



STATE OF NEW JERSEY

In the Matter of Peter Delcollo
South Woods State Prison,
Department of Corrections

CSC DKT. NO. 2017-3628
OAL DKT. NO. CSV 07665-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 20, 2018 BW

The appeal of Peter Delcollo, Institutional Trade Instructor 1, South Woods State Prison, Department of Corrections, 45 working day suspension, on charges, was heard by Administrative Law Judge Tama B. Hughes, who rendered her initial decision on March 8, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on April 18, 2018, 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 suspending the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Peter Delcollo.

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
THE 18TH DAY OF APRIL, 2018

Deirdre L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 07665-2017

AGENCY DKT. NO. 2017-3628

**IN THE MATTER OF PETER DELCOLLO,
SOUTH WOODS STATE PRISON
DEPARTMENT OF CORRECTIONS.**

John P. Morris, Esq., appearing for appellant, Peter Delcollo

Kathleen L. Krieger, Esq., appearing for respondent, South Woods State
Prison, Department of Corrections pursuant to N.J.A.C. 1:1-
5.4(a)(2)

Record Closed: January 22, 2018

Decided: March 8, 2018

BEFORE TAMA B. HUGHES, ALJ:

STATEMENT OF THE CASE

Appellant, Peter Delcollo (Delcollo) an Institutional Trade Instructor 1, Cooking, with the respondent, South Woods State Prison (South Woods), Department of Corrections (DOC) appeals a Final Notice of Disciplinary Action and the forty-five-day suspension for: 1) Conduct Unbecoming a Public Employee (N.J.A.C. 4A:2-2.3(a)(6); 2) Other Sufficient Cause (N.J.A.C. 4A:2-2.3(a)(12)); Human Resource Bulletin (HRB) 84-17 (as amended): C-4 - Verbal Abuse of an Inmate, Patients, Client, Resident or

Employee; C-5 - Inappropriate Physical Contact or Mistreatment of an Inmate Patient, Client, Resident or Employee; C-11 - Conduct Unbecoming an Employee; C-24 - Threatening, intimidating, Harassing, Coercing or Interfering with a Fellow Employee on State Property. Respondent's basis for the suspension originates from appellant allegedly yelling, grabbing and hitting Senior Corrections Officer, Bethzaida Malpica (Malpica) while in the workplace in violation of the New Jersey Department of Corrections prevention of violence in the workplace policy.

PROCEDURAL HISTORY

On November 21, 2016, Delcollo was issued a Preliminary Notice of Disciplinary Action ("PNDA") suspending him for forty-five days on a date to be determined. A departmental hearing was held on March 1, 2017, the result of which was the issuance of a Final Notice of Disciplinary Action ("FNDA") on March 29, 2017, suspending Delcollo for forty-five days. Delcollo requested a hearing and the matter was transmitted to the Office of Administrative Law, on May 31, 2017, to be heard as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. A prehearing conference was held on August 10, 2017 and thereafter, a Prehearing Order was entered on September 1, 2017. The matter was heard on December 6, 2017 and December 11, 2017. Upon receipt of written summations, the record closed on January 22, 2018.

FACTUAL DISCUSSION

Bethzaida Malpica (Malpica), testified that she has been in the corrections system since 1996 when she started working at the Cumberland County Jail. In 1998, she was hired at South Woods and has been employed there ever since. Throughout her employment at South Woods, she has held various positions and has worked in both the male and female populations. In 2015, she successfully bid into Facility 1 Kitchen (kitchen) as a kitchen officer. As part of her responsibilities, she oversees the inmates and civilians that work in the kitchen to ensure that the area is safe and secured.

According to Malpica, one of the civilians that worked in the kitchen in January 2016 was Delcollo who was an institutional trade instructor (ITI) for South Woods. As an

ITI, Delcollo oversaw inmates assigned to him for the shift. Malpica, in turn, was responsible to oversee both Delcollo's position and the inmates assigned to the kitchen.

On January 3, 2016, inmates arrived for their shift in the kitchen. As part of their responsibilities/tasks, inmates cleaned dishes and assisted in preparing the meals. Starting around 2:10 p.m., when the inmates were done their tasks, she started releasing them to go back to their units through the inmate dining hall. As she was getting ready to go back into the kitchen area from the dining hall area, Delcollo approached her and grabbed her arm. According to Malpica, she demanded that he release her several times, but he insisted that he needed to talk to her, still holding her arm and pulling back into the dining hall. Delcollo was so close to her that the front of his body was up against the side of her body and his face was six inches from her face. Given how close he was, she could not get to her radio to call for assistance.

