



STATE OF NEW JERSEY

In the Matter of Jared Brown,
 Garden State Youth Correctional
 Facility, Department of Corrections

CSC DKT. NO. 2022-165
 OAL DKT. NO. CSR 06756-21

:
:
:
:
:
:
:
:
:
:
:

**FINAL ADMINISTRATIVE ACTION
 OF THE
 CIVIL SERVICE COMMISSION**

ISSUED: APRIL 27, 2022

The appeal of Jared Brown, Senior Correctional Police Officer, Garden State Youth Correctional Facility, Department of Corrections, of his removal, effective July 14, 2021, on charges, was heard by Administrative Law Judge David M. Fritch (ALJ), who rendered his initial decision on March 10, 2022. 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 ALJ's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and reply, the Civil Service Commission (Commission), at its meeting of April 27, 2022, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision.

The Commission makes only the following comments. The ALJ's initial decision was thorough and well-reasoned and most of his findings and conclusions were based on his assessment of the credibility of the witnesses. In this regard, upon its *de novo* review of the record, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J. W.D.*, 149 N.J. 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See also, In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to

reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A. 52:14B-10(c); Cavalieri u. Public Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004). In this matter, the exceptions filed by the appellant are not persuasive in demonstrating that the ALJ's credibility determinations, or his findings and conclusions based on those determinations, were arbitrary, capricious or unreasonable. As such, the Commission has no reason to question those determinations or the findings and conclusions made therefrom. Moreover, the Commission wholeheartedly agrees with the ALJ's determination that the appellant's egregious conduct was deserving of removal from employment.

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 Jared Brown.

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 27TH DAY OF APRIL, 2022

Deirdre' L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Allison Chris Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 06756-21

AGENCY DKT. NO. N/A

2022-165

**IN THE MATTER OF JARED BROWN,
GARDEN STATE YOUTH CORRECTIONAL
FACILITY, NEW JERSEY DEPARTMENT
OF CORRECTIONS.**

Robert Cannan, Esq., for appellant Jared Brown (Markman & Cannan, LLC,
attorneys)

Bryce K. Hurst, Deputy Attorney General, for respondent Department of
Corrections (Matthew J. Platkin, Acting Attorney General of New Jersey,
attorney)

Record Closed: January 26, 2022

Decided: March 10, 2022

BEFORE **DAVID M. FRITCH**, ALJ:

STATEMENT OF THE CASE

Senior Correctional Police Officer (SCPO) Jared Brown (appellant) appeals the decision of the respondent, the New Jersey Department of Corrections (DOC), Garden State Youth Correctional Facility (GSYCF), to impose a penalty of dismissal for charges

of conduct unbecoming a public employee and other sufficient cause for violations of administrative procedures and/or regulations involving physical or mental abuse of an inmate, inappropriate physical contact or mistreatment of an inmate, falsification by intentional misstatement of material fact in connection with work, and violation of rules, regulations, policy, procedure, order, or administrative decision. The appellant denies the allegations.

PROCEDURAL HISTORY

The DOC issued a Preliminary Notice of Disciplinary Action (PNDA) dated March 30, 2021, notifying Brown of the charges against him. (R-1.) After a departmental hearing held on June 16 and June 30, 2021, the DOC sustained the following charges, which were incorporated into a Final Notice of Disciplinary Action (FNDA) dated July 14, 2021, with a proposed penalty of removal: N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, for violations of DOC Human Resources Bulletin (HRB) § 84-17, C-3, physical or mental abuse of an inmate, C-5, inappropriate physical contact or mistreatment of an inmate, C-8, falsification by intentional misstatement of material fact in connection with work, C-11, conduct unbecoming an employee, and E-1, violation of a rule, regulation, policy, procedure, order, or administrative decision. (R-2.) Brown appealed, and his appeal was filed at the Office of Administrative Law (OAL) on August 12, 2021, for hearing as a contested case pursuant to N.J.S.A. 40A:14-202(d). The respondent filed a motion for summary decision on October 5, 2021, and the appellant responded to the motion on October 22, 2021. Following the denial of the respondent's motion for summary decision in an order dated November 10, 2021, the matter was heard on November 29, 2021, December 3, 2021, and December 8, 2021, via the Zoom video-conferencing platform. The record remained open for the parties to provide post-hearing submissions and the record closed on January 26, 2022, upon receipt of the parties' written post-hearing submissions.

