A-7

STATE OF NEW JERSEY

In the Matter of Michael Canavan
Mountainview Youth Correctional
Facility
Department of Corrections

CSC DKT. NO. 2014-3081
OAL DKT. NO. CSR 7368-14

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: December 3, 2014 PM

The appeal of Michael Canavan, a Senior Correction Officer with Mountainview Youth Correctional Facility, Department of Corrections, removal effective May 21, 2014, on charges, was heard by Administrative Law Judge Joseph Lavery, who rendered his initial decision on October 14, 2014. Exceptions and cross exceptions were filed on behalf of the parties.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, including a review of the video of the incident, the Civil Service Commission, at its meeting on December 3, 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 Michael Canavan.

Re: Michael Canavan

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 3, 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 7368-14

2014-3081

IN THE MATTER OF MICHAEL J. CANAVAN, MOUNTAINVIEW YOUTH CORRECTIONAL FACILITY.

Robert A. Fagella, Esq., for appellant Michael J. Canavan (Zazzali, Fagella, Nowak, Kleinbaum & Freidman, attorneys)

Adam Verone, Deputy Attorney General for respondent Mountainview Youth Correctional Facility (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: September 5, 2014 Decided: October 14, 2014

BEFORE **JOSEPH LAVERY,** ALJ t/a:

STATEMENT OF THE CASE

This is an appeal by **Michael J. Canavan, appellant**, from his removal as a Senior Correction Officer, New Jersey Department of Corrections. He has been charged (a) with using excessive force to coerce compliance by an inmate through use of OC (oleoresin capsicum) canister at prohibited close range; (b) with misleading

statements to staff concerning deployment of the OC spray, and (c) with misleading statements concerning damage to the OC can after the incident.

The **appointing authority, Mountainview Youth Correctional Center (Mountainview; the State)** contests the appeal.

Today's initial decision (a) finds that appellant used excessive force through use of his OC canister, (b) finds that he misled the appointing authority in statements concerning the canister use, and (c) finds that no preponderating evidence of record persuades that appellant misled in describing how the canister was dented.

PROCEDURAL HISTORY

This is an appeal filed in the Office of Administrative Law (OAL) pursuant to L. 2009, c. 16, supplementing Title 40A of the New Jersey Statutes (N.J.S. 40A:14-200 through -212) and amending N.J.S. 40A:14-150 and N.J.S. 40A:14-22.

This matter was filed in the Office of Administrative Law (OAL) on June 10, 2014, and assigned for hearing before the undersigned. A prehearing Order issued on July 3, 2014, and hearings convened on August 26, August 28, and September 5, 2014. On that date, the record closed.

ANALYSIS OF THE RECORD

Background:

The incident giving rise to appellant's final discipline occurred on February 3, 2014, in that part of the Mountainview facility designated as Housing Unit 4. This building had two floors, with the bottom level numbered 4A, and the upper, 4B. The incident involved an encounter with an inmate involving force. This confrontation, with Inmate L.H. began in the limited open portion of Unit 4 on the first level, which gives

access to 4A hallway through a door in the center of cross-barred, full-width walls on either side with square see-through windows called the "grill-gate." The open area also opens to the stairway leading to 4B.

It is significant that inmates routinely move through the grill gate on to the hallway of 4A, where a line of cells are located with their doors facing on either side along the hallway length. On this particular day they were doing exactly that, and appellant would thereafter be called on to "take the count" once all had entered. He was the Housing Officer on duty guarding 4A. Senior Correction Officer (SCO) Raymond Harris had the same assignment on 4B. At the time of the encounter with Inmate L.H., Correction Officer Recruit (COR) Michael Haggerty also was "floating" on site as a general assignment (GA) officer.