Malpica testified that she repeatedly told Delcollo to let her go as he was yelling at her questioning why she was disrupting his kitchen and commanding her to stop. As he was yelling at her, Delcollo was hitting her left forearm. After about ten minutes, Delcollo let her go, turned around and went back into the kitchen stating that he was going to call the Sergeant. Throughout the incident, because there were inmates in the area, she tried to stay focused and controlled. Malpica explained that Delcollo's conduct undermined her authority in the room which is very dangerous in a prison setting. In this case, she was concerned that inmates would attack either Delcollo or herself which could potentially lead to a riot. After Delcollo walked away, Malpica composed herself and finished her shift which ended around 3:15 p.m. – 3:30 p.m. During this time, inmates came up and asked her if she was okay. This added to her concern for Delcollo's safety as the inmate population does not take assaulting a female lightly.

At the end of her shift, when she was walking towards the officer's desk, Malpica saw Delcollo on the phone at the ITI desk which is located across the room. She assumed he was calling the sergeant. Seeing this, she went into the restroom and broke down. When she came out there were no supervisors in the area and due to her state of mind, she went home. At the time she mentally questioned whether Delcollo had actually called anyone.

Upon arrival at work the next day, she immediately went to speak to her Lieutenant, Sergeant and the Assistant Superintendent about the incident after which she was referred to the Special Investigation Division (SID) where she spoke to Senior Investigator Donna Alexander (Alexander). After speaking to Alexander, she wrote a "special" documenting the incident in which she noted that this was the second incident involving Delcollo. (R-3).

According to Malpica, in 2015, there was a prior incident with Delcollo wherein he started yelling and screaming at her in front of inmates over trays that had been delivered to the officer's desk by an inmate. Delcollo attempted to grab the trays back, causing him to invade her personal space by leaning across her to get to the trays. As Delcollo was attempting to grab the trays, she kept trying to push him away - telling him to get off.

On January 6, 2016, three days after the second incident, Malpica went to the Bridgeton Police Department (PD) and filed a report. (R-5). Accompanying her was a friend and fellow officer - Annie Palmer (Palmer). When she received a copy of the police report, she didn't read it right away however, when she did review it days later, she noticed a couple of discrepancies. On January 20, 2016, she contacted the police officer who took her initial statement and asked that the report be amended to clarify a couple of points. Specifically, that the prior incident with Delcollo was handled internally and second, that she had developed bruising on her arm because of the incident, which she herself photographed. Malpica informed the officer that the photos had been provided to the SID. According to Malpica, when she was at the PD to file the report, she rolled her sleeve up to show the officer her arm however, he stated that he did not see any bruising.

In describing how the incident affected her, Malpica stated that between the incident and having to go to court multiple times, she left her "bid" in the kitchen because of her stress and duress on the job.

On cross-examination, Malpica was questioned about the 2015 incident with Delcollo and her same day reporting of the matter to her supervisor. In response, Malpica stated that given the severity of that incident, she immediately reported the incident and

the matter was resolved without a referral to SID. Two months later, the second incident occurred.

When questioned regarding the number of inmates that were present during the second incident, Malpica estimated that while there may have been twenty to twenty-two inmates in the area, there were none in the back dining room where she had been releasing them. No supervisor was present nor did she attempt to immediately contact one after the incident occurred. She did not report the incident to anyone on that date including the other officer who was at the officer's podium, given her frame of mind. Malpica reiterated the incident, adding that when he grabbed her left arm, he continued to hit her forearm until he finished saying what he had to say. When she kept telling him to let go, he would state, "Oh, come on now, it doesn't hurt."

Malpica was also questioned about the "special" which she filed and why information such as Delcollo's body touching hers was left out and the fact that she couldn't reach her radio. In response Malpica stated that it happened the way she testified however she did not put it in the "special." Regarding her delay in filing a criminal complaint against Delcollo, she stated that initially she was too distraught to go to the police and wanted to keep the matter internal, however ultimately decided to file a complaint. She continued to work in the kitchen until she could put in a "bid" to another location which was several months later. Delcollo was not working in the kitchen during this time as he had been transferred to another location the day after the incident.

In going through the IAD report and her statement that she (Malpica) would be filing a complaint against Delcollo after work that day, Malpica stated that she delayed in filing a complaint because she wanted the matter to be handled internally. Regarding her statement that she did not recall seeing any witnesses to the incident, she was referencing "custody" witnesses or fellow officers, not inmate witnesses. According to Malpica, there were a number of inmates present when the second incident occurred. She could not recall if she provided the names of the inmates to Alexander during their meeting nor did she mention inmate witnesses when she went to the PD.

