A-11

STATE OF NEW JERSEY

In the Matter of Natalie Whyano
Camden County
Department of Corrections

CSC DKT. NO. 2014-2689
OAL DKT. NO. CSR 6325-14

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: December 17, 2014 PM

The appeal of Natalie Whyano, a County Correction Officer with the Camden County Correctional Facility, Department of Corrections, removal effective February 27, 2014, on charges, was heard by Administrative Law Judge Edward J. Delanoy, who rendered his initial decision on November 13, 2014. Exceptions were filed on behalf of the appellant.

After reviewing the video and having considered the record in addition with the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on December 17, 2014, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Natalie Whyano.

Re: Natalie Whyano

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
DECEMBER 17, 2014

Robert M. Czech
Chairperson
Civil Service Commission

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 6325-14
AGENCY DKT. NO. N/A
2014-2689

IN THE MATTER OF NATALIE WHYANO, CAMDEN COUNTY CORRECTIONAL FACILITY.

Jacqueline M. Vigilante, Esq., for appellant (The Vigilante Law Firm, P.C., attorneys)

Antonieta Paiva Rinaldi, Esq., Assistant County Counsel, for respondent (Sherri L. Schweitzer, County Counsel)

Record Closed: October 27, 2014 Decided: November 13, 2014

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

STATEMENT OF THE CASE

Appellant Natalie Whyano was removed from her position as a correction officer at respondent's Camden County Correctional Facility (CCCF) after charges pertaining to a physical altercation with an inmate on July 7, 2013, were sustained. The specifications underlying the charges set forth:

> On or about 07 July 2013, you assaulted an inmate after he was walking away from you and entering a cell. Additionally, on or about 25 February 2014 during an Internal Affairs interview, you provided mistruths and false information to the interviewer, thereby impeding an Internal Affairs investigation. Your behavior as a correctional officer was inappropriate and your actions bring the department in disrepute.
>
> [R-1.]

PROCEDURAL HISTORY

On February 27, 2014, appellant was charged in a Preliminary Notice of Disciplinary Action. (R-1.) Appellant was also suspended with pay from her position. A departmental hearing was held on April 2, 2014, and all charges were sustained. A Final Notice of Disciplinary Action was filed on April 28, 2014, removing appellant from her position. (R-1.) Appellant appealed on May 6, 2014, and on May 21, 2014, the matter was filed at 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. Hearing dates were scheduled for July 17 and August 11, 2014, but on July 14, 2014, appellant requested an adjournment of those dates to allow additional time to complete expert discovery. Appellant also agreed, as part of that request, to waive back pay and to toll the running of the 180-day rule. The hearing was held on September 12, September 25, and October 1, 2014. Summation briefs were submitted on October 27, 2014. The record was closed on that date.

FACTUAL DISCUSSION

The following matters are not in dispute and I **FIND** them as **FACT**:

On July 7, 2013, at approximately 3:20 a.m., inmate T.C. was involved in an altercation with appellant. The manner in which appellant acted during and subsequent to the confrontation constitutes the material facts in dispute.

Testimony

Investigator Sergeant John Jones has been employed by the CCCF in Internal Affairs (IA) investigations for eight years. Jones began his investigation after receiving then Lieutenant Franceschini's report (R-5), which revealed that appellant punched inmate T.C. with a closed fist.

Jones initially reviewed appellant's incident and use-of-force reports of July 7, 2013 ("Reports"). (R-6; R-7.) In those Reports, appellant charged T.C. with two violations: 1) refusal to obey an order, and 2) conduct which disrupts. Jones viewed three angles of a video recording taken of the incident on July 7, 2013. (R-8.) The videos do not have audio. Jones testified that the videos begin with T.C. exiting cell 41 and walking toward the "BOSS" chair, a device that can check for weapons or hidden metal objects. (R-8 at 3:29:16.) T.C. approaches the BOSS chair and is about to sit down. (R-8 at 3:29.51.) Appellant waives T.C. away from the chair, and as T.C. walks away toward cell 41, appellant attempts to re-direct T.C. to cell 40 by grabbing the back of his shirt. (R-8 at 3:30:03.) T.C. turns and strikes appellant's hand in an apparent attempt to get her to remove her grip. Appellant grabs T.C. in the neck area and pushes him into the doorframe area of cell 41. A scuffle ensues, and appellant strikes at T.C.'s head and face three times. Appellant grabs T.C. by the back of the head and escorts him toward cell 40. Some part of T.C.'s body strikes the door of cell 40 and the door begins to close as T.C. is pulled past the door. Appellant re-opens the cell door and places T.C. in cell 40. No emergency code is called by the appellant as she engages T.C. At no time after appellant has T.C. in the cell 41 doorframe does T.C. exhibit any aggression toward appellant. T.C. was not injured in the scuffle.