In the course of the officers' shift, Inmate L.H., housed upstairs on 4B, appeared downstairs in the open area outside the 4A cell hallway, and attempted to leave for the recreation area. A gathering of inmates, not from HU 4, but from a part of the facility known as the "Highside," had formed for recreation outside Unit 4 at their assigned time. However, Inmate L.H. was not officially assigned to this group, nor had he otherwise been given permission to join it. Aware of this, appellant stopped the inmate. Pressing to leave the Unit, Inmate L.H. then told appellant he was permitted to engage in recreation nonetheless, on the strength of his work assignment as a barber. Appellant, unpersuaded by this claim, called a recreation sergeant to determine the validity of the inmate's claim of exception. The sergeant's response was that whether the inmate could join the group in recreation was wholly within appellant's discretion. Appellant chose not to allow Inmate L.H. to leave the Housing Unit. He did so because Inmate L.H. was not from the Highside units. Trouble began at once.

Finding himself unable to leave the Housing Unit, Inmate L.H. became increasingly loud and more argumentative with appellant, causing SCO Harris to descend from his post on 4B. Shortly after, COR Haggerty, in a nearby bathroom, emerged and saw the inmate pushing into SCO Harris in an attempt to enter the 4A

hallway. Appellant reported[1] that he told his inmates on 4A who happened to be filing back in for a count to "lock in." At about that time, SCO Harris, who had been blocking the entryway, deployed his CO spray can, which emitted a liquid stream, as it was designed to do. Appellant deployed his own canister, with poor results. Appellant's canister dispersed only a misty spray, which spread widely through the air. In the uproar, Inmate L.H. managed to push past SCO Harris, making his way through inmates walking toward their individual cells. With the argument now turning physical, the inmates immediately fell full length to the floor. COR Haggerty and SCO Harris pursued the inmate into the hallway, with appellant close behind.

Inmate L.H., once he was well into the in the hallway and within camera range, began walking backward, with hands raised, facing the doorway. Perhaps halfway down the hall, the inmate went to his knees, and lay down on the floor, locking his hands behind his head. SCO Harris, COR Haggerty and appellant reached the inmate, and in a manner here disputed sought to disengage the inmate's fixed hands for cuffing. Immediately after, a group of five other officers and supervisors, including Highside supervisor Sergeant Jean-Phillipe Michel, responding to the Code 33, joined the effort. After a brief period of difficult struggle, Inmate L.H. was ultimately subdued and handcuffed. Within a few minutes, appellant and SCO Harris turned in their used OC cans to Sergeant Michel, in accord with established procedure. Appellant's can was dented when he exchanged it for a replacement.

After the event, the entire matter was investigated by the Special Investigations Division (SID) of the Department of Corrections. The officer assigned to this duty was Investigator Samuel Wise. On February 10, 2014, he completed his task and summarized his investigation in a formal report (Exh. R-1). On the strength of this report, disciplinary action was instituted through issuance of a preliminary notice of disciplinary action, amended and dated May 7, 2014. A hearing followed, with the result that a final notice of disciplinary action dated May 21, 2014 issued, terminating appellant's employment as a Senior Correction Officer in the New Jersey Department of Corrections.

[1] Exhibit R-7

Arguments of the Parties

The parties submitted both testimonial and documentary evidence in support of their positions:

Respondent appointing authority's case:

Samuel Wise, Investigator for the SID described his investigation through his report, Exhibit R-1, and through oral testimony: Investigator Wise related how he had interviewed the participants in the events and had analyzed, minute-by-minute, in his report pertinent portions of the video surveillance captured in Exhibits R-19 and R-20. With respect to appellant, referring to these exhibits, he wrote that when appellant reached the inmate lying in the hallway, SCO Harris had already emitted a CO stream from his canister. When appellant arrived he picked up the inmate's "head area" with his left hand, and with his right was "placing the OC canister in an upward motion from the floor directly in inmate L.H.'s facial area."[2] Appellant contorted his body in a "twitch" in response, the Investigator reported.[3] A "shiny spot" on the floor, not present when SCO Harris used his CO canister first, was proof that appellant had used his.[4]

Turning to appellant's damaged OC canister, Investigator Wise noted that a full canister weighed 4.87 ounces. Appellant's weighed 3.25 ounces when turned in to Sergeant Michel, and had a horizontal crease in the middle (Exh. R-1, at page DOC 234). Further, appellant had exited the hallway while Sergeant Michel was still supervising the inmate's removal, a fact which did not jibe with appellant's contention that he returned the canister to the sergeant immediately, Investigator Wise concluded.