When questioned about the changes to the police report, Malpica admitted that she did not immediately review the report after she picked it up. When she finally read

the report, she noticed that a couple of items were not as she described them to the officer. Specifically, the first incident with Delcollo needed to be clarified and the fact that she did have bruising. According to Malpica, the officer did not want to see her arm when she attempted to pull her sleeve up - he only wanted to know if she had any pain. While she took pictures on January 7, 2016 – four days after the incident and the day after she went to the PD, she did not send the photos to the police. Malpica could not recall if she showed Alexander the bruises on her arm.

Throughout her testimony, Malpica appeared extremely anxious, physically shaking at times and tearful. She would not make eye contact, looking straight ahead when responding to questions.

Annie Marie Palmer (Palmer), testified that she has been employed by South Woods for over twenty years and is currently a Senior Corrections Officer in Facility 1. Palmer has known and been friends with Malpica for approximately eight years. Palmer became aware of the incident after she received a call on January 6, 2016, from a distraught Malpica who told her what had occurred on January 3, 2016. Specifically, how Delcollo got in her space; grabbed her; and told her how to do her job – all in front of inmates. After speaking to Malpica on the phone, Palmer met her at which time Malpica again described the incident and showed Palmer her arm. After seeing her arm, Palmer told Malpica that her authority had been undermined in front of the inmates and that she could not let the matter ride and needed to go to the police.

Palmer stated that after work that day, she accompanied Malpica to the PD. When they got to the station and prior to going in, Palmer took a picture of Malpica's arm and sent it to her. When they were called to go in for an interview, it appeared that the officer was in training given the fact that he was being walked through the process by a senior police officer. At one point, the younger officer asked Malpica if she was in pain. When Malpica tried to pull her sleeve up and show him the bruising on her arm, the officer told her that that was not necessary.

On cross-examination, Palmer stated that Malpica did not tell her that she had spoken to SID until after she met her on January 6, 2016. Additionally, while Malpica told Palmer that the incident occurred in front of inmates, she did not mention their names.

Donna Alexander (Alexander), testified that she has been employed by DOC for twenty years and has been in the SID as a Senior Investigator since 1998. Prior to taking her current position and throughout the years since she has been in SID, Alexander has attended multiple training seminars relevant to her position. As part of her current responsibilities, she conducts administrative as well as criminal investigations.

Alexander became aware that an incident had occurred on January 3, 2016, when Malpica came to see her on January 4, 2016 and reported an incident of workplace harassment between her and Delcollo. After speaking briefly to Malpica, she had Malpica speak to Cline to see if it was an Equal Employment Division (EED) matter. Cline determined it was not an EED matter and referred Malpica back to SID. Malpica returned to SID on January 5, 2016, at which time Alexander requested that she write a statement. The statement was handwritten due to Malpica being too emotional to talk about the incident.

In speaking to Malpica, Alexander learned that on January 3, 2016, around 2:10 p.m., Malpica was approached by Delcollo who starting yelling at her, questioning why she was sending back his inmates. After informing Delcollo that the inmates were just sitting around, Delcollo told her that it wasn't her job to send his inmates back – her job was to ensure safety and security in the kitchen. According to Malpica, Delcollo, who was directly in her space, grabbed her arm and started hitting it with his fingers. Malpica told Delcollo several times to back off but he did not. While Malpica stated that there were inmates in the area, she could not recall their names. Malpica did not report any injuries at the time of the interview.

After speaking to Malpica, Alexander testified that she obtained a copy of the inmate kitchen detail list for January 3, 2016, interviewed several of the inmates, and synopsised their statements in her report. (R-2). On January 3, 2016, there were two officers on shift and approximately twenty to thirty inmates in the kitchen area. Alexander

went on to state that one of the concerns when there is a conflict between custody and non-custody civilians is that it creates a problem for the inmates – particularly if one of the participants in the conflict is a female. If a female is involved, the inmates going forward will view her differently - approach her in a more hostile manner because they sense a weakness. That is why there is a zero-tolerance policy. Alexander further commented that it is important for an officer and the ITI to work together and be cordial, as it can go bad very quickly if inmates get involved.

Also interviewed was Delcollo who informed her that after Officer Bauman (Bauman) informed him that Malpica was releasing inmates, he went to her and asked why she was releasing the inmates back to their units. In response, she stated that they were not doing anything, so she released them. According to Delcollo, he did not touch Malpica or raise his voice. As the interview was ending, Delcollo commented that he may have raised his voice a little.

In describing the kitchen area as part of her testimony, Alexander provided a physical descriptor of the kitchen area, commenting on the row of refrigerators, ovens and tables. Equipment in the kitchen included heavy pots, pans and utensils. Alexander stated that if an altercation broke out, the equipment in the kitchen could be used as a weapon.