Appellant was thereafter placed on the No Inmate Contact list. (R-9.) On February 15, 2014, Jones took a statement from appellant. (R-10.) In this statement, appellant admitted that she is familiar with the policies of the jail, and that she struck T.C. twice. (R-10 at page 6, line 11.) Appellant stated that she was told she did not have to write a report but she did so anyway. (R-10 at page 7, lines 1–2.) Appellant advised T.C. that he had a choice, and according to Jones, that is a bad practice. (R-10 at page 9, line 17.) Appellant admitted that she struck T.C. twice in the face, and that

she had not been trained in that manner. (R-10 at page 14, lines 15-21.) Appellant stated that she incorrectly reacted to T.C.'s failure to move and follow her orders by punching him twice. (R-10 at page 15, line 21.) Her correct reaction should have been to call a code. (R-10 at page 15, line 23.) Appellant also admitted that she was angry with T.C. (R-10 at page 16, line 14.) Appellant admitted that in retrospect, she should have handled the matter differently. (R-10 at page 20, line 11; page 33, lines 4–20.) Appellant did not set forth in either of her Reports that she felt threatened by T.C. (R-10 at page 28, lines 5–10.) Appellant stated that the correct way to guide an inmate is to walk behind the inmate and verbally advise the inmate of the appropriate orders to follow. (R-10 at page 30, lines 4–7.)

Jones next interviewed Lieutenant Franceschini (R-12) and Sergeant Antrilli (R-11). Both denied advising appellant that she did not have to write a report. Antrilli did not have T.C. evaluated medically, nor did he file a report, as required by General Order 13. (R-15 at 5.) Antrilli was not disciplined for this failure. Jones's investigation ended with his report and recommended charges. (R-4.)

Jones stated that appellant had alternatives to her treatment of T.C. She could have called a code or for assistance from another officer. She also should have allowed T.C. to enter cell 41, then requested assistance to place him back into cell 40.

Gary Merline has investigated several hundred excessive-force cases. He was accepted as an expert witness for respondent in the field of law enforcement and use of force. (R-16; R-20; R-21.) He reviewed all statements and reports of witnesses, and he reviewed the video prior to preparing his report. (R-17.)

While Merline believed that T.C. was aggressive in attempting to remove appellant's hand from his shirt, appellant's grabbing of T.C.'s shirt in an attempt to redirect him was not appropriate. Appellant should have called a code or for assistance from another officer. She also should have allowed T.C. to enter cell 41, then requested assistance to place him back into cell 40. If all else failed, appellant could then use mace or other similar-type spray.

Once T.C. was in the doorframe of cell 41, Merline observed that T.C.'s hands were at all times by his side, and that he continued to hold onto his sandals. Merline observed appellant attempt to strike T.C. three times, and he stated that appellant was correct when she stated T.C. was never aggressive. Contrary to appellant's statement, Merline did not observe T.C. attempting to break away from her.

Merline believed that appellant's use of excessive force began at the doorframe of cell 41. Although Merline was not involved in use-of-force training at the CCCF, he stated that appellant violated the Rules of Conduct, Use of Force (Non-Lethal) rules, because no exception for the non-use of force was present for appellant. (R-14 at 9, sec. 3.8.) Merline did not believe appellant was quelling a disturbance, preventing an escape, or arresting T.C. because he was offering resistance. Although Merline was not aware of what the CCCF officers are taught regarding the meaning of "quelling a disturbance," Merline believed that quelling a disturbance referred to an incident involving multiple inmates, rather than a one-on-one incident. Force also was not appropriate under the Use of Force, General Order 13, because none of the permitted reasons to use force was demonstrated by appellant. (R-15 at 3, sec. A.) Appellant did not use any alternatives to force. (R-15 at 4, sec. D.) Merline also believed appellant used excessive force when she was moving T.C. back toward cell 40. Merline opined that appellant's use of force was excessive.

Merline disagreed with Emanual Kapelsohn's opinion of appellant correctly using force for several reasons. First, Merline believed Kapelsohn provided information that was not part of the case, and that he used his own perceptions, rather than those of appellant, in reviewing the case. While Kapelsohn may have perceived a threat from T.C., appellant stated that she did not perceive such a threat. Second, unlike Kapelsohn, Merline did not believe T.C. was attempting to evade appellant's control, and Merline saw three punches thrown by appellant, rather than the two viewed by Kapelsohn.

Deputy Warden Christopher Fosler became involved when he received and reviewed appellant's Reports and the video of the incident. Fosler also reviewed Franceschini's report, and he recognized that after Franceschini concluded her

investigation of appellant's conduct, she did not refer appellant for discipline. (R-5.) Fosler concluded that there were several concerns with appellant's actions. Fosler was troubled that she grabbed at T.C.'s shirt, grabbed T.C. by his throat, and punched T.C. twice in the face with a closed fist. He concluded that appellant should have stepped away and called for assistance rather than engage T.C. in a conflict. T.C.'s actions did not require the level of response of punching by appellant.

CCCF has a tolerance for the use of force when necessary, but no tolerance when force is used unnecessarily. Appellant's conduct violated the CCCF's Use of Force policy, in particular, Guideline B(a), which prohibits striking an inmate to discipline him/her for failing to obey an order. (R-15 at 3.) In addition, Guideline B(e) prohibits employing a chokehold. (R-15 at 3.) Fosler concluded that appellant reacted inappropriately and not within the confines of the Use of Force policy. After speaking with the warden, the two agreed that notwithstanding appellant's history of nothing more than reprimands and counseling (R-19), removal was the appropriate discipline for the totality of appellant's actions. Fosler agreed that Antrilli failed to write a required report, and that he was not disciplined for this omission.