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[2] Exhibit R-1, page DOC 234, where Investigator Wise refers to a visual recording time measurement. The report does not designate which of the two exhibits were relied upon. Consequently, the times specified were viewed in both videos by this tribunal. However, in live testimony at hearing, Investigator Wise did identify the videos as he spoke.

[3] Ibid.

[4] Ibid. But cf. Investigator Wise's contrary conclusion on cross examination, infra.

By way of assessing the horizontal crease in appellant's OC canister, Investigator Wise reported that he had personally performed an operability test on the OC canisters of both SCO Harris and appellant (Exh. P-2). SCO Harris' canister was operable. Appellant's was not. Further, "to ascertain if the damage to SCO Canavan's canister was duty related, or done intentionally to hinder this investigation," Investigator Wise contacted by phone Robert Nance, Vice-president of Operations for Security Equipment Corporation, the distributor for the company manufacturing the OC canister. He also subsequently forwarded photos of appellant's damaged can to Mr. Nance. In response, Mr. Nance opined by letter (Exh. R-4) that the damage was "highly unlikely" to have arisen from "typical on-duty activities." It would require "intentional" two-handed slamming into a curb or cinder block to duplicate this deformity. Mr. Nance's letter related also that the company crush-tests full cans set on their sides with pressure of 220 pounds for one minute, without resulting injury to the product.

On cross-examination, however, Investigator Wise candidly admitted that he erred in reporting that the "shiny spot" occurred after appellant reached the inmate. In reviewing Exh. R-19, at 12:44:19 during hearing, he was now certain that the spot pre-existed, and could not be attributed to spraying by appellant. He also acknowledged that none of the officers in the videos, Exhs. R-19 and R-20 said they had seen appellant spray the inmate. Investigator Wise nevertheless grounded his conclusion that appellant had sprayed the inmate on the "twitch" which he perceived as having been recorded in Exh. R-19, at 12:44:15. This, he testified, taken together with the totality of circumstances which he had described in his investigative report, Exh. R-1, still validated his ultimate opinion that a violation occurred through spraying of the inmate by appellant at a prohibited close range of less than three feet.

Further in cross-examination, though recalling that he had personally crush-tested a full OC canister, Investigator Wise conceded that he had not tested a canister at the level of emptiness in appellant's canister when it was handed to Sergeant Michel. Investigator Wise also agreed that he was not testifying as an expert, but was appearing only as a fact-witness.

Sgt. Jean Phillipe Michel testified that when he responded to the Code 33, he was supervising officers on the Highside, Units 7, 8, 9 and 10. When he reached 4A, there were about five officers engaged with the inmate. He ordered that the inmate be handcuffed. He did not see appellant leave the scene, not did he see anyone actually employ OC spray. However, the sergeant recalled that he had ordered appellant to go to the desk outside the grill gate to obtain a new OC canister while he himself supervised the cuffing. Within five minutes or so, appellant encountered him there, and turned in his OC canister, as did SCO Harris. Sergeant Michel said he then issued replacements. He recalled that appellant had said while at the desk that his canister was broken. The can had a crease in it. Appellant explained that he had squeezed it.

Lieutenant Michael Murray testified that he trained incoming officers at Mountainview. In that function, he described the continuum in use of force, which should never be used as a punishment. He stated further that he had seen the surveillance videos of the incident in issue, and concluded that once the inmate resisted the order to place his hands behind his back, he was non-compliant. Use of force was then justified to handcuff, and CO canister employment could have been an option.

The lieutenant added that he did not train new officers in-depth concerning use of chemicals, but he personally had squeezed a full CO canister, and was unable to crease the can. He conceded that he had not squeezed a canister which duplicated the content of appellant's, that he had not been informed what that amount was, and that he had not physically touched appellant's canister. He had been shown it only in photos.

Appellant's case in reply:

Appellant, Michael J. Canavan, testified on his own behalf. He maintained that at no time after pursuing Inmate L.H. into the hallway of 4A did he, or was he ever able to, spray the inmate. His CO can was unworkable by then. Further, appellant maintained that the inmate was refusing to release his hands for handcuffing on

command. The inmate, with interlocking fingers, was continuing to strongly keep both hands pressed behind his head.