On cross-examination, Alexander testified that there were no photographs of Malpica's arm in or attached to her report. While Malpica showed her photographs of her arm on her phone which showed marks and bruising, by the time copies were provided, her report had been finalized. Alexander could not say for certain that the pictures provided were of Malpica's arm. Additionally, the only PD report that she received from Malpica was the initial report, dated January 6, 2016, not the supplemental report, dated January 20, 2016.

Christopher Cline (Cline), testified that he started with the DOC in 1997 and worked his way up the ranks to his current position in 2014 of Assistant Superintendent. Among his responsibilities, he oversees: social services; mental health; is the EED Ethics

Liaison; and reviews the policies and procedures when incident happen to make sure that protocol was properly followed.

Cline became aware of the January 3, 2016, incident between Malpica and Delcollo when Malpica was referred from IAD to his office to determine if there was an EED component to the complaint. Specifically, if there was a violation of any of the protected categories (age, gender, sex, religion, military status, pregnancy). Malpica was provided an EED packet which she filled out and forwarded to the Director's office for handling. Thereafter, the matter was investigated by SID who handled the investigation and submitted a report to the Administrator who in turn sends it to the Office of Employee Relations (OER). The OER determines what if any charges should be brought and appropriate sanctions.

Cline testified that he reviewed the SID report and in so doing, noted a couple of things. First, there was an allegation that Delcollo grabbed and hit Malpica. Delcollo by his own admission stepped into her personal space. According to Cline, officers are trained to have at least an arms-length protection when they are around any aggressors be it inmates or civilians. This is to enable the officer to protect themselves. This is particularly important in a kitchen area where there are lots of potential weapons and multiple inmates doing multiple things. As such, an officer must stay focused always on the inmates and surroundings.

Second, there was an allegation of yelling which is not professional and is not tolerated – the DOC has a zero tolerance of such conduct. The DOC's zero tolerance policy includes any type of harassment, violence (threat or actual), intimidation (verbal and non-verbal). The DOC has a Prevention of Violence in the Workplace Policy (Policy) which all employees receive. (R-6; R-7).

In looking at the allegations and the Policy, Cline stated that assuming the alleged conduct was true, Delcollo's conduct by stepping into Malpica's personal space and yelling at her would constitute "intimidation." Hitting Malpica on her arm would also violate the policy. The policy is particularly applicable to all individuals who work in areas where

there is contact with potentially violent inmates. (R-6). Cline went on to state that it is not unusual for a victim of workplace violence to wait a day or so to report the incident.

Cline testified that the DOC, under Human Resource Bulletin (HRB) 84-17 has a disciplinary action policy. (J-3). Under Section (C)(4) there is an offense titled "Personal Conduct – Verbal Abuse" which carries a potential penalty of five days up to removal for the first infraction. Under Section (C)(5) there is an offense titled "Personal Conduct – Inappropriate Physical Contact or Mistreatment of an . . . Employee" which carries a potential penalty of official written reprimand (OWR) up to removal. Under Section (C)(11) there is an offense titled "Personal Conduct – Conduct Unbecoming An Employee" which carries a penalty of three days suspension up to removal for the first infraction. Under Section (C)(24) there is an offense titled "Personal Conduct – Threatening, Intimidating, Harassing, Coercing, or Interfering With Fellow Employees on State Property" which carries a penalty of official written reprimand up to removal.

On cross-examination, Cline admitted that other than in his capacity as the Assistant Administrator, he is not involved in the SID report or determining sanctions. His only role in this matter was to provide Malpica with a EED packet. In review of the SID report which was sent to him, he found that what Malpica wrote in her "special" was consistent with what she told him when they met. Cline could not say whether Delcollo was asked to submit a "special" as he did not control the investigation - that was SID's purview.

Mark Yoshioka (Yoshikoa), testified that he was hired by the Bridgeton Police Department in June 2015, as a Patrolman however, has since been promoted to Detective. In January 2016, he was in his second month on the job having just returned after attending the Police Academy. As a new officer, he was assigned to a field training officer who worked with him on the departmental policies and procedures.

On January 6, 2016, he was dispatched to take a walk-in report by a complainant who was a corrections officer at South Woods. He and his training officer, Patrolman Broomall (Broomall) met with Malpica and her friend Palmer. According to Yoshioka, it

was his investigation however, he was being supervised by Broomall who was present throughout the interview.