TESTIMONY AND FACTUAL DISCUSSION

I **FIND** the following **FACTS** are uncontested on this record:

1. GSYCF is a State correctional facility which houses young adult male offenders.
2. The appellant has been employed by the New Jersey Department of Corrections (NJDOC) since graduating from the New Jersey Department of Corrections Academy on November 10, 2014. (R-8.)
3. As an SCPO, the appellant received use-of-force training from his employer, the DOC, annually, and most recently received use-of-force training on July 18, 2019, prior to the incident at issue. (R-8.)
4. On April 21, 2020, the appellant was on duty at GSYCF when an incident occurred involving K.W., an inmate in custody at GSYCF, and other correctional police officers. (See R-3.)
 - a. The appellant responded to a "Code 33" called by other officers on duty at GSYCF that day and the appellant was the second officer to arrive. (Ibid.)
 - b. A surveillance video of the incident (R-3) shows K.W. being physically removed from his cell at GSYCF and wrestled to the ground by GSYCF officers. The video also shows the appellant delivering several blows to K.W. while K.W. is engaged in a melee on the ground with a number of GSYCF officers.
5. The appellant completed a written Special Custody Report following the incident, where the appellant reported:

On [April 21, 2020], I OFC J. Brown #4 responded to a Code 33 called on West I C Wing. When I arrived I observed I/M [K.W.] assaulting OFC McGlassion & Ofc. Demartine. At this time I assisted in taking I/M. [K.W.] to the ground. While on the ground I heard Ofc. McGlassion yell "weapon." I then struck I/M [K.W.] in the upper torso area in attempt to gain

compliance. I/M [K.W.] resisted & refused a direct order to place his hands behind his back & remained combative. Continued use of closed fist strikes were used until response team arrived. At this time I then helped Ofc. McGlass[i]on off the tier when I realized he had a head injury.

[R-7 at DOC 99.]

6. On September 23, 2020, the appellant was interviewed in a videotaped interview with officers from the New Jersey DOC Special Investigations Division (SID). (R-6.) In that interview, the appellant stated:

- a. On April 21, 2020, he responded to an incident at GSYCF which he described as “a fight between cops and inmate.” (R-6.)
- b. The appellant reviewed his prior written statement (R-7 at DOC 99) as well as the surveillance video of the incident. (R-3.)
- c. The appellant stated that when he arrived at the scene, he saw SCPO McGlassion engaged in a physical altercation with an inmate. (R-6.)
- d. The appellant stated that, during the incident, he “probably threw a punch . . . probably a couple.” (Id.)
- e. He employed force against the inmate because, upon arriving at the scene, he saw an “officer fighting with [K.W.] and [K.W.] was not complying” with verbal orders from the appellant and other officers to place his hands behind his back. (Id.)
- f. The appellant gained control of K.W.’s right arm and forearm and delivered a few strikes to K.W.’s forearm. While the appellant noted that he initially had control of one of K.W.’s arms during the scuffle, he let go of that arm to move to the other side of K.W. in order to get in “a better position to grab him . . . to restrain him” and “put both his arms behind his back and cuff him.” (Id.)

g. Because K.W. was not complying with the orders to place his hands behind his back, the appellant continued to strike at K.W.'s torso. As he explained:

Q. You're hearing the officers and you said you stated to him to put his hands behind his back and stuff, but how do you know that he isn't . . . he may have, at that point given his hands up.

A. I don't know. I was one of the first officers to arrive, I was worrying about getting him to comply.

[Id.]

h. The appellant noted that, during the ensuing incident, he administered "a few" close fist strikes to the inmate's torso. (R-6.) The appellant explained:

I was trying to get the inmate to put his hands behind his back, he's not putting his hands behind his back, I'm going to strike him in the ribcage.

[Id.]

i. The appellant described K.W. as "combative" during the incident, detailing that "if you're not complying with orders and you're refusing to give your hands, it's a combative situation" and noting that K.W. had already physically attacked another officer. (Id.) When further questioned on this point, the appellant stated:

Q. Outside the initial allegation that he struck Officer McGlassion, was the inmate combative, was he attempting to strike you in any way, with any part of the body, while he's laying on the floor?