Giving his version of the incident, appellant stated that he had rebuffed the inmate's request to join other inmates outside, because the recreation was intended only for "high side" inmates. Appellant also had a head-count to make. When Inmate L.H. eventually pushed SCO Harris, appellant had no choice but to deploy the CO can. After it exploded in a burst of undirected mist rather than the focused stream of its design, appellant called a Code 33, announcing an emergency. He then followed behind SCO Harris and COR Haggerty as they chased Inmate L.H., who had pushed into the 4A hallway.

Appellant recalled that he was unsuccessful in pulling the interlocked fingers apart on the inmate, who was holding them tightly against the back of his head despite appellant's order to release them. Once a command had been given to put his hands behind him, the inmate was in violation. At no time in the 4A hallway did he use the CO canister, appellant stated, nor did he pull the inmate by his head backward. Appellant gripped only his fingers. Only after a scrum of considerable force involving himself, SCO Harris, COR Haggerty and several Code 33 officers quickly arriving on the scene was Inmate L.H. finally subdued. In the course of this melee, appellant had lost the safety flip-top cap to his CO can.

Appellant explained further that he had continued to carry the can with him into the hallway, gripping it tightly as he moved, because he was under the influence of heightened adrenalin in the excitement of the moment. He was uncertain how the OC can came to be dented, but he was definite in affixing the timing of that damage as happening during his violent encounter on the 4A hallway floor. He did recall as well that he had been forced to squeeze the canister while leaning on it several times with his full 260-pound weight, for balance. This was during his one-handed effort to pry loose the inmate's fingers. Appellant denied ever stating that he had squeezed the can while holding it in the air. He also noted that he himself could not actually cuff the inmate. Housing officers do not carry handcuffs.

Once Inmate L.H. had been secured, he left the hallway through the grill gate, and handed the can to Sergeant Michel. Appellant emphasized that he did this immediately following the event, just after speaking with supervisors outside the grill gate. He was sure that he did not at any time beforehand purposely dent the OC can. Further, appellant stated, during his entire career he had not previously been called on to use this instrument to compel compliance.

Investigator Samuel Hill was presented by appellant as his witness. The investigator acknowledged that canisters can emit fog or mist when broken. Appellant's made only a hissing sound when he checked it. This was caused by nitrogen escape. He found that the canister had a dime-sized impact mark on one side, and a crease on the other. The can was without the flip-top safety cap. Nevertheless, an emission button was still present.

Offered as a corroborative witness was former **COR Michael Haggerty**[5]. He had seen appellant attempting to spray the inmate from a distance of seven-to-ten feet after the latter had bumped up against SCO Harris. The latter was barring the inmate's entry through the grill gate to the 4A hallway. Appellant's CO can failed. Instead of the normal steady stream, the can dispensed a wide mist. The mist had no effect on Inmate L.H., who then successfully barged past SCO Harris into the hallway.

Officer Haggerty testified further that when he reached the inmate after a pursuit, he removed the handcuffs he carried, ready to secure him with the assistance of the other two officers. Until that happened, the scene was not safe. He did not see appellant use his CO can during this effort. Within his observation, the one time this happened was initially, in the open area outside the grill gate.

[5] Since the event, Officer Haggerty has left the Department of Corrections and at the time of hearing was called away to testify from Police Academy training preliminary to a municipal law enforcement appointment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact:

To resolve disputes of material fact, I make the following **FINDINGS:**

1. When Inmate L.H. went to the floor in the 4A hallway, he refused the command to put his hands behind him to be cuffed. Instead, he locked them tightly behind his head in stiff resistance.
2. When appellant reached Inmate L.H., coming behind COR Haggerty and SCO Harris, he had his OC canister in his right hand.
3. With his left hand appellant pulled at Inmate L.H.'s head area, trying to reach underneath the inmate's arms to employ his OC canister.
4. Appellant triggered an emission from the canister within a few inches of the inmate's face.
5. Appellant's canister emitted the same type of mist as was first expelled by him outside the hallway, beyond the grill gate. This second expression of mist spread throughout the immediate area of the hallway floor scuffle, causing the coughing reaction affecting most of the eight officers eventually on scene.
6. No evidence preponderates to prove appellant's canister was dented anywhere but in the midst of the strenuous group effort to subdue and cuff Inmate L.H.

Conclusions of Law

Burden of persuasion:

The burden of proof falls on the agency in enforcement proceedings to prove violation of administrative regulations, Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The agency must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings, Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a

reasonably cautious mind to a given conclusion, Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power, State v. Lewis, 67 N.J. 47 (1975). Credibility, or more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well, Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

The charges:

In its final notice of disciplinary action dated May 21, 2013, the appointing authority adopted the specifics which it had entered in its preliminary notice of disciplinary notice dated May 7, 2014. They are here reprinted verbatim:

> On February 3, 2014, you were involved in an incident involving an inmate in which you applied excessive force. Video footage demonstrates that at the time in question the inmate was attempting to be compliant and is not seen as resisting. You were present when SCO Harris kicked this inmate in the ribs and utilized OC spray. Video footage shows you deploying OC spray near the head of the inmate at close range. Your statement to staff after this incident were affirmatively misleading and contradicted by the video footage. This behavior violated the use of force rules and regulations and cannot be tolerated.

At hearing, the parties sought to infuse the foregoing specifics with more precise organization. They agreed on the following language to define the issues, amending the prehearing order of July 2, 2014:

1. The charge of excessive force involves the alleged utilization of OC spray by Officer Canavan in the hallway area, while attempting to obtain inmate L.H.'s compliance as indicated on video Exh. R-19.

2. The charge of a misleading statement involves Officer Canavan's denial of utilizing OC spray in the hallway area while attempting to obtain Inmate L.H.'s compliance as indicated on video Exh. R-19.

3. The charge of a misleading statement also involves appellant's statement of how the OC canister was damaged.

> [Three issues agreed to on the record, Hearing Day 1 (August 26, 2014), Mountainview Youth Correctional Facility v. Michael J. Canavan, CSR 7368-14].[6]

The foregoing will be the issues analyzed infra to determine whether violations of those rules and regulations cited by the appointing authority have occurred.[7]

Issue No. 1: Excessive force through use of OC spray (Exhibit R-19)

By spraying his OC canister from within inches of Inmate Hill's face, appellant used excessive force.

The regulation giving precautions concerning use of OC warn of the danger of application at too close a range. Therein, it states that there must be a minimum distance of four feet from the suspect. (Exh. R-10, at DOC 140). That section states further:

> Spraying the suspect closer than four (4) feet may produce the Hydraulic Needle Effect. This effect consists of serious injury to the eye due to the force of the propellant at close range.
> [Ibid.; See also those regulatory sections specified in Exh. R-21 covering use of force]

Primarily, however, in the end, what most persuade that appellant used excessive force are the primary source materials: Exhs. R-19 and R-20, videos taken from the 4A hallway surveillance cameras. These support the appointing authority's charge on this issue. The videos, in particular Exh. R-19, are preponderating evidence.

The institutional demand that a correction officer spray his OC canister from a minimum distance of four feet is unchallenged by appellant. Here, as Exh. R-19 shows, the canister's emission was virtually within inches of the inmate's face. This fact is evident in the time frame on the film elapsing from approximately 12:44:13 through 12:44-17, as marked in the exhibit. The video further discloses that as SCO Harris and

[6] For clarity, the issues have been numbered 1 through 3 by this tribunal
[7] See, final notice of disciplinary action dated May 21, 2014.

COR Haggerty moved rapidly toward the inmate as he lay prone, appellant came from behind. He quick-stepped past COR Haggerty and went directly to the inmate, where he straddled his body. Appellant then bent down to his right, slightly curving his arm around and under Inmate L.H., whose hands were clasped tightly against the back of his head in resistance. Appellant's left hand grasped that same head area, in an attempt to better access the inmate's face. Inmate L.H., reacting, moved his upper body to the left, with a slight head "twitch" visible in the process. SCO Harris and COR Haggerty stood by.

