace may result in discipline of a ten-day suspension to removal. Salort did not participate in issuing Young's discipline but referred that portion of the investigation to the Administrator Major, who issued the charges. Salort's testimony was credible and forthright.

Appellant Venus Young became a Correction Officer in 2001. She testified that she received training on the use of OC Spray but never received a written copy of the policy and claimed she received no directives on the proper storage of mace. Moreover, she never read a copy of the policy. She further testified about the incident. On August 6, 2013 she completed her work shift at 10:00pm, returned home, parked

her car inside the locked gate, entered her home, placed her belt and items on the coat rack and activated her alarm. The next day, she prepared to report to work for the 2:00 to 10:00pm shift, and got into her car, which was still parked in the driveway. However, before starting the engine, she left the car to return to the house to use the bathroom. She was in the house no longer than fifteen (15) minutes. While inside she heard a window smash but did not believe it was her car. She entered the car, started the engine and proceeded to drive to work, but did not notice that her rear passenger window was broken until she reached the toll booth. She called the Center and reported the incident to the Lieutenant on duty, continued to drive to work, where she filed the Incident Report, R-4. With regard to the Newark Police Report, Young further testified, "The officers came out and they took a report but they didn't confirm with me where to pick the report up, they came around 2:00 in the morning and they woke me up out of my sleep and apparently they didn't record the exact information that I gave them." While taking Young's statement, the officers remained in their patrol car. After reading the report, she made several attempts to correct the information recorded by the Newark police officers. Young testified that the Newark Police Department refused to make additional amendments to the report, R-3.

FINDING OF FACTS

Based on a review of the relevant evidence, I **FIND** the following **FACTS**.

1. Venus Young began employment as a Correction Officer in 2001.
2. Security equipment includes OC spray (mace), hand guns, hand cuffs, radios and batons. (R-8.)
3. Officers carrying security equipment are trained in the proper use, handling and storage of security equipment. (R-8.)
4. Officers shall report the loss or theft of his/her OC Spray (mace) "to local law enforcement authorities and to the correctional facility Center Control or the

New Jersey Department of Corrections Central Communications Unit within three (3) hours from the time he/she is aware that the canister is missing." (R-8.)

5. The officer's failure to properly store her mace may result in discipline of a ten-day suspension to removal. (R-9.)

6. Young's police reports with the Newark Police Department, R-3, and the Operations report with the Department of Corrections, (R-4) report reveal two versions of the incident regarding the theft of her OC Spray.

DISCUSSION

The Civil Service Commission has jurisdiction to hear major disciplinary disputes under N.J.S.A. 34:13A-5.3. Major discipline includes removal or fine or suspension of more than five working days. N.J.A.C. 4A:2-1.4. Employees may be disciplined for insubordination, neglect of duty, failure to perform duties, and conduct unbecoming a public employee, among other things. N.J.A.C. 4:2-2.2. Appeals before the Commission are conducted as hearings de novo. N.J.A.C. 4:2-2.3. East Patterson v. Dep't of Civil Serv., 47 N.J. Super. 55 (App. Div. 1957); Newark v. Civil Serv. Comm'n, 114 N.J.L. 406, 413 (1935).

The Appointing Authority, East Jersey State Prison, Department of Corrections, has the burden of proof by a preponderance of the credible evidence. N.J.S.A. 11A:1-1 to 12-6. This tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of the truth." Jackson v D.L. & W.R.R., 111 N.J.L. 487, 490 (E. & A. 1933). Preponderance is 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). The evidence must be such as to lead a reasonable cautious mind to a given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958). Where the standard is reasonable probability, that is, preponderance of the evidence, the evidence must be such as to "generate belief that the tendered hypothesis is in all

human likelihood the fact.” Loew v Union Beach, 56 N.J. Super. 93, 104 (App. Div 1959).

The Department contends that Young’s behavior in reporting the stolen OC Spray was careless and violated the Department’s Policy. Young first report on August 7, 2013, claimed that her vehicle was broken into and her utility belt stole when she left the vehicle in a locked area of her driveway to return to her house for fifteen minutes to use the bathroom. In contrast, her report filed with the Newark Police Department states that on August 6, 2013, she locked her vehicle in a secure driveway at 10:00pm and returned to the car the next day to discover the vehicle had been broken into and her OC Spray stolen. Young testified that her attempts to amend the conflicting reports were unsuccessful because the Newark Police Department refused to make the changes. Appellant maintains that the Department’s evidence violated the AG Guidelines, department training procedures for handling and storing OC Spray, and relies on impermissible hearsay.

I have considered the evidence and arguments presented by the parties. The determination of the witness’ credibility often turns on the value that a finder of the facts gives to the testimony of the witness. The process of evaluating the credibility of witnesses entails observing demeanor, evaluating the ability to recall specific details, considering the consistency of the testimony under direct and cross-examination, determining the significance of any inconsistent statements or evidence, and otherwise developing a sense of the witness’s candor. Determining credibility also requires an overall assessment of the witness’s story in light of its rationality, internal consistency and the manner in which it “hangs together” with the other evidence. See Carbo v. U.S., 314 F.2d 718 (9th Cir. 1963), cert. denied sub. nom. Palermo v. U.S., 377 U.S. 953 (1964)..