A. [Shrugs]

Q. Was that a yes or a no?

A. I was just trying to get the inmate to comply.

Q. I mean, you're not really answering my question.

Q. Did he kick you? Was he being combative? Was he . . .

A. The inmate was being combative.

Q. How was he being combative? Like, what was it that he did? Did he strike you in any way with any part of his body?

A. Might have kicked me.

Q. We don't work on "mights" – we're working on what happened.

A. The inmate was resisting, I was trying to get him to comply.

[Id.]

j. The appellant denied suffering any physical injuries from the April 21, 2020, incident. (R-3.)

Senior Investigator Ruben Baca with the New Jersey DOC Special Investigations Division (SID) testified that he has been a special investigator with DOC since 2019 and worked as a corrections officer with DOC since December 2009. Inv. Baca was assigned to investigate the April 21, 2020, incident at GSYCF. The incident was reported to SID by the shift commander at GSYCF as an incident involving a possible inmate assault on a GSYCF staff member. After reviewing the available surveillance video, however, Inv. Baca continued to investigate the incident as a possible use of excessive force by the DOC personnel involved in the incident. Inv. Baca conducted multiple interviews of the involved GSYCF staff and inmates and prepared a report which outlined his investigation. (R-4.)

Based upon his investigation, Inv. Baca added additional details to the April 21, 2020, incident recorded on surveillance video at GSYCF. (R-3.) At approximately 5:50 p.m., Senior Correctional Police Officer (SCPO) McGlassion was patrolling housing unit West One at GSYCF. SCPO McGlassion reported that cell 84, the cell assigned to GSYCF inmate K.W., had a window block which prevented SCPO McGlassion from seeing inside the cell. (R-7 at DOC 98.) SCPO McGlassion reported that he knocked on the cell door and ordered the block to be removed. (ibid.) After receiving no response from the inmate inside the cell, SCPO McGlassion opened the cell door to check on the inmate and remove the obstruction. (ibid.) The surveillance video from

GSYCF documents that SCPO McGlassion can be observed knocking on K.W.'s cell door and subsequently entering the cell.

While not captured by the surveillance video which only recorded the hallway outside K.W.'s cell, SCPO McGlassion reported that once he entered K.W.'s cell, K.W. "charged at [him] with an unknown object in his hand." (*Ibid.*) SCPO McGlassion reported that he ordered K.W. to the ground and, when K.W. did not comply, SCPO McGlassion utilized his "O.C. spray"¹ and called a "code 33" via his radio. (*Ibid.*) SCPO McGlassion reported he applied several "counter strikes with a closed fist" to K.W.'s head to gain his compliance and, at some point during the incident, "was struck in the head with an unknown object by [K.W.]." (*Ibid.*) Although SCPO McGlassion reported he was struck with an unknown object by K.W. (*ibid.*) and other officers, including the appellant, reported that they were told K.W. had a weapon when they responded to the scene (*see* R-7 at DOC 99; *id.* at DOC 108; *id.* at DOC 112), no weapon was recovered from K.W. or found at the scene.

SCPO DeMartine reported that he was observing SCPO McGlassion's security check of the GSYCF West One housing wing and saw SCPO McGlassion giving orders to remove a window block on K.W.'s cell. (R-7 at DOC 106.) As the cell door opened, SCPO DeMartine reported he heard SCPO McGlassion yell "get back get on the ground" and deploy his O.C. spray. SCPO DeMartine can be observed on the surveillance video responding to K.W.'s cell and entering the cell after SCPO McGlassion. (R-3.) Upon entering the cell, SCPO DeMartine reported that K.W. was "being combative" and he and SCPO DeMartine "used physical force to gain control and help restrain" K.W. (R-7 at DOC 106.)

The surveillance video shows SCPOs DeMartine and McGlassion physically removing K.W. from his cell and entering the hallway. (R-3.) Other GSYCF officers began responding to SCPO McGlassion's "code 33" radio call which Inv. Baca

¹ "O.C. Spray" or oleoresin capsicum spray is a compound that irritates the eyes and "causes a burning sensation, pain, and temporary blindness" that is utilized in policing, riot control, crowd control and self-defense applications. Wikipedia, [Pepper Spray](https://en.wikipedia.org/wiki/Pepper_spray), available at https://en.wikipedia.org/wiki/Pepper_spray (last visited November 30, 2021).

explained was a call that an officer or inmate was being assaulted. One of the first responding officers on the scene was SCPO Cardona. (R-4 at DOC 25.) The surveillance video shows SCPO Cardona arrive on the scene with two other officers (SCPO Fuentes and the appellant) as SCPOs DeMartine and McGlassion are exiting the cell with K.W. (R-3; Nov. 29, 2021, Tr. at 109:19-22.) Upon arriving, the appellant takes K.W. to the ground and SCPOs McGlassion and DeMartine are taken to the ground as well. SCPO Cardona arrived on the scene with an O.C. canister in his right hand and a radio in his left hand (R-4 at DOC 25) and can be seen moving along the wall by K.W.'s head as K.W. is brought to the ground. (R-3.)