With these facts in mind, it is evident that from the point in the surveillance video beginning where appellant passed COR Haggerty, it is apparent that he was intent on reaching the inmate to use the CO canister. It cannot be argued that appellant intended to cuff Inmate L.H. single-handedly, because he did not carry handcuffs. Moreover, when he arrived, he made no serious, two-handed gesture to undo Inmate L.H.'s grip. Instead, as noted, appellant's left-hand grab at the inmate's head was unmistakably for the purpose of turning him toward the canister in his right hand. The evasive movements of the inmate's body leaves slight doubt that the OC was applied, and from a distance of within inches. This action is inconsistent with the threshold requirement that there be a reasonable belief that appellant was in imminent danger of bodily harm (Exh. R-15, at DOC 83). OC may never be used for punishment (Ibid). The inmate was lying full length, face down, holding his hands tightly behind his head.

The video reveals other signs of appellant's intent: The two accompanying officers, SCO Harris and COR Haggerty, appeared to understand appellant's purpose. In the two seconds during which appellant was at work with the canister, they did nothing to assist, remaining in a standing position as onlookers. They intervened only when the spray of OC did no good and the inmate continued with his sustained grip. As additional evidence that appellant used his canister, the videos show that virtually all the responding officers in the video exhibited coughing symptoms while in the area, suggesting that there had been a dispersal of CO. Since SCO Harris' working canister deployed as a direct stream, it is most believable that appellant's canister, at that point still able to emit an expansive mist or fog, was the cause of their irritation.

In short, the flow of appellant's movements within the time captured on video R-19 showing the three officers' initial hallway contact with the inmate compel one conclusion: that appellant used excessive force. He did so by deploying his CO canister against Inmate L.H. at prohibited close range. The appointing authority's charge must be upheld.

Issue No. 2: Whether appellant misled with his statement denying OC spray use against Inmate L.H. in the hallway of 4A (Exhibit R-19)

With the finding that appellant did engage his canister to spray the inmate in the 4A hallway, his statements to the contrary during the investigation, of necessity must be seen as to misleading. The appointing authority's charge of misleading statements is upheld.

Issue No. 3: Whether appellant misled in his statement describing how his OC canister was damaged.

The evidence does not preponderate with proofs that appellant misled the appointing authority when describing how his OC canister was damaged.

From the outset, when turning in the used OC canister, appellant told Sergeant Michel it was broken. None of the witnesses on either side disagreed that it dysfunctionally emitted a misty spray, not a stream, on the desk-side of the grill gate when the inmate first assaulted SCO Harris. In a video demonstration nine days later, on February 12 (Exh. P-2), Investigator Wise himself showed that appellant's OC can emitted nothing more than what he described at hearing as the hissing sound of nitrogen escape. He announced on camera that it was "broken."

The essence of dispute, then, is not whether the canister was damaged. It was from the first. Rather, the dispute centers on how the OC canister became dented

through appellant's knowing and voluntary effort to smash the canister on its sides, and whether appellant lied about this act.

Appellant's position essentially is that he doesn't precisely know the cause of the canister's crease. He suggests that it could have been a squeeze when he leaned his 260 pounds into the canister on the hallway floor, while struggling with a highly resistant inmate. The 4A hallway episode, in his view, was far too confusing for him to retrieve from memory the moment or method to which the dent could be attributed.

In contrast, to support its charge, the appointing authority offers pictures (Exh. R-3a,b and c). The record also includes the aforementioned video of Investigator Wise's functional test, Exhibit P-2. Appellant's actual canister itself was not presented by the State. Neither was a sample canister proffered for comparison. Nothing in the video exhibits (R-19, R-20) shows appellant consciously damaging the canister.

What the appointing authority highlights is its finding that appellant's canister weighed 3.25 ounces after the 4A hallway event. A full canister, it claimed, without rebuttal, weighs 4.87 ounces. Investigator Wise and Lieutenant Murray maintained that in personal efforts to dent a full canister with a squeeze, they could not successfully replicate that change. However, both officers were fact, not expert witnesses at hearing. Neither witness suggested that he had done a "crush test" equivalent to applying appellant's 260 pound body weight, using a partially empty canister weighing the same as appellants after its deployment outside the grill gate. Mountainview did not offer demonstrative evidence of record to reveal what result such a test would produce. For these reasons, their testimony lacks persuasiveness.