Captain Rebecca Franceschini was a lieutenant at the time of the incident, responsible for supervising other officers. Franceschini reviewed appellant's Reports and the video prior to meeting with appellant regarding the incident. Franceschini was troubled by appellant's admission in her Reports, namely, that appellant admitted that she was wrong and that she "just kinda lost it." (R-5.) Franceschini was also concerned that T.C. may have required medical attention, but she did not recommend discipline for appellant. This was because she was not authorized to reach conclusions on whether the use of force by an officer was appropriate. Franceschini was authorized to make determinations only for officer behaviors other than the use of excessive force. Franceschini notified IA of her concerns because IA had responsibility for determining discipline in use-of-excessive-force matters. Franceschini agreed that Antrilli failed to write a required report, and that he was not disciplined for this omission.

Emanual Kapelsohn has investigated several hundred excessive-force cases since 1984. He has testified twice in New Jersey in the area of correction officers, but

never for the employer. He was accepted as an expert witness in the field of law enforcement and use of force. (A-1; A-2.) He reviewed all statements and reports of witnesses, and he reviewed the video prior to preparing his report. (A-3.)

Kapelsohn believed that T.C. was assaultive in attempting to remove appellant's hand from his shirt. Kapelsohn stated that T.C. had his arms bent and was touching and pushing appellant when she grabbed him by his collar. Nevertheless, Kapelsohn agreed that appellant never stated that T.C. touched her. Kapelsohn testified that appellant initially threw a weak closed-fist punch at T.C. which glanced off the side of T.C.'s head. Kapelsohn subsequently saw appellant throw a closed-fist "girl punch" at T.C.'s face, but it failed to connect and missed entirely. He then viewed appellant place her open hand on the back of appellant's neck in an attempt to escort him out of cell 41. Kapelsohn did not believe this was a striking of T.C., and based upon his viewing of the video, he did not feel that appellant intended to cause serious bodily harm by her actions.

Kapelsohn reviewed the CCCF Use of Force policy and believed that appellant was not in violation. His view was that the appellant's objective reasonable perception of the danger she was in was the critical issue. Appellant's judgment, as well as the inmate's resistance, must be considered in a use-of-force case. Although appellant never stated that T.C. assaulted her, nor did she charge T.C. formally with assault, T.C. did threaten and assault appellant when he swept her hand off of him using an elbow sweep. Appellant was justified in her use of force because in Kapelsohn's view, after using the elbow sweep, T.C. had turned and faced appellant, and then tried to move toward cell 41. Appellant did not want T.C. in cell 41 because T.C. had not sat in the BOSS chair. T.C. then planted his feet, he was struggling, his hands were up, and he was not complying. At that time, appellant was vulnerable to being struck by T.C., and she was in an inherently dangerous situation. Kapelsohn agreed that T.C. never spit on, kicked, bit, or punched appellant. He also agreed that after T.C. turned and faced appellant, T.C. then backed up and moved toward cell 41. Appellant pursued T.C. and the incident escalated.

General Order 13 allows for the use of force when quelling a disturbance, and for self-defense. (R-15 at 3.) Appellant was correct in grabbing T.C.'s shirt and attempting to redirect him. When T.C. turned to face appellant and brought his hands up, appellant reacted reasonably. Although appellant does not describe being threatened by or engaged in a struggle with T.C. in her Reports, Kapelsohn felt that it was not unusual for officers to be brief in their reporting of incidents that happen quickly. Kapelsohn also believed that appellant was confronted with a disturbance, and that such a disturbance can arise in the context of a one-on-one incident. Kapelsohn opined that appellant's use of force, while not ideal or perfect, was not excessive and was reasonable to quell the disturbance and obtain compliance by T.C. He also stated that he believed appellant acted in self-defense, although he agreed that the term "self-defense" was never used by appellant. Kapelsohn stated that appellant's IA interview (R-10) was more of an interrogation than an interview. In addition, appellant's Reports were not intentionally inaccurate, but rather were inaccurate because appellant had not had the benefit of viewing the video of the incident prior to drafting her Reports.

Kapelsohn disagreed with Merline's opinion of appellant incorrectly using force for several reasons. First, Kapelsohn did not believe that appellant used the door of cell 40 to strike T.C. Second, Kapelsohn felt that the Attorney General Guidelines and CCCF Use of Force guidelines were not violated, and that no excessive force was used by appellant. The force used by appellant was caused by the actions of T.C.

FINDINGS OF FACT

The two experts disagreed as to whether appellant violated the CCCF Use of Force policy. Kapelsohn reviewed the CCCF Use of Force policy and opined that appellant was not in violation. Kapelsohn believed that General Order 13 allowed for the use of force when quelling a disturbance and for self-defense. In his opinion, appellant acted properly when she grabbed T.C.'s shirt and attempted to redirect him. When T.C. turned to face appellant and brought his hands up, appellant reacted reasonably. Kapelsohn also believed that appellant was confronted with a disturbance, and that such a disturbance can arise in the context of a one-on-one incident. Kapelsohn concluded that appellant's use of force was not excessive and was

reasonable to obtain compliance by T.C. He also stated that he believed appellant acted in self-defense.