SCPO Cardona falls to the ground by K.W.'s head and proceeds to strike K.W. in the head/face area multiple times with the O.C. canister while K.W. is on the ground with SCPO McGlassion on top of him. (R-3.) K.W. can be seen in the surveillance video moving his arms up over his head in defense against SCPO Cardona's blows with the O.C. canister. (Id.) Inv. Baca's report notes that, from his review of the surveillance video, it appears that SCPO Cardona may have struck SCPO McGlassion in the head as well with the O.C. canister (R-4 at DOC 26), however, SCPO McGlassion's reported that his head injuries were caused by being struck by K.W. in the head when he first entered K.W.'s cell. (R-7 at DOC 98.)

While on the ground with K.W. and the other officers, the appellant can be seen delivering blows with his right hand directed at K.W. (R-3.) The appellant moves around SCPO McGlassion and SCPO McGlassion can be seen falling away from the pile of persons on the ground. (Id.) With SCPO McGlassion now laying on the ground in front of the melee, the appellant can be seen continuing to strike K.W. in the torso with his left hand as another officer comes in between the appellant and K.W. (Id.) This officer was identified in Inv. Baca's report as SCPO Fuentes. (R-4 at DOC 22.) The appellant then moves around by K.W.'s feet and continues to deliver blows at K.W. over SCPO Fuentes' back. (Id.) At one point in the video, the appellant can be seen standing over SCPO Fuentes, who is on top of K.W. (Id.) The appellant can be seen looking down the hall towards the camera while continuing to deliver blows to K.W. over SCPO Fuente's back. (Id.) Less than a minute after the scuffle in the hallway began,

additional GSYF officers arrive on the scene. (Id.) Those officers assist in securing K.W., and one of them can be seen helping SCPO McGlassion leave the area. (Id.) K.W. is brought to his feet and placed, face first, against the wall as his hands are secured behind his back and he is escorted out of the area. (Id.)

After the incident, SCPO McGlassion was taken to the infirmary where it was noted that he had a “1-2 inch laceration to the right side of his head,” redness on his knee, and scratches to his right hand. (R-7 at DOC 96.) K.W. was also taken to the infirmary following the incident, where he was “decontaminated for O.C. exposure” and treated for a “5 cm scratch below the right eye, superficial bruises and scratche[s] to the right shoulder and back.” (Ibid.) Based on the review of the video surveillance and other evidence gathered, the matter was referred to both the Burlington County Prosecutor’s Office (BCPO) and the New Jersey Attorney General’s Office of Public Integrity and Accountability (OPIA) to review for possible criminal charges against the appellant and SCPOs McGlassion and Cardona. Both OPIA and BCPO declined to bring criminal charges from the incident. SCPO McGlassion has since left DOC.

Major Ronald Paldino, the Administrative Major (AM) at GSYCF, testified that, as the AM, he is responsible for handling administrative functions for the staff at GSYCF including training and operations. He has been in his current position since January 2019, and has over twenty-eight years with DOC. Maj. Paldino is familiar with DOC policies including those covering the use of force. (R-12, R-13, and R-14.) These policies apply to all custody staff and staff is trained annually on use of force.

The appellant received DOC use of force training as a new hire when he attended the DOC Academy in 2014 (see R-11) and was retrained on this policy annually. (R-8.) Use of force is governed by both a department-wide “Level 1” policy (R-13) which applies to all facilities throughout DOC, as well as a “Level 3” policy that applies specifically to GSYCF. (R-14.) Both policies deal with the use of force and require the use of “utmost restraint” in application of force.

Major Paldino was familiar with the appellant's case, and the charges brought against him. Among the charges brought against the appellant are charges for violating DOC Human Resource Bulletin 84-17, C-3 (physical or mental abuse of an inmate), C-5 (inappropriate physical contact or mistreatment of an inmate), C-8 (intentional misstatement of a material fact in connection with work or any record, report or investigation), and E-1 (violation of a rule, regulation, policy, procedure, