

Re: Kenneth Carter

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
MAY 6, 2015

A handwritten signature in blue ink that reads "Robert M. Czech". The signature is written in a cursive style 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. CSR 13243-14

**IN THE MATTER OF KENNETH CARTER,
EAST JERSEY STATE PRISON.**

Robert R. Cannan, Esq., for appellant Kenneth Carter (Markman & Cannan, attorneys)

Peter H. Jenkins, Deputy Attorney General, for respondent East Jersey State Prison (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: February 17, 2015

Decided: April 1, 2015

BEFORE MICHAEL ANTONIEWICZ, ALJ:

STATEMENT OF THE CASE

Correction Officer Kenneth Carter (Carter or appellant) was hired by the respondent, East Jersey State Prison, on May 5, 1988. Respondent alleges that appellant was charged with four criminal complaints by the Linden Police Department as follows: 1) aggravated assault (N.J.S.A. 2C:12-1(B)); 2) terroristic threats (N.J.S.A. 2C:120-3A); 3) possession of weapons unlawfully (N.J.S.A. 2C:39-5D); 4) possession of a weapon for an unlawful purpose (N.J.S.A. 2C:39-4D); and a charge of driving while intoxicated (DWI). Respondent alleges that appellant committed four violations of

criminal law and a DWI and thus committed conduct unbecoming a public employee and other sufficient cause. On February 12, 2014, Carter entered a Pre-Trial Intervention (PTI) program without a plea of guilty. Appellant was suspended without pay on September 3, 2013, and was subsequently terminated, effective September 26, 2014.

Respondent has charged appellant with conduct unbecoming a public employee and violating criminal law and other charges as a result of an incident allegedly occurring on September 2, 2013.

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

PROCEDURAL HISTORY

On September 3, 2013, and September 5, 2013, Preliminary Notices of Disciplinary Action (PNDA) were created and filed seeking appellant's removal from his position as a correction officer. Respondent suspended appellant without pay, effective September 3, 2013. On September 25, 2014, respondent issued a Final Notice of Disciplinary Action (FNDA) that sustained the disciplinary charges set forth below and removed appellant from his position with the New Jersey Department of Corrections, effective September 26, 2014.

Appellant appealed the FNDA and the matter was filed with the Office of Administrative Law (OAL) on October 10, 2014, for a hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The undersigned was assigned to the case and a telephone prehearing conference was held on November 14, 2014. The hearing was held on January 23, 2015, and February 17, 2015, after which the record closed.

ISSUES

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

SUMMARY OF TESTIMONY

Sergeant Edward Chabak

Sergeant Edward Chabak (Chabak) has been employed by the City of Linden Police Department for over thirty years and a sergeant for eight years. Chabak recalled that he handled an encounter with Carter on September 2, 2013. Chabak described that he was in a marked police car on South Wood Avenue and a car driven by a female was flashing its high beams at him. The female, who was later identified as Verona Carter, pulled up behind his police vehicle. Mrs. Carter informed him that her husband, Kenneth Carter, threatened her with a knife and she was also being chased. Chabak recalled that Mrs. Carter's hand was bleeding and noticed a wound to one of the fingers on her right hand. Appellant stopped behind Mrs. Carter's vehicle. Chabak then called for back-up. It appeared to Chabak that Mrs. Carter was upset and he described Carter as indifferent.

Subsequently, back-up police officers arrived at the scene and a field sobriety test was conducted on Carter. The matter was then turned over to Officer Schulhafer for an investigation. Linden Police Officers then went to the Carter's residence. Chabak explained that since it was not his investigation, and he did not go to the Carter residence. He went to police headquarters on September 2, 2013, around 10:50 p.m. to type up the report regarding the incident. (J-5.)

On cross-examination, Chabak stated that no ambulance was called to the scene. Carter appeared to him to be intoxicated at the scene but that Carter was neither aggressive nor agitated. Carter did not identify himself as an officer.

Officer James Schulhafer

Officer James Schulhafer (Schulhafer) was with the Linden Police Department for about four and a half years. Schulhafer was on the patrol division and with the night shift at the time of the incident. Schulhafer recalled that Chabak was flagged down by Mrs. Carter. Schulhafer pulled up alongside Carter's vehicle. He was made aware that there was a possible domestic violence incident taking place. As a result of the stop, Schulhafer took Carter out of his vehicle. He handcuffed Carter and placed him under arrest. Schulhafer did not speak with Mrs. Carter at the scene. He described Carter as indifferent and that Mrs. Carter was at first panicked but then calmed down. Later, Schulhafer went through the restraining order process and then went to Carter's house. Schulhafer obtained the knife allegedly used during the incident at the house. Subsequently, Schulhafer completed a report. (J-6.)

Thereafter, at police headquarters, Mrs. Carter gave a formal statement and then went through the handwritten statement. Mrs. Carter stated that there was a verbal altercation that turned physical. Carter was charged with four criminal violations as follows: aggravated assault with a deadly weapon, terroristic threats, possession of a weapon for an unlawful purpose, and unlawful possession of a weapon. A Temporary Restraining Order was granted to Mrs. Carter. All of Mrs. Carter's statements were basically consistent.

During cross-examination, Schulhafer admitted that Carter was cooperative. Schulhafer searched Carter's car for weapons but no weapons were found. On September 2, 2013, Mrs. Carter completed a handwritten statement wherein she alleged that Carter threatened to kill her. Mrs. Carter also wrote in her statement that Carter put a knife up to her neck, she told him to stop because he was going to hurt her, and he told her to "shut the fuck up." She put her hand up as a shield and Carter cut her middle finger on her right hand. She yelled at Carter to leave her alone and then went to the bathroom in order to clean the cut on her finger. Her statement further indicates that Carter continued to yell at her. Thereafter, Mrs. Carter left the house and Carter grabbed her by the face and knocked her head into the wall. She got into her car

and drove off with Carter driving behind her. Mrs. Carter saw a police officer and flagged him down for assistance. (J-16.)

Schulhafer stated that he observed the cut on her right hand at the scene on the evening of September 2, 2013. Schulhafer asked Mrs. Carter if she needed any assistance and she declined. No first aid was given to Mrs. Carter. Importantly, Schulhafer stated that he noticed that Mrs. Carter was bleeding at the scene of the traffic stop. Schulhafer went to the Carter house and took the evidence, i.e., a ten-inch knife. Schulhafer does not recall any further contact with the parties.

Lieutenant Andrew Bara

Lieutenant Andrew Bara (Bara) was a Linden Police Officer for twenty-three years. He served as a lieutenant for four years. Bara was running the night shift on September 2, 2013. Bara was not on the scene on that evening but he did hear the call. Bara found out that Carter was a correction officer. Bara made an inquiry with a correction officer responsible for the correction officers at East Jersey State Prison as to possible firearms assigned to Carter. He found that none were assigned to Carter, but Carter had two weapons on his own. The two personal weapons registered to Carter were seized in 2011 and were never returned to Carter as verified from the records department. Accordingly, Bara was satisfied that Carter had no weapons. Bara informed the correction officers' representative about the Carter incident. Bara reviewed Mrs. Carter's written statement and her recorded statement. Bara reviewed the statements in order to decide if the charges were warranted. He determined the charges were warranted.

Detective Kenneth Mikolajczyk

Detective Mikolajczyk (Mikolajczyk) was with the Linden Police Department for twenty-three years. Mikolajczyk handled fraud, sexual assault, and domestic violence. Mikolajczyk took Mrs. Carter's statement after the incident. Mikolajczyk asked Mrs. Carter to describe the events that took place that evening. Mrs. Carter described an incident of domestic violence with Carter. Mikolajczyk described Mrs. Carter as upset

and he noticed that Mrs. Carter had an injury to her right hand finger. In Mikolajczyk's opinion, he had no doubt that Mrs. Carter was telling the truth.

Mikolajczyk was not part of any field investigation. He reviewed the reports on this incident in order to prepare for the hearing. Mikolajczyk noticed the injury to Mrs. Carter's right hand, but stated that there was no bandage on the cut. He stated that the physical evidence taken was a knife with a black handle, which he believed was in the record bureau.

Lieutenant Richard Salort

Lieutenant Richard Salort (Salort) was with the East Jersey State Prison for approximately twenty-eight years, with seven years as a lieutenant. Salort was in charge of policy and procedures. He handled performance reports and disciplinary matters. Salort knew Carter during his tenure. Salort stated that Carter worked as a correction officer for over twenty years. He stated that the personal conduct policy applied to correction officers both on and off duty. It was Salort's opinion that Carter's conduct in September 2013 was a violation of the public trust.

Salort described that he drafted two PNDAs dated September 3, 2013, (J-1) and September 5, 2013, (J-2) and was served upon Carter via certified mail. Copies of both PNDAs were forwarded to Beverly Hastings. As a result to the four third-degree charges, a FNDA dated September 25, 2014, was drafted removing Carter from his position, effective September 26, 2014. (J-3.) Carter did not request a departmental hearing. Accordingly, Carter was suspended without pay pending the criminal charges.

Salort recalled that Carter entered a PTI program and the charges were dismissed. The decision to remove Carter was not Salort's but rather made by the Appointing Authority. Salort stated that he was unaware of any change in discipline policy regarding domestic violence. It was his understanding that they weigh all kinds of charges, i.e., guilty pleas to charges and not guilty pleas to charges. It was also Salort's understanding that Carter entered the PTI program regarding the four criminal charges, fulfilled the program, and thus all of the criminal charges were dismissed.

Salort testified that he had worked with Carter and that he had nothing bad to say about him. Salort was unaware of any prior discipline for Carter. Carter had over twenty years of service and did not plead guilty to any crimes regarding this incident. Salort was unaware if SID interviewed Mrs. Carter.

On redirect, Salort testified that conduct policy deals with conduct outside the workplace. Accordingly, the conduct policy applied to Carter while he was off duty in this particular incident. It was required that a correction officers be in control at all times.

On re-cross examination, Salort stated that even if criminal charges were dismissed on PTI, the personal conduct policy still applied to Carter's actions. Salort reiterated that he did not have a say into whether to charge carter once PTI was completed. Exhibit J-13 was the Pretrial Intervention Program, Order of Dismissal, and Order to Discharge Bail, dated August 5, 2014.

Mrs. Verona Carter

Mrs. Verona Carter (Mrs. Carter) testified that she knew Carter for thirty years and was married to Carter for twenty years. They have three children together, current ages seventeen, nineteen, and twenty-two. Mrs. Carter confirmed that Carter worked for the Corrections Department for over twenty years.

Mrs. Carter and Carter had marital problems due to his infidelity and they separated but later reconciled prior to 2013. There was a dispute on September 2, 2013, at the marital home. The dispute began on September 1, 2013, because Carter did not get a gift for Mrs. Carter for their anniversary. They stopped speaking to each other. Then they began arguing. Mrs. Carter wanted Carter to leave the home but, instead, Mrs. Carter left and Carter followed her. While on the road, Mrs. Carter flagged down a Linden Police Officer. Mrs. Carter was "fed up" with Carter and did not want to speak to Carter on September 2, 2013. She wanted to make Carter leave the house.

Mrs. Carter was issued a Temporary Restraining Order (TRO) and Carter was removed from the marital home, which was ultimately dismissed. Mrs. Carter stated in her testimony that she had cut her finger on her right hand while moving stuff on September 1, 2013, with her daughter. Mrs. Carter stated that Carter was not the cause of the cut as she had told the Linden Police. She also testified that the allegation that Carter threatened her with a knife was not true and that she wanted a TRO, but lied about the cut as well. Mrs. Carter never told the Linden Police that her allegations were not true.

Mrs. Carter sent a letter dated February 17, 2014, to the Union County Prosecutor's Office requesting that her husband be accepted into the PTI program. (J-20.) Mrs. Carter stated that no one forced her to sign that letter. Carter was accepted into the PTI program and she had an expectation that Carter would ultimately go back to work. In addition, Mrs. Carter sent a letter to Investigator Smith on August 28, 2014, (J-21) stating that she was not going to testify against Carter and that they have reconciled their family matters.

Mrs. Carter stated that Carter was suspended from the East Jersey Prison without pay. Thereafter, Carter went to a hospital in Princeton in order to address his alcohol issues. In addition, she and Carter attended marriage counseling which Mrs. Carter claims went well. As of the date of the hearing, the parties were living together.

Mrs. Carter testified that there were no holes in the bathroom door; there was no physical violence between her and Carter on September 2, 2013; and that she had lied to the police because she was angry with Carter due to his drinking and infidelity. Mrs. Carter was feeling frustration, but that things have been good between them since the counseling. Mrs. Carter wants her husband to be reinstated to his job.

On cross-examination, Mrs. Carter again stated that she lied to the police about Carter being physical with her. Carter did argue with her but did not strike her. Mrs. Carter went to the police in order to get a TRO. She had sought a TRO before September 2013. Mrs. Carter admitted that they have three children together, all of college age, and that things would be better if Carter was working.

Kenneth Carter

Kenneth Stephen Carter (Carter) is forty-seven years old. He graduated high school but did not attend college. Carter was hired as a correction officer on May 5, 1988. In September 2013, he had worked over twenty-three years as a correction officer. He had no previous major discipline on his record.

Carter testified that there were marital issues between him and his wife. They had separated for a year and a half and then got back together in September 2013. The marital issues involved other women and Carter's drinking. Carter received treatment for his alcohol issues including ten days in a Princeton Hospital and thirty days in under Richard B. Seely, M.D., in Florida. Since rehabilitation, Carter has been clean and sober for about two years.

Carter admitted that he was charged criminally as a result of an incident on September 2, 2013. The Linden Police took his statement at the scene. Carter was not asked any questions from SID. Most of the allegations made by his wife to the Linden Police did not occur. Carter denied making any terroristic threats and did not hold a knife to his wife. He stated that he always cooperated with the police. After the incident, Carter addressed his alcoholism immediately. In addition, Carter and his wife attended marriage counseling.

Carter stated that he pled not guilty to the criminal charges and entered the PTI program regarding the criminal charges. This program was offered by the Union County Prosecutor's Office. He stated that he entered the PTI program because he did not want his wife to be accountable for making false statements to the police. In addition, Carter stated that he knew of other correction officers who got their job back after completing the PTI program, although he admitted he was unaware of the specifics of their cases.

In order to complete the PTI program, Carter had to report to a probation officer, he had to complete community service, and he had to complete anger management.

Thereafter, Carter received an Order of Dismissal in only six months. In August 2014, Carter received the Order of Discharge.

Carter further testified that he had an expectation that he would get his job back from the Department of Corrections. He was advised that because of the "Ray Rice" incident, the Appointing Authority was reconsidering whether to take him back. Carter stated that it hurt to hear that because nothing happened with his wife. Carter said he wanted two things: 1) get back together with his wife; and 2) to get his job back by being reinstated.

On cross-examination, Carter admitted that he had been drinking on September 2, 2013, and that he did drive drunk. Carter also admitted that a restraining order was entered against him as a result of the incident. Carter also admitted that this was not the first time that his wife sought a TRO.

FINDINGS OF FACT

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

1. Appellant was an employee of the New Jersey Department of Corrections, East Jersey State Prison as a correction officer.
2. Verona Carter, appellant's wife, informed the Linden Police Department that Carter used a knife to threaten her by putting it to her throat and causing a cut to her middle finger on her right hand.
3. Verona Carter also alleged that Carter threatened her life with her reasonable belief that he would carry out such a threat.
4. As a result of the above allegations on September 2, 2013, Carter was charged with the following crimes: aggravated assault with a deadly weapon; possession

of a weapon for an unlawful purpose; terroristic threats, which are all third-degree crimes; unlawful possession of a weapon, which is a fourth-degree crime; and driving while intoxicated.

5. Appellant was then charged by the New Jersey Department of Corrections with violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, Human Resources Bulletin 84-17 C 11, and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause.
6. Appellant was then suspended on September 3, 2013, without pay, pending a Loudermill Hearing pursuant to two PNDAs, dated September 3, 2013, and September 5, 2013.
7. Appellant was then served with a FNDA relating to the above charges which ordered for his removal as a correction officer as of September 26, 2014.
8. At no time was Carter convicted of any offenses contained in the complaint as he entered a plea of not guilty and entered the PTI program that he successfully completed resulting in a dismissal of all criminal charges.
9. There was a guilty plea to the charge of DWI. Carter was driving a vehicle while intoxicated on September 2, 2013, and lost his driver's license for a period of three months.
10. Carter's entry into the PTI program did not require any admission of guilt to the underlying charges.
11. Carter completed his probationary period under the PTI program and all criminal charges were dismissed.
12. Verona Carter gave detailed statements, both orally and in writing, of the facts involving her husband which supported the criminal charges against Carter.

13. Carter did commit acts against Verona Carter on September 2, 2013, including terroristic threats, possession of a weapon for an unlawful purpose, unlawful possession of a weapon, and aggravated assault with a deadly weapon.
14. The above acts led to three charges of third-degree crimes, one charge of a fourth-degree crime, and one charge of driving while intoxicated.

LEGAL ANALYSIS AND DISCUSSION

A civil service employee's rights and duties are governed by the Civil Service Act and the regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to -12-6 and N.J.A.C. 4A:1-1.1 to 4A:2-6.2. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex DOC Park Comm'n, 46 N.J. 138, 147 (1965). Governmental employers also have delineated rights and obligations. A public employee who is protected by the provisions of the Act may be subject to major discipline for a wide variety of offenses connected to his employment. N.J.A.C. 4A:2-2.2(a) provides the penalties for a major discipline of removal or suspension for more than five working days at any one time. The Act sets forth that it is State policy to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, 2-2.3(a).

There is no constitutional or statutory right to a government job. State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, which should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, the City of Newark bears the burden of proving the charges

against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

Charges

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

The Administrative Code does not specifically define unbecoming conduct. Unbecoming conduct is not precisely defined in N.J.S.A. 11A or N.J.A.C. 4A. See, e.g., Emmons, supra, 63 N.J. Super. at 140. The term unbecoming conduct has been applied in case law to cover a broad range of conduct, including misconduct. The Court in Pfitzinger v. Board of Trustees, PERS, 62 N.J. Super. 589, 602 (Law Div. 1960), in attempting to define conduct unbecoming or misconduct, stated, "[T]here is no specified definition for what conduct falls into these categories. Each case must be decided on its own merits in the light of the public position held by the individual involved." In Hartmann v. Police Department of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992), the court held that a finding of misconduct need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior, which devolves upon one who stands in the public eye as an upholder of that, which is morally and legally correct. Unbecoming conduct

may include behavior, which is improper under the circumstances. The conduct may be less serious than a violation of the law, but is inappropriate on the part of a public employee because it is disruptive of governmental operations. Depending upon the incident complained of and the employee's past record, major discipline may include removal for conduct unbecoming a public employee. Bock, 38 N.J. at 522-24. It is axiomatic that in order to prove that the employee violated criminal law, the respondent must show that the employee entered a plea of guilty to the violation of criminal law or facts which prove that the employee violated the specified criminal law.

Credibility

In the instant case, evidence was presented at the hearing proving that Carter did, in fact, violate a number of criminal laws. The respondent relies on the statements made by Mrs. Carter just after the incident and that a complaint was filed against Carter, which was ultimately discharged through the PTI program. It is noted for the record that both Carter and Mrs. Carter (saying that she lied at the time of the incident) testified at this hearing that very little of what Mrs. Carter stated (and wrote) earlier actually happened and that she lied at that time when it was reported to the Linden Police.

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

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

The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). A decision must favor the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth. Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). Credibility and credible testimony must not only proceed from the mouth of a credible witness, but it must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

In the instant case, I have considered the strength of the testimony, the demeanor, as well as the possible conflicting position(s) of witnesses, prior to finalizing a decision. I note that there were statements made by Mrs. Carter, very close in terms of time to the incident, supporting the incidents contained in the criminal complaint. Respondent presented evidence of supporting the criminal charges. The fact that Carter entered a plea of not guilty and then entered into the Pre-Trial Intervention Program and ultimately successfully completed same is of little relevance. Neither Mrs. Carter nor Carter were credible in their testimony regarding the events of September 1 and 2, 2013. Mrs. Carter's testimony was especially unconvincing as it appeared clear to me that she had sanitized the events of September 2, 2013, and was clearly motivated by financial factors and/or the fact that Mr. and Mrs. Carter had reconciled after Carter's rehabilitation and marriage counseling. It is clear to me that the statements made by Mrs. Carter in the midst of the events have far more credibility than those statements testified to at the hearing. Her statement made to the Linden Police orally as well as the handwritten statement contained consistent stories with much detail. The statements went far beyond what was required in order to "get Carter out of the house." There is a history of prior TROs issued by Mrs. Carter, thus she was fully

aware of the consequences of her statements. Her testimony at the hearing rung hollow and lacked a core of truthfulness needed in order to be persuasive.