Conversely, Merline believed that appellant's use of excessive force began at the doorframe of cell 41. Merline stated that appellant violated the Rules of Conduct, Use of Force (Non-Lethal) rules, because no exception for the non-use of force was applicable. Merline did not believe appellant was quelling a disturbance, preventing an escape, or arresting T.C. because he was offering resistance. Merline was of the belief that quelling a disturbance referred to an incident involving multiple inmates, rather than a one-on-one incident. Force was also not appropriate under the Use of Force, General Order 13, because appellant did not demonstrate an allowable reason to use force, and appellant did not undertake any alternatives to force. Merline also believed that appellant used excessive force when she was moving T.C. back toward cell 40. Merline concluded that appellant's use of force during the incident with T.C. was excessive.

The respondent did not produce an actual witness to the altercation. The direct participant, inmate T.C., did not provide a written statement. The respondent's evidence was the testimony of Jones, who viewed a recorded video version of the incident, as well as Fosler and Merline. The video recording was from three camera locations. These three camera angles provide a clear view of what occurred. (R-8.) What is undisputed, and admitted by appellant, is that she used physical force to secure inmate T.C.

Respondent's position is that the video did not match the Reports and statement given by appellant. In viewing the video, Jones and Merline observed that T.C.'s hands were at all times by his side, and that he continued to hold onto his sandals. Merline observed appellant attempt to strike T.C. three times, and he stated that appellant was correct when she stated that T.C. was never aggressive. Contrary to appellant's statements in her Reports, Merline did not observe T.C. attempting to break away from her.

Appellant's position is that use of force was not excessive and was reasonable to obtain compliance by T.C. Kapelsohn also stated that he believed appellant acted in self-defense.

The video from the three camera angles does provide a clear, unobstructed view of the incident. Although audio is not provided, the camera shows T.C. exiting cell 41 and walking toward the BOSS chair, a device that can check for weapons or hidden metal objects. T.C. approaches the BOSS chair and appears undecided about sitting down. Appellant waves T.C. away from the BOSS chair, and as T.C. walks away toward cell 41, appellant attempts to redirect T.C. to cell 40 by grabbing the back of his shirt. T.C. turns and strikes appellant's hand in an apparent attempt to get her to remove her grip. Appellant grabs T.C. in the neck area and pushes him into the doorframe area of cell 41. A scuffle ensues, and appellant is seen striking at T.C.'s head and face several times. Appellant grabs T.C. by the back of the head and escorts him toward cell 40. Some part of T.C.'s body strikes the door of cell 40 and the door begins to close as T.C. is pulled past the door. Appellant re-opens the cell door and places T.C. in cell 40. No emergency code is called by the appellant as she engages T.C. At no time after appellant has T.C. in the cell 41 doorframe does T.C. exhibit any aggression toward appellant. T.C. was not injured in the scuffle.

Based simply on the video, the fact that T.C. cannot be seen at any time charging appellant from any camera angle is sufficient proof to discount Kapelsohn's theory. Appellant did not at any time appear to be acting in self-defense. Kapelsohn's interpretation of events is inconsistent with what can be seen in the video. For this reason, I give only limited credibility to the testimony of Kapelsohn.

I **FIND** that Kapelsohn's testimony that T.C. was touching and pushing appellant while in the cell 41 doorframe was not credible. A review of the video reveals that appellant was the aggressor.

I **FIND** that the video is clear that appellant was involved in a confrontation with inmate T.C. Although the video contained no audio, it is plain that something occurred that caused appellant to become angry and aggressive towards T.C. I **FIND** that T.C.

did not follow the orders of appellant to return to cell 40 after leaving the area of the BOSS chair. In addition, the action of T.C. in removing appellant's grip on his shirt was an action that appellant perceived to be threatening. This action by T.C. so upset appellant that appellant reacted in anger, and she grabbed at T.C. in the neck area and attempted to twice punch T.C. in the face. Appellant, to her credit, admitted using force to restrain T.C., but I **FIND** that the force used was not used to restrain, but rather was used to aggressively punish, retaliate against or discipline T.C. for his actions. This action by appellant was an unlawful action, because it was not done in defense of an attacking or combative inmate. T.C. did not attack, and other than pushing appellant's hand away, was never combative. I also **FIND** that it has been proven by a preponderance of the evidence that appellant failed to exhaust all reasonable means before resorting to the use of force.

The record in this matter includes documentary evidence and the testimony of the individuals who had knowledge of the incidents they described. After carefully considering the testimonial and documentary evidence presented, and having had the opportunity to review the video on numerous occasions and to listen to testimony and observe the demeanor of the witnesses, including that of the two experts, I **FIND** the following to be the additional relevant and credible **FACTS** in this matter:

Appellant had been employed by the CCCF for approximately five years when the incident occurred. Appellant had no disciplinary history of abuse or mistreatment of inmates.