It is true that the appointing authority does proffer a documentary exhibit, perhaps in the hope that it would serve as expert confirmation that appellant could not have dented the OC canister as he described. The exhibit is in the form of a letter from Mountainview's OC canister distributor (not manufacturer), Security Equipment Corporation (Exh. R-4). This letter was in reply to a phone call to the SEC vice-president of operations initiated by Investigator Wise. This company official, relying on

the investigator's forwarded photos, conferred with his "label manager." He then wrote that "[W]e have concluded it is highly unlikely that this damage would have resulted from typical on-duty activities."

Neither this operational administrator nor his label manager were presented at hearing to testify. The grounds for their reasoning, as set forth in the letter, could not be subjected to scrutiny in the crucible of cross-examination. No opportunity was given appellant to challenge any expert credentials which might have been advanced, or to probe the writer's understanding of appellant's "typical on-duty activities." Finally, these company administrative personnel apparently were referring to a full OC canister, rather than one reduced to a weight of 3.25 ounces.

Although admission of evidence under the Uniform Administrative Procedure Rules is far more liberal than in the judiciary, this letter, Exh. R-4, can be accorded no evidentiary weight. In the absence of testimony, it is unduly prejudicial, N.J.A.C. 1:1-15.1(c)2, amounting to hearsay lacking any residuum of competent evidence to support its content. N.J.A.C. 1:1-15.5(b). As ruled during hearing, this letter-exhibit was admitted in evidence only because it was quoted in Investigator Wise's report. Fairness requires admission of the document in full.

In sum, the record is left with appellant's expression of uncertainty over the cause or timing of the dent. His plausible guess was that it was likely to have arisen from being pressure-squeezed by his body weight leaning on his hand while holding the canister. This would have happened during the chaos of the adrenaline-fueled battle with the inmate on the floor of 4A hallway, appellant said. In its rejoinder, the appointing authority has failed to counter with preponderating evidence to the contrary, or to adequately define how it was misled by appellant's excuse. Sergeant Michel, the State's witness, gauged the time passed from the event in the hallway no more than five minutes. No witnesses testified that they saw appellant purposely damage his OC canister. On this issue, then, Mountainview positions its case on a platform of unproven surmise. The charge of misleading must therefore be dismissed.

Penalty:

Even with dismissal of the third charge that appellant had misled in his statements describing how the can was damaged, termination of appellant is the fitting penalty for those violations listed in final notice of disciplinary action dated May 21, 2014[8]. Though a sworn law enforcement officer, appellant used excessive force and lied about it. In law enforcement, this misbehavior clearly exceeds the threshold of tolerability. Misconduct anywhere in public service is objectionable but when it takes place in law enforcement, there is a wider dimension of responsibility:

> A police officer is a special kind of public employee. His primary duty is to enforce and uphold the law . . . He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have respect of the public. [Twp. of Moorestown v. Armstrong, 898 N.J. Super. 560, 566, 215 A.2d 775 (App. Div. 1965), certif. denied, 47 N.J. 80, 219 A.2d 417 (1966)]

Removal in circumstances comparable in seriousness to the instant matter is not unusual. In the case of In re Carter, 191 N.J. 474, 485-486 (2007), affirming removal of a police officer who slept while on duty, the Court held:

> In matters involving discipline of police and corrections officers, public safety concerns may also bear upon the propriety of the dismissal sanction. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580, 410 A.2d 686 (1980) (affirming appellate reversal of Board decision to reduce penalty from dismissal to suspension for prison guard who falsified report because of Board's failure to consider seriousness of charge); In re Hall, 335 N.J. Super. 45, 51, 760 A.2d 1148 (App. Div. 200) (reversing Board's decision to reduce penalty imposed on police officer for attempted theft from dismissal to suspension), certif. denied, 167 N.J. 629, 772 A.2d 931 (2001); Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06, 633 A.2d 577 (App. Div. 1993) (holding that it was arbitrary, capricious, or unreasonable to reduce penalty from removal to six months suspension for prison guard who gambled with inmates for cigarettes), certif. denied, 135 N.J. 469, 640 A.2d 850 (1994).