During the interview, Malpica stated that while at her post in the kitchen area, Delcollo approached her and grabbed her left forearm. When she told him to get off, he started striking her left forearm telling her that he was the boss. This went on for approximately ten minutes. When questioned why she delayed in reporting, Malpica stated that she was dealing with personal issues but had already reported the matter to the SID. In asking if she had pain, Malpica stated "yes." When asked if she had marks on her arm, Malpica who was wearing a long sleeve shirt, looked at her arm and told him that she did not have any visible injuries at that time. He did not request to see or look at her arm himself. Malpica also described an earlier incident in 2015, after an inmate brought food trays to her desk and Delcollo running up behind her - yelling and grabbing at the trays. According to Yoshioka, Malpica was very upset throughout the interview. At the end of the interview, Malpica signed a complaint against Delcollo for harassment and aggravated assault. Yoshioka generated an Investigation Report (IR) outlining the interview with Malpica and closed the case. (R-5).

On January 20, 2016, Yoshioka received a call from Malpica who wanted to clarify information in the IR – regarding the first incident with Delcollo in 2015; the reason she waited to report the incident to the PD was due to personal issues; and that she did later develop bruising on her arm, photos of which she provided to SID. A supplemental IR was generated based upon the call. (R-5).

Peter Delcollo (Delcollo), testified that he has been with the DOC since 2004 as an ITI. In January 2016, he was assigned to the Facility 1 kitchen area where he was responsible for working with and training inmates in different aspects of cooking, kitchen sanitation and trash removal. He also handles the evening meal for all of the officers as well as the inmates of which there are nine hundred and ninety-two.

Delcollo explained that the kitchen area has three sections - the Officer's Dining Room (ODR); the kitchen area itself; and the old dining room which is used for food

staging. The kitchen itself contains industrial size refrigeration units and hot boxes, ovens, sinks and fans for heat. He described the kitchen area as noisy.

On Sunday, January 3, 2016, he was the only ITI working in the kitchen area however, two officers were working, Malpica and Bauman. While on break around 2:15 p.m. or 2:20 p.m., he was approached by Bauman who informed him that Malpica had sent two of his inmates back to their unit. According to Delcollo, he has a regular roster of inmates that work a specific shift every day. On this particular day, given the menu, there were two workers/inmates that he would typically keep back to assist in clean up. These were among the inmates that Malpica had sent back to their units.

After hearing this, he approached Malpica who was near the officer's desk, located in the kitchen and asked to speak to her. In response, Malpica went towards the old dining room, located off the kitchen and stood in the doorway with her back facing the old dining room. He was on the other side of the doorway with his back facing the kitchen. No one else was present in the area at that time.

Delcollo stated that he questioned Malpica why she was sending the workers/inmates back as she knew he needed them specifically stating: "Why are you constantly interfering with my job? Let me do my job and you do yours." According to Delcollo, Malpica's job was safety and security and her responsibilities were to take care of the trash that goes out and things in the back. Malpica responded by telling him that he could not tell her how to run the kitchen and "went off" at which point Delcollo called her "crazy" and told her that he was going to call the sergeant. He walked away and went to the ITI desk, located across from the officer's desk in the kitchen, and called for a sergeant. At no time did he yell at Malpica; grab her arm; pull her; strike her; or get in her face. Delcollo admitted however, that he had to speak louder than normal to Malpica due to the fans and other kitchen noise. The whole conversation took three or four minutes.

After receiving a call from Delcollo, Sergeant Conti (Conti) came to the Kitchen area where they met in the ODR. Delcollo explained what had happened and informed Conti that he was "...tired of the way Malpica tries to control everything and run everything." After assuring Conti that he could finish out his shift which ended at 6:30

p.m., and that he would address the issue with the regular weekday Sergeant (Sheppard), he went back to work.

Upon his arrival to work the next day, he was informed he had been transferred to another kitchen facility ultimately ending up in Kitchen Facility 2 in March 2016. He later learned that his transfer was due to the complaint filed by Malpica. Delcollo noted that he was not contacted by SID until mid-March 2016 and never asked to write up a "special". He additionally commented that Malpica bid into the same kitchen as the one he is currently working in, last December 2016.

In describing the 2015 incident, Delcollo stated that one of the things that ITI's request is that no food comes out of the ODR without first checking with the ITI. This is to ensure that there is enough food for officers and staff. On that particular occasion, he saw an inmate place two trays of food on the officer's desk. When questioned, the inmate stated that Malpica had requested them. He got up and took the trays off the desk. When Malpica found out, she called Sheppard who came down and spoke to them and requested that they just try to get along. The first he heard Malpica state that he reached over her and grabbed the tray was when she testified at the hearing.