On July 7, 2013, at approximately 3:20 a.m., T.C. approached the BOSS chair. Appellant waved T.C. away from the chair, and as T.C. walked away toward cell 41, appellant attempted to re-direct T.C. to cell 40 by grabbing the back of his shirt. T.C. turned and struck appellant's hand in an apparent attempt to get her to remove her grip. Appellant then grabbed T.C. in the neck area and pushed him into the doorframe area of cell 41. A scuffle ensued, and appellant struck at T.C.'s head and face with a closed fist. Appellant grabbed T.C. by the back of the head and escorted him toward cell 40. Some part of T.C.'s body struck the door of cell 40 and the door began to close as T.C. was pulled past the door. Appellant re-opened the cell door and placed T.C. in cell 40.

No emergency code was called by the appellant as she engaged T.C. At no time after appellant had T.C. in the cell 41 doorframe did T.C. exhibit any aggression toward appellant. T.C. was not injured in the scuffle.

In her IA statement, appellant admitted that she is familiar with the policies of the jail, and that despite not being trained to do so, she struck T.C. twice in the face. Appellant stated that she incorrectly reacted to T.C.'s failure to move and follow her orders by punching him twice. Her correct reaction should have been to call a code. Appellant also admitted that she was angry with T.C. Appellant agreed that in retrospect, she should have handled the matter differently. Appellant did not set forth in either of her Reports that she felt threatened by T.C. Appellant stated that the correct way to guide an inmate is to walk behind the inmate and verbally advise the inmate of the appropriate orders to follow. In addition, in her IA statement, appellant stated that she asked Sergeant Antrilli if he wanted her to write a report and he said no. Neither Lieutenant Franceschini nor Sergeant Antrilli advised appellant that she did not have to write a report.

LEGAL ANALYSIS

Civil service employees' 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 Cnty. 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 a civil service 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).

In appeals concerning major disciplinary actions brought against classified employees, the burden of proof is on the appointing authority. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is a preponderance of the credible

evidence. In re Polk License Revocation, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). The preponderance may also be described as the greater weight of credible evidence in a case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Testimony, to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 554–55 (1954). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). An appeal to the Civil Service Commission requires the Office of Administrative Law to conduct a de novo hearing and to determine the appellant's guilt or innocence, as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987); Cliff v. Morris Cnty. Bd. of Soc. Servs., 197 N.J. Super. 307 (App. Div. 1984).

Based on the specifications in the charges, appellant was charged with unbecoming conduct, in violation of N.J.A.C. 4A:2-2.3(a)(6); neglect of duty, in violation of N.J.A.C. 4A:2-2.3(a)(7); and other sufficient cause, for unauthorized use of force, in violation of N.J.A.C. 4A:2-2.3(a)(12). In addition, appellant was charged with violations of CCCF Rules of Conduct 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 3.2 Security; 3.6 Departmental Reports; 3.8 Use of Force (Non-lethal); and General Order #013. Appellant has been removed from her duty as a result of this incident.

Appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee. Conduct unbecoming a public employee has been described as an elastic phrase that includes any conduct that adversely affects the morale of governmental employees or the efficiency of a public entity or conduct that has a tendency to destroy public respect for governmental employees and confidence in public entities. Karins v. City of Atl. City, 152 N.J. 532, 554–57 (1998); In re Emmons, 63 N.J. Super. 136 (App. Div. 1960). A finding or conclusion that a public employee engaged in unbecoming conduct need not be based upon the violation of a particular rule or regulation and may be based upon the implicit standard of good behavior

governing public employees consistent with public policy. City of Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955); Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992).

The video showed appellant aggressively move toward T.C., grab T.C. in the neck area, and punch T.C. in the face. Even accepting the testimony of Kapelsohn regarding T.C.'s use of threatening behavior, T.C. was continuously moving away from appellant until reaching the door jamb of cell 41. At that point, there is no evidence from the video that T.C.'s hands or arms came up in an aggressive manner. T.C.'s actions, without more, are insufficient to excuse appellant's behavior. This action represents conduct that could adversely affect the morale of governmental employees or the efficiency of a public entity or conduct that has a tendency to destroy public respect for governmental employees and confidence in public entities. Such actions do not reflect the implicit standard of good behavior governing public employees consistent with public policy. Therefore, as to this charge, respondent has met its burden of proof that appellant did commit an act of unbecoming conduct. I do so **CONCLUDE**.

Appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, unauthorized use of force. Other sufficient cause is an offense for conduct that violates the implicit standards of good behavior which devolve upon one who stands in the public eye as an upholder of that which is morally and legally correct. I have found that appellant did charge at T.C., and that appellant punched T.C. with a closed fist.

The Appointing Authority's Rules of Conduct, Section 3.8, Use of Force (Non-Lethal), sets forth:

> Personnel shall not inflict corporal punishment on the person of any inmate, prisoner, or other person, nor shall they strike or lay hands on an inmate, prisoner, or other person unless it is in self-defense or unless to prevent escape, serious injury to person or property, to quell a disturbance, or effect an arrest where resistance is offered. In all circumstances, only the amount of force necessary to accomplish the desired result is to be used.