Young’s report of the incident reveals a wide discrepancy regarding the amount of time the vehicle was left unattended with the security equipment inside the car. However, some inconsistencies in a witness’s testimony do not warrant an automatic discounting of that testimony as incredible. United Stations of N.J. et al. v. Getty Oil Co. et al., 102 N.J. Super. 459 (Ch. Div. 1968). The testimony must be such that the

administrative law judge can reasonably conclude that the witness is wholly unworthy of belief. Accordingly, the trier of fact must carefully weigh the evidence before rejecting testimony, even if not directly contradicted, when it is contrary to the circumstances.

Appellant offered no proof to support her belief that the charges against her were filed in retaliation to a discrimination complaint that she filed. Indeed, Appellant's evidence lacks motive on the part of the Department's investigators or Administrators. The testimony presented by the Department was candid, unbiased and believable. On the other hand, Appellant's credibility is undermined by the wide deviation of time in which her security equipment was left unattended. I have carefully considered the difference between the reported time on the Newark Police Report R-3, (August 6, 10:00pm to August 7, 2:00 pm) and the reported time on the Operations Report R-4, (Young re-entered her house for no longer than fifteen minutes to use the bathroom when someone broke into the vehicle and stole her utility belt, mace and other items). Young's claim that Newark Police Officers reported incorrect information and her unsuccessful attempts to amend the reports regarding theft of the OC Spray is questionable. Moreover, Young has been a Correction Officer since 2001 to present, less one year on disability leave. Thus, she is a veteran and experienced Correction Officer, who should be familiar with the use and handling of security equipment, including OC Spray. Consequently, I am more persuaded by the evidence presented by the Department than that presented by Appellant.

CONCLUSION

Based on the whole of the evidence, I **CONCLUDE** the Appointing Authority, East Jersey State Prison Department proved by a preponderance of the relevant and credible evidence the charges stated in the Final Notice of Disciplinary Action dates 09-12-13 including Neglect of duty and Conduct Unbecoming a Public Employee.¹

PENALTY

¹ Unbecoming conduct" is broadly defined to include any conduct "which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." Karins v. Atlantic City, 152 N.J. 532, 554 (1998), quoting In re Emmons, 63 N.J. Super. 136, 140 (1960).

I have carefully considered whether the penalty of a 20-day suspension is reasonable, appropriate and consistent with the law. In determining the reasonableness of a sanction, the employee's past record and any mitigating circumstances should be reviewed for guidance. West New York v. Bock, 38 N.J. 500 (1962). However, the courts should not adhere to rigid disciplinary guidelines in assessing penalties. To determine whether sufficient cause exists to justify the sanction, the conduct must be examined in light of certain factors. Moreover, evaluating appellant's conduct must be made in context with its relationship to the nature of the job and the circumstances, which may impact specific conduct. On appeal, the Board may modify a penalty originally imposed. N.J.S.A. 11A-2-9. Henry v. Rahway State Prison, 81 N.J. 571 (1980). Indeed, the Board is empowered to substitute its judgment on the appropriate penalty, even if the local appointing authority has not clearly abused its discretion. Henry at 579. However, the penalty imposed may not be so disproportionate to the offense and the mitigating factors that the administrative decision is arbitrary and unreasonable. Feldman v. Town of Irvington Fire Department, 162 N.J. Super. 177, 182 (App. Div. 1978). Here, there exist no mitigating circumstances to warrant a lesser penalty.

Based on the whole of the evidence, I **CONCLUDE** that a suspension of twenty (20) days is appropriate and reasonable.

ORDER

It is hereby **ORDERED** that the suspension of twenty (20) days be **AFFIRMED** determination of East Jersey State Prison that Officer Venus Young Brown violated Newark Police Rules and Regulations and warranted.

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.

December 29, 2014
DATE

Mumtaz Bar Brown
MUMTAZ BAR BROWN, ALJ

Date Received at Agency:

12-29-14

Date Mailed to Parties December 30, 2014
dr

Suzanne Perdue
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

Presented by Appellant:

Venus Young

Presented by Respondent:

Sergeant Patricia McGill

Richard Salort, Administrative Lieutenant

Exhibits

For Appellant:

P-1 Photos of Young's Residence, Gate and Driveway

For Respondent:

- R-1 Final Notice of Disciplinary Action, dated 9-12-13 and Preliminary Notice of Disciplinary Action, dated 8-22-13
- R-2 Investigation report dated 8-21-13
- R-3 Incident Report from Newark PD dated 8-8-13 and 9-9-13
- R-4 Special Custody Report of Appellant dated 8-7-13 and 8-8-13
- R-5 Unusual Incident Report dated 8-9-13
- R-6 Memorandum from Major Cifelli dated 8-12-13
- R-7 Internal Management Procedure – Security Equipment Management
- R-8 Internal Management Procedure – Department Assigned OC
- R-9 NJDOC Human Resources Bulletin 84-17, as amended Disciplinary Action Policy
- R-10 Work History of Venus Young