[8] N.J.A.C. 4A:2-2.3(a)6 (Conduct unbecoming a public employee); N.J.A.C. 4A:2-2.3(a)12 (Other sufficient cause); HRB 84-17, as amended, C. Personal conduct, 3. Physical or mental abuse of an inmate, patient, client, or employee; HRB 84-17, C. Personal conduct, 8. Falsification; HRB 84-17, as amended, C. Personal conduct, 11. Conduct unbecoming; HRB 84-17, D. Safety and security; HRB 84-17, as amended, E. General violation of rules, regulation, policy procedure, order or administrative decision.

Appellant's employment of CO in the hallway was without justification. It was a violent tactic prohibited by those rules and regulations cited by the appointing authority in its final notice of discipline dated May 21, 2014. What was needed, as video Exhs. R-19 and R-20 confirm, was sufficient manpower to handcuff a resisting but unmoving, and therefore relatively unthreatening inmate. With a Code 33 in motion, appellant knew that immediate high-number backup was a certainty. In light of this safeguard, his decision to act can only be seen as entirely punitive, with potential for serious injury to the inmate.

Moreover, appellant's categorical insistence that he did not resort to CO use, in view of today's findings, is misleading falsification. As such, it is a violation on the same level of seriousness. Correction officers responsible for the safety and security of themselves and the inmates they guard have a fundamental obligation to be truthful. Failing that, all are placed at risk. Consequently, when this responsibility is consciously disregarded, removal of the offending officer from the line of duty is the one durable safeguard. This must be today's result.

ORDER

For all the foregoing reasons, **I ORDER**, therefore that the **termination** of appellant, **Michael J. Canavan** by the **Mountainview Youth Correctional Facility** be, and hereby 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.

October 14, 2014
DATE

JOSEPH LAVERY, ALJ t/a

Date Received at Agency: 10/14/14

Date Mailed to Parties: 10/14/14

mph

LIST OF WITNESSES:

For appellant:

Michael J. Canavan
COR Michael Haggerty
Samuel Wise

For respondent:

Samuel Wise
Sgt. Jean-Phillipe Michel
Lt. Michael Murray

EXHIBITS:

For appellant:

P-1 Authorization for prehearing detention placement: Inmate L.H., February 3, 2104
P-2 Video of OC canister spray test.

For respondent:

R-1 Investigative report by Investigator Samuel Wise, dated 04/07/2014
R-2 Receipt: 2 cans of OC spray [signatures unreadable]
R-3 a & b Two pages of photographs, OC spray can and loose flip-top safety cover

R-4 Letter dated February 27, 2014: Security Equipment Corporation to Samuel Wise

R-5 Certification of Equipment receipt [OC Canister]: M. Canavan, dated 1/15/13

R-6 Results of operability and weight tests of OC cans for SCO's Harris and Canavan by S. Wise on 2/12/14

R-7 Special Custody Report by M. Canavan, dated 2/3/14

R-8 Training Class Attendance Form, In-service Firearms: 2/12/13

R-9 Special Custody Report: Sgt. J. Michel, dated 2/4/14

R-10 In-service Training Booklet: Chemical Agent Devices, eff. October 2012

R-11 In-service Training Booklet: Use of Force, Annual Refresher, May 2007

R-12 Internal Management Procedure: Administrative Specifications Law Enforcement Code of Ethics, dated 08/84

R-13 Internal Management Procedure: Departmental Assigned OC, effective September 26, 2012

R-14 Internal Management Procedure: Departmental Assigned OC, effective 01/2013

R-15 Internal Management Procedure: Use of Force and Security Equipment, effective July 12, 2012

R-16 Internal Management Procedure: Use of Force and Security Equipment, effective 11/22/2013.

R-17 Law Enforcement Personnel Rules and Regulations

R-18 DOC HR Bulletin 84-17 As Amended.

R-19 Video disc

R-20 Video disc

R-21 Listing of Exhibit sections on which respondent relies.