On cross-examination, Delcollo admitted that "custody" was in charge of the inmates and safety and security in the kitchen. Custody was also in charge of letting inmates in and out of the kitchen area. On January 3, 2016, he wanted to talk to Malpica about what had occurred. The only reason he asked her to step away was because Malpica had previously asked him to take her aside if there was ever an issue. When he spoke to her, he was a foot away. When challenged on this, Delcollo's statement changed and he stated the distance between them was between six to eight inches however, he was not in "her face". While his voice was louder than normal conversation, it was because of the noise of the kitchen. He went on to state that he was not angry at Malpica for releasing his inmates, he was "frustrated" because it was an ongoing issue. Delcollo again reiterated that no inmates were in the area where he and Malpica were speaking.

FINDINGS

Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." *Id.* at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Cmty. Affairs Dep't, 182 N.J. Super. 415, 421 (App. Div. 1981).

After hearing the testimony presented and review of the documentary evidence submitted, and having had an opportunity to observe the witnesses and assess their credibility, I **FIND as FACT** that the testimony presented by Malpica, while melodramatic at times, to be credible in that an incident occurred between herself and Delcollo on January 3, 2016. I **FIND** Alexander's testimony to be credible in that she performed an extensive investigation, which included interviews of officers and inmates. Two inmates, whose interviews were taped, substantiated Malpica's version of events. One officer, Bauman, provided a written statement. None of these individuals were present to testify.

Their interviews, as well as the totality of Alexander's investigation, were outlined in her SID report.

Hearsay is admissible in an administrative proceeding, per N.J.A.C. 1:1-15.5, which provides as follows:

Subject to the Judge's discretion to exclude evidence under N.J.A.C. 1:1-15(c) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the Judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and generally, its reliability.

Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

N.J.A.C. 1:1-15.5(b) recites what is commonly referred to as the residuum rule, which is best described in Justice Francis' foundational opinion for the New Jersey Supreme Court in Weston v. State, 60 N.J. 36, 50-51 (1972):

It is common practice for administrative agencies to receive hearsay evidence at their hearings . . . As Judge Learned Hand said for the Court of Appeals for the Second Circuit in NLRB v. Remington Rand, Inc., 94 F.2d 862, 873 (1938), mere rumor would not support a board finding, "but hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs." And see, Goldsmith v. Kingsford, 92 N.H. 442, 32 A.2d 810 (1943) ... However, in our State as well as in many other jurisdictions, the rule is that the fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may not be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But, in the final analysis for a court to sustain an administrative decision, which effects the substantial rights of a party, there must a residuum of legal and competent evidence in the record to support it.

Here, competent evidence was presented to support Malpica's claims and Alexander's findings in her report by Delcollo himself. Delcollo testified that he was informed by Bauman that inmates had been released by Malpica. This was consistent with Bauman's report. Delcollo testified that he immediately got up from where he was sitting and went to find Malpica as he was "frustrated" with her. This too was consistent with Bauman's report. Upon finding her, he questioned why she was interfering with his job and told her to do her own job. This was consistent with Delcollo's testimony, the inmates taped statements and Malpica's testimony. Delcollo initially testified that he was an arm's length away from Malpica but subsequently changed the distance to six or eight inches. This was consistent with both Alexander's report wherein Delcollo's admitted to her that he may have been "too close" to Malpica and Malpica's testimony that he was in "her space." Delcollo further testified that he had to speak "loudly" due to the kitchen equipment and that Malpica "went off." This statement was inconsistent with his statement to Alexander, wherein he at first stated that he never raised his voice but then later stated that there may have been a point in time that he raised his voice. Malpica testified that the incident lasted approximately ten minutes. This is consistent with Bauman's written statement.

I **FIND** that on January 3, 2016, Malpica, in accordance with her job responsibilities, commenced sending inmates back to their units upon completion of their duties in the kitchen area. I **FIND** that Delcollo, upon learning of this fact, became angry and immediately went to confront Malpica. I further **FIND** that in confronting Malpica, Delcollo was at least six to eight inches from Malpica if not closer, which caused physical contact between the two. I **FIND** that Delcollo grabbed Malpica's left forearm however, no credible evidence was presented that such action caused bruising.

I **FIND** that when Delcollo confronted Malpica, he did so in the presence of inmates and/or in utter disregard of whether any were present. I **FIND** that Malpica was distraught as a result of the incident. I **FIND** that in a prison setting, a unified workforce is absolutely required to ensure the safety of inmates and personnel working in the area. Any demonstration of weakness or lack of respect, will undermine a correction officer's authority. I **FIND** that the DOC has a zero-tolerance policy for harassment, intimidation, violence or threats of violence by or against employees in the workplace.

LEGAL DISCUSSION AND CONCLUSION

A civil service employee's rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointment and broad tenure protection. See Essex Council Number 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 Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide public officials with appropriate appointment, supervisory and other personnel authority in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). A public employee who is thus protected by the provisions of the Civil Service Act may nonetheless be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are enumerated in N.J.A.C. 4A:2-2.3.

In an appeal concerning major disciplinary action, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). This applies to both permanent career service employees and those in their working test period relative to such issues as removal, suspension, or fine and disciplinary demotion. N.J.S.A. 11A:2-14, 2-6. The State has the burden to establish by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk License Revocation, 90 N.J. 550 (1982).

This matter involves a major disciplinary action brought by South Woods against Delcollo seeking a forty-five-day suspension. Specifically, Delcollo has been charged with the following offenses: 1) Conduct Unbecoming a Public Employee (N.J.A.C. 4A:2-2.3(a)(6)); 2) Other Sufficient Cause (N.J.A.C. 4A:2-2.3(a)(12)); HRB 84-17 (as amended): (C)(4) - Verbal Abuse of an Inmate, Patients, Client, Resident or Employee; (C)(5) - Inappropriate Physical Contact or Mistreatment of an Inmate Patient, Client, Resident or Employee; (C)(11) - Conduct Unbecoming an Employee; (C)(24) -Threatening,

Intimidating, Harassing, Coercing or Interfering with a Fellow Employee on State Property.

Conduct Unbecoming a Public Employee is found under N.J.A.C. 4A:2-2.3(a)(6) and is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); See also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, Supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "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." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

The "incident" giving rise to the FNDA identifies the following basis for the sustained charges:

On January 3, 2016, you confronted SCO Malpica in Facility 1 Kitchen. You were reported to have argued with/yelled at SCO Malpica, grabbed the SCO's arm and hit it and stood very close to the SCO invading her personal space. The incident was reported to SID and an investigation was done due to allegations of work place violence. The investigation revealed witnesses to the incident of yelling, grabbing and hitting. You admitted to standing too close to the SCO and raising your voice.

Delcollo's argument centers on credibility or lack thereof on the part of Malpica. For the reasons cited above - I disagree.

In a prison setting, it is imperative that rules are followed and discipline is maintained at all times given the inherent danger should either be disrupted. Here, it is undisputed that Delcollo, angry over the fact that Malpica was releasing "his" inmates,

confronted Malpica in the kitchen area where inmates were still present; started yelling at her, stood inches from her face and grabbed her arm to emphasize his point. Such conduct caused emotional distress to Malpica, but also undermined her authority in front of the inmate population.

Under the circumstances presented here, Delcollo displayed a significant lack of judgment in confronting, yelling and inappropriately touching Malpica, thereby violating his obligations and duties. I **CONCLUDE** that Delcollo's behavior did rise to a level of Conduct Unbecoming a Public Employee, in violation of N.J.A.C. 4A:2-2.3(a)(6).

The second charge against Delcollo was Other Sufficient Cause (N.J.A.C. 4A:2-2.3(a)12).

There is no definition in the New Jersey Administrative Code for Other Sufficient Cause. Other Sufficient Cause is generally defined in the charges against appellant. The charge of Other Sufficient Cause has been dismissed when "respondent has not given any substance to the allegation" Simmons v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm'r (April 26, 2006), <<http://njlaw.rutgers.edu/collections/oal/final/csv9122-99.pdf>>.

In this case, as set forth more fully above, respondent has given substance to the allegations set forth in the FNDA. As such, I **CONCLUDE** that the respondent has met its burden of proof on this charge.

Delcollo has also been charged with violating HRB 84-17, as amended; (C)(4) Verbal Abuse of an Inmate, Patient, Client, Resident or Employee; (C)(5) Inappropriate Physical Contact or Mistreatment of an Inmate Patient, Client, Resident or Employee; (C)(11) Conduct Unbecoming an Employee; (C)(24) Threatening, Intimidating, Harassing, Coercing or Interfering with Fellow Employees on State Property;

HRB 84-17, as amended, provides in pertinent part as follows:

In any disciplinary matter, reference must always be made to the collective bargaining agreement covering the disciplined employee, relevant Department of Personnel Rules, appropriate Department bulletins or memoranda, the Handbook of Information and Rules for Employees of New Jersey Department of Corrections, and/or the Law Enforcement Personnel Rules and Regulations.

First, pursuant to HRB 84-17, as amended, Delcollo was required to follow all policies established by the DOC and as it relates to this case - The Prevention of Violence in the Workplace Policy. (R-6).

Under the policy, harassment or intimidation means "behavior or communication designed or intended to intimidate, menace or frighten another person." Behavior or communication can take the form of both verbal and non-verbal action.

In this instance, Delcollo's actions of stepping into Malpica's personal space - so close that his body came into physical contact with her; yelling at her; and grabbing her arm, were intended to intimidate, menace or frighten Malpica.

For the foregoing reasons, I **CONCLUDE** that Delcollo's conduct was in violation of (C)(4).

The Policy defines physical assault to mean "unwanted or hostile physical contact including, but not limited to, hitting, fighting, pushing, shoving or throwing objects."

For the reasons cited above, I **CONCLUDE** that Delcollo's conduct was in violation of (C)(5).

Workplace violence under the Policy includes but is not limited to "the utterance of threats and/or the display of threatening behavior, harassment, intimidation, physical assault or intentional property damage".

Delcollo's conduct fell within the purview of this definition and constitutes Conduct Unbecoming an Employee.

For the reasons cited above, I **CONCLUDE** that Delcollo's conduct was in violation of (C)(11).

With regard to violation of (C)(24), for the reasons cited above, it is undisputed that Delcollo's conduct rose to the level of Intimidation, Harassment and Interference of a Fellow Employee on State Property.

I **CONCLUDE** that Delcollo's conduct was in violation of (C)(24) by Intimidating, Harassing and Interfering with a Fellow Employee on State Property

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). The question to be resolved is whether the discipline imposed in this case is appropriate.

Delcollo has been found guilty of Unbecoming Conduct, in violation of N.J.A.C. 4A:2-2.3(a)(6); Other Sufficient Cause, in violation of N.J.A.C. 4A:2-2.3(a)(12); violations of HRB 84-17 (as amended): (C)(4) – Verbal Abuse of an Inmate, Patient, Client, Resident or Employee; (C)(5) – Inappropriate Physical Contact or Mistreatment of an Inmate Patient, Client, Resident or Employee; (C)(11) – Conduct Unbecoming an Employee; (C)(24) – Threatening, Intimidating, Harassing, Coercing or Interfering with a Fellow Employee on State Property.

A forty-five-day suspension was imposed against Delcollo for his actions. While Delcollo has no prior disciplinary history, given the egregiousness of his conduct - imposition of major discipline is warranted.¹ (R-8).

¹ In 2011, Delcollo received a Letter of Counselling which does not rise to the level of formal disciplinary action.

The DOC's Policy is a zero-tolerance policy which was put in place to prevent employees from being harassed, threatened, intimidated or assaulted in the workplace setting. Delcollo's actions against Malpica were not only in direct violation of the Policy but were in utter disregard of the order, discipline, safety and security that must be stringently maintained in a correctional facility.

Having considered the proofs offered in this matter and having given due deference to the concept of progressive discipline, I **CONCLUDE** that Delcollo's misbehavior on January 3, 2016, was so significant as to warrant the forty-five-working-day suspension imposed by the appointing authority, which, in part, is meant to impress upon him, as well as others, the seriousness of his infractions.

ORDER

I **ORDER** that the action of the respondent in imposing a forty-five-day working-day suspension on Delcollo is **AFFIRMED**.

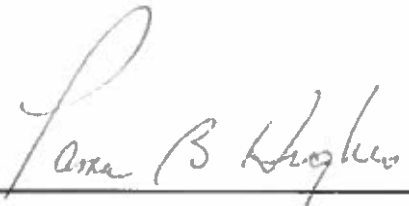
I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

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. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 8, 2018

DATE



TAMA B. HUGHES, ALJ

Date Received at Agency:

3/8/18

Date Mailed to Parties:

3/8/18

/vj

APPENDIX
WITNESSES

For appellant:

Mark Yoshioka
Peter Delcollo

For respondent:

Bethzaida Malpica
Annie Marie Palmer
Donna Alexander
Christopher Cline

EXHIBITS

For appellant:

None

For respondent:

- R-1 Amended and now identified as "J-1"
- R-2 New Jersey Department of Corrections Special Investigations Division
Administrative Investigation (5 pages)
- R-3 Special Custody Report (page 1 only)
- R-4 Special Investigation Division – SID statement of Senior Correction Officer
Matthew Bauman (1 page)
- R-5 Bridgeton City Police Department Investigation Report (3 pages)
- R-6 New Jersey Department of Corrections Police Statement (12 pages)
- R-7 Amended and now identified as "J-2"
- R-8 Work History (1 page)
- R-9 Amended and now identified as "J-3"
- R-10 Taped statement of Inmate "F"
- R-11 Taped statement of Inmate "S"
- R-12 Not entered into evidence

Joint Exhibits

- J-1 Preliminary Notice of Disciplinary Action and Final Notice of Disciplinary Action (2 pages)
- J-2 Department of Corrections – New Hire Orientation Checklist (2 pages)
- J-3 Department of Corrections – Human Recourses Disciplinary Action Policy (37 pages)