[R-14 at 9.]

The Appointing Authority's Use of Force, Including Deadly Force, policy sets forth:

A. Permissable Force

When force may be used:

a. To defend one's self or others against physical assault;
b. To prevent serious damage to property;
c. To prevent escape;
d. To prevent or quell a riot and/or disturbance;
e. To prevent a suicide or attempted suicide; and
f. To enforce facility regulations or in situations where a ranking supervisor officer believes that the inmate's failure to comply constitutes an immediate threat to facility security or personal safety.

B. Impermissable Force

When force may not be used:

Force may not be used to punish, discipline or retaliate against an inmate; the following acts are strictly prohibited:

a. Striking an inmate to discipline him/her for failing to obey an order;
b. Striking an inmate when grasping the inmate to guide him/her, or a push, would achieve the desired result;
c. Using force against an inmate after he/she has ceased to offer resistance;
d. Striking an inmate with institutional equipment such as keys, handcuffs and flashlights, or striking an inmate restrained by a mechanical device, except as a last resort where there is no practical alternative available to prevent serious physical injury to staff and others;
e. Employing a chokehold or unauthorized weapon of intentionally striking an inmate's head against the wall, floor or other object.

[R-15 at 3.]

The Appointing Authority's Use of Force, Including Deadly Force, policy sets forth regarding alternatives to force:

> Whenever possible, alternative methods to resolve a conflict should be exhausted before force is used, for example, when an inmate refuses to obey an order, force should never be the first response. Employ the following techniques:
>
> a. Act and speak in a deliberate manner;
> b. Keep a safe distance;
> c. Listen to the inmate and ask for his/her cooperation;
> d. Explain the consequences of the inmate's behavior;
> e. Request the assistance of a supervisor and additional staff.

[R-15 at 4.]

Here, the use of force was not justified and authorized. Appellant was not properly using force to restrain T.C. Appellant did not encounter resistance from T.C., and while T.C. was attempting to move toward a cell where appellant did not want him, T.C. did not have a weapon, nor did he make any aggressive move toward appellant or bring his hands up towards appellant's body while in the door jamb of cell 41.

It is understood by this tribunal that the decision to use force is a decision that needs to be made quickly under difficult and unpredictable circumstances. However, appellant did not follow the dictates of the Use of Force Policy. The degree of force employed in this situation was not reasonably necessary.

Therefore, as to the charge of other sufficient cause, unauthorized use of force, respondent has met its burden of proof that appellant abused an inmate, and, therefore, appellant did commit an act of using unauthorized force. Therefore, respondent has

proven that appellant committed an act that violated standards of good behavior for a correction officer, and I do so **CONCLUDE**.

Appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(7), neglect of duty. This section prohibits negligence in performing one's duty. Appellant herself, in her statement to IA, admirably admitted her deficiencies in her conduct. Appellant admitted that she was familiar with the policies of the jail, that she struck T.C. in the face, and that she had not been trained in that manner. Appellant stated that she incorrectly reacted to T.C.'s failure to move and follow her orders by punching him twice. Her correct reaction should have been to call a code. Appellant was angry with T.C., and she agreed that in retrospect, she should have handled the matter differently. Appellant did not set forth in either of her Reports that she felt threatened by T.C., and she stated that the correct way to guide an inmate is to walk behind the inmate and verbally advise the inmate of the appropriate orders to follow. As a result, I **CONCLUDE** that appellant neglected her duty.

Appellant was charged with a violation of CCCF Rules of Conduct 1.1, Violations (In General). This section provides that

> [a]ny employee who violates any rule, regulation, procedure, order or directive, either by an act of commission or omission, whether stated in this manual or elsewhere, or who violates the standard operating procedure as dictated by departmental practice, is subject to disciplinary action in accordance with the New Jersey Department of Personnel (Civil Service) rules and regulations. Disciplinary actions shall be based on the nature of the rule, regulation, procedure, order, or directive violated, the severity and circumstances of the infraction and the individual's record of conduct.
>
> [R-14 at 2.]

For all of the same reasons appellant is guilty of violating N.J.A.C. 4A:2-2.3(a)(6), she must also be held responsible under this Rule of Conduct. Here, officers are required to maintain a high degree of self-control, remain professional at all times and control their tempers. Appellant did not do so in this instance. In addition, the pursuit of T.C. by

appellant and subsequent throwing of punches was unprofessional, disrespectful, and created a safety issue. This is because such actions can cause tensions to escalate, resulting in a possible assault on an officer. Therefore, respondent has proven that appellant committed an act of a violation of CCCF Rules of Conduct 1.1, Violations in General, and I do so **CONCLUDE**.

Appellant was charged with a violation of CCCF Rules of Conduct 1.2, Unbecoming Conduct. This section provides that

> [a]ll personnel are required to conduct themselves, both on and off duty, in such a manner as to reflect favorably on the department. Conduct unbecoming an employee shall include that which brings the department into disrepute, reflects discredit upon the employee as a member of the department, or which impairs the operation or efficiency of the department or the employee.
>
> [R-14 at 2.]