Preponderance of the Evidence

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

In disciplinary cases the appointing authority has both the burden of persuasion and production and must demonstrate by a preponderance of the competent, relevant and credible evidence that it had just cause to discipline the officer and file charges. See Coleman v. E. Jersey State Prison, CSV 1571-03, Initial Decision (February 25, 2004), <http://njlaw.rutgers.edu/collections/oal/> (citations omitted); see also N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Polk, supra, 90 N.J. at 560; In re Darcy, 114 N.J. Super. 454, 458 (App. Div. 1971); N.J.S.A. 11A:2-6(a)(2); -21; N.J.A.C. 1:1-2.1; N.J.A.C. 4A:2-1.4. A preponderance of evidence has been defined as that evidence which generates belief that the tendered hypothesis is in all human likelihood the fact. Martinez v. Jersey City Police Dep't, CSV 7553-02, Initial Decision (October 27, 2003), <http://njlaw.rutgers.edu/collections/oal/> (quoting Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959)).

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

the fact. The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein, supra, 26 N.J. at 275.

Penalty

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

Based on an assessment of the type, nature and extent of the alleged infractions presented in the instant matter, the penalty imposed by respondent is clearly in proportion to the violations alleged. The extent and severity of the charges and specifications as set forth on the Final Notice of Disciplinary Action and as described in the testimony leaves me to believe that the penalty of removal is appropriate as to the charges which were proven at the de novo hearing.

CONCLUSION

Based on the above, I **CONCLUDE** that respondent has met the burden of proving by a preponderance of the evidence that appellant's action rose to the level of conduct unbecoming to a public employee or a violation of criminal law that warrants a termination from his employment with respondent as a correction officer. I **CONCLUDE** that appellant's alleged violation of criminal law or conduct unbecoming a public employee was proven as the evidence presented showed that there were acts so egregious to warrant termination of employment.

I further **CONCLUDE** after careful consideration of all the foregoing and pursuant to applicable law that the respondent has established by a preponderance of credible evidence all of the charges against appellant.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action by the Appointing Authority against appellant is hereby **AFFIRMED**.

It is **ORDERED** that the penalty of termination shall be imposed in this matter.

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, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 1, 2015
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency:

April 2, 2015

Mailed to Parties: *April 6, 2015*

Laura Sanders

jb

DIRECTOR AND
ADMINISTRATIVE LAW JUDGE

APPENDIX

List of Witnesses

For Appellant:

Mrs. Verona Carter
Kenneth Carter

For Respondent:

Sergeant Edward Chabak
Officer James Schulhafer
Detective Kenneth Mikolajczyk
Lieutenant Richard Salort

List of Exhibits in Evidence

Joint:

- J-1 Preliminary Notice of Disciplinary Action dated September 3, 2013
- J-2 Preliminary Notice of Disciplinary Action dated September 5, 2013
- J-3 Final Notice of Disciplinary Action dated September 25, 2014
- J-4 Linden Police Department Booking Report dated September 3, 2013
- J-5 Sgt. Edward Chabak Incident Report dated September 3, 2013
- J-6 Officer James Schulhafer Supplementary Report dated September 3, 2013
- J-7 Lt. Andrew Bara Supplementary Report dated September 3, 2013
- J-8 Complaint Warrant No. 2009 W 2013 001182
- J-9 City of Linden Ticket No. 2009-L-139886
- J-10 Temporary Restraining Order dated September 3, 2013
- J-11 Special Custody Report dated September 3, 2013
- J-12 Memo from Major Joseph Cifelli to Kenneth Carter
- J-13 PTI Order of Dismissal and Order of Discharge Bail dated August 5, 2014
- J-14 Voluntary Statement of Verona Carter dated September 2, 2013
- J-15 Victim Notification Form dated September 2, 2013

- J-16 Domestic Violence Victim Statement of Verona Carter September 2, 2013
- J-17 Domestic Violence Central Registry for Kenneth Carter
- J-18 Order of Dismissal, Temporary Restraining Order dated November 13, 2013
- J-19 Pre-trial Intervention-Order of Postponement dated March 12, 2014
- J-20 Letter from Verona Carter to Grace H. Park, Union County Prosecutor, dated February 17, 2014
- J-21 Letter from Verona Carter to Investigator Smith dated August 28, 2014

For Appellant:

- P-1 Report of Richard Seely, M.D., dated October 15, 2013
- P-2 Report of Princetta A. Edwards, LCSW, c/o Regroup Behavioral Services, dated July 21, 2014

For Respondent:

None