For all of the same reasons appellant is guilty of violating N.J.A.C. 4A:2-2.3(a)(6), she must also be held responsible under this Rule of Conduct. Therefore, respondent has proven that appellant committed an act of a violation of CCCF Rules of Conduct 1.2, Unbecoming Conduct, and I do so **CONCLUDE**.

Appellant was charged with a violation of CCCF Rules of Conduct 1.3, Neglect of Duty. This section provides that

> [p]ersonnel are required to give suitable attention to the performance of their duties. Any act of omission or commission indicating the failure to perform or the negligent performance or compliance to any rule, regulation, directive, order or standard operating procedure as dictated by department practice or as published, which causes any detriment to the department, its personnel, any inmate, prisoner, or to any member of the public, shall be considered neglect of duty.
>
> [R-14 at 2.]

For all of the same reasons appellant is guilty of violating N.J.A.C. 4A:2-2.3(a)(7), she must also be held responsible under this Rule of Conduct. Therefore, respondent has proven that appellant committed an act of a violation of CCCF Rules of Conduct 1.3, Neglect of Duty, and I do so **CONCLUDE**.

Appellant was charged with a violation of CCCF Rules of Conduct 3.2, Security. This section provides that

> [p]ersonnel shall exercise a scrupulous regard for security in their dealings with inmates and with regard to the Correctional Facility in general. Any act of commission or omission tending to undermine security shall constitute a breach of security. Examples include but are not limited to:
>
> a. Failure to ensure adequate vision of cells and cellblocks;
> b. Loss or improper control of facility keys;
> c. Failure to make proper search of prisoner, inmate or cell area;
> d. Failure to close and/or lock any gate or door required to be shut and/or locked;
> e. Failure to use or properly apply restraining devices when necessary;
> f. Failure to properly secure a weapon.
>
> [R-14 at 7.]

In the circumstances presented to appellant, if appellant felt threatened by T.C., she should have stepped away, hit her help button, and waited for help to arrive. Appellant did not properly follow procedures and/or regulations involving safety and security. Therefore, respondent has proven that appellant committed an act of violation of administrative procedures and/or regulations involving security. Therefore, respondent has proven that appellant committed an act of a violation of CCCF Rules of Conduct 3.2, Security, and I do so **CONCLUDE**.

Appellant was charged with a violation of CCCF Rules of Conduct 3.6, Departmental Reports. This section provides that

> [p]ersonnel shall submit all necessary reports, whether at the direction of a supervisor or upon the occurrence of circumstances requiring a report, prior to going off duty after the request by the supervisor or of an incident necessitating a report.
>
> Daily reports, logs, etc., shall be submitted by personnel at the end of a normal tour of duty. Reports submitted by personnel shall be truthful and complete.
>
> Personnel shall not knowingly enter or cause to be entered any inaccurate, false, or improper information in any departmental report.
>
> [R-14 at 9.]

In the charge specifications, respondent alleges that during the IA interview, appellant provided mistruths and false information to the interviewer. In her IA statement, appellant stated that she asked Sergeant Antrilli if he wanted her to write a report and he said no. However, neither Lieutenant Franceschini nor Sergeant Antrilli advised appellant that she did not have to write a report. Therefore, respondent has proven that appellant committed an act of knowingly entering an inaccurate, false or improper statement in connection with her departmental interview. Therefore, respondent has proven that appellant committed an act of a violation of CCCF Rules of Conduct 3.6, Departmental Reports, and I do so **CONCLUDE**.

Appellant was charged with a violation of CCCF Rules of Conduct 3.8, Use of Force (Non-Lethal). As stated above, this section provides that

> [p]ersonnel shall not inflict corporal punishment on the person of any inmate, prisoner, or other person, nor shall they strike or lay hands on an inmate, prisoner, or other person unless it is in self-defense or unless to prevent escape, serious injury to person or property, to quell a disturbance, or effect an arrest where resistance is offered. In all circumstances, only the amount of force necessary to accomplish the desired result is to be used.
>
> [R-14 at 9.]

Appellant must be held responsible under this Rule of Conduct. Here, appellant acted with hostility toward T.C., and by her actions intended to cause anguish in some form to T.C. Appellant aggressively grabbed and punched T.C. Therefore, respondent has proven that appellant committed an act of a violation of CCCF Rules of Conduct 3.8, Use of Force (Non-Lethal), and I do so **CONCLUDE**.

Appellant was charged with a violation of CCCF General Order #13, which discusses when force may be permissibly used. For all of the same reasons appellant is guilty of violating N.J.A.C. 4A:2-2.3(a)(6), she must also be held responsible under this General Order. Therefore, respondent has proven that appellant committed an act of a violation of General Order #13, and I do so **CONCLUDE**.

PENALTY

In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). However, where the charged dereliction is an act which, in view of the duties and obligations of the position, substantially disadvantages the public, good cause exists for removal. See Golaine v. Cardinale, 142 N.J. Super. 385 (Law Div. 1976), aff'd, 163 N.J. Super. 453 (App. Div. 1978); In re Herrmann, 192 N.J. 19 (2007). The question to be resolved is whether the discipline imposed in this case is appropriate.

Appellant has been removed for her actions on July 7, 2013. Appellant has had no prior abuse incidents with any inmate during her career.

I am satisfied that appellant's actions herein were egregious. The incident began over appellant's belief that T.C. refused to sit in the BOSS chair. T.C. then began to move toward cell 41 and appellant attempted to correct T.C. by grabbing at his shirt. T.C. pushed appellant's hand off his shirt, and the situation quickly escalated.

Regardless of T.C.'s action, appellant did have a responsibility to de-escalate, but instead she undertook to aggressively pursue T.C. to ensure his compliance with her orders. In so doing, appellant placed herself and others in danger. The appellant's behavior served only to further incite the situation. Appellant became angry, and it caused her to aggressively physically assault T.C. T.C. did not initiate the assault, and took the worst of the scuffle that followed. I **CONCLUDE** that the proper response of an officer who believes orders are not being followed, or that she is being threatened or is in need of assistance to de-escalate a situation, is to attempt to step or back away, and to remove herself from the situation. An officer might also request assistance from another officer. Appellant failed to take any of these steps. Any abuse or intimidation of an inmate is unacceptable.

Given the actions of appellant on July 7, 2013, removal of appellant from her position is necessary to maintain the diligence and integrity of the appointing-authority staff. While appellant lacks any prior discipline relating to abuse or mistreatment of an inmate, there is no second chance if an inmate is abused, and removal is mandatory. Regardless of the appellant's prior disciplinary record, appellant's inappropriate actions toward an inmate are serious and unprofessional. As a public employee, the appellant's interactions with an inmate must be above reproach.

T.C. did not make any aggressive moves toward appellant other than pushing appellant's hand off his shirt. T.C. was moving away from appellant when appellant assaulted him. T.C.'s actions, without the additional presence of a weapon or other aggressive actions, are insufficient to justify appellant's actions. After T.C. was struck by appellant, he offered no resistance. After having considered all of the proofs offered in this matter, and the impact upon the institution of the behavior by appellant herein, and after having given due deference to the impact of and the role to be considered by and relative to progressive discipline, I **CONCLUDE** that appellant's misbehavior was so significant as to warrant removal, which, in part, is meant to impress upon her, as well as others, the utter seriousness of this infraction. Thus, even considering that appellant had never been involved with inappropriate aggressive behavior before, I uphold the action of removing her from service. Therefore, based on the totality of the record, I

CONCLUDE that the imposition of removal is appropriate given the flagrant nature of appellant's aggressive behavior.

I **CONCLUDE** that the action of the appointing authority removing appellant for her actions on July 7, 2013, should be **AFFIRMED**.

ORDER

I **ORDER** that the appeal of Officer Natalie Whyano is **DENIED**, and that the disciplinary action of the CCCF removing appellant is **AFFIRMED**.

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.

November 13, 2014
DATE

EDWARD J. DELANOY, JR., ALJ

Date Received at Agency: November 13, 2014

Date Mailed to Parties: November 13, 2014

EJD/cb

APPENDIX

WITNESSES

For appellant:

Rebecca Franceschini

Emanual Kapelsohn

For respondent:

John Jones

Gary Merline

Christopher Fosler

EXHIBITS

For appellant:

A-1 Emanual Kapelsohn, Curriculum Vitae

A-2 Emanual Kapelsohn, list of recent trial and deposition testimony

A-3 Expert Witness Report, The Peregrine Corp., Emanual Kapelsohn

For respondent:

R-1 Preliminary Notice of Disciplinary Action (31A), dated February 27, 2014

R-2 Final Notice of Disciplinary Action (31B), dated April 28, 2014

R-3 Final Notice of Disciplinary Action (31C), dated April 28, 2014

R-4 Internal Affairs report authored by Sgt. John Jones

R-5 Memorandum authored by Lt. Rebecca Franceschini, dated July 9, 2013

R-6 General Incident Report authored by CO Natalie Whyano, dated July 7, 2013

R-7 Use of Force Report authored by CO Natalie Whyano, dated July 7, 2013

R-8 Video of incident

R-9 No Inmate Contact memo by Lt. Christopher Foschini, dated July 9, 2013

R-10 Internal Affairs Interview of CO Natalie Whyano on February 25, 2014

R-11 Internal Affairs Interview of Sgt. Joseph Antrilli on February 26, 2014

R-12 Internal Affairs Interview of Lt. Rebecca Franceschini on February 27, 2014

R-13 Camden County Department of Corrections Internal Affairs Order #001

R-14 Camden County Department of Corrections Rules of Conduct

R-15 Camden County Department of Corrections General Order #013 Use of Force

R-16 Curriculum vitae of Gary Merline

R-17 Expert witness report authored by Gary Merline, Merline Consulting and Training, LLC

R-18 Loudermill Consideration, dated February 26, 2014

R-19 CO Natalie Whyano chronology of discipline

R-20 Expert Witness History

R-21 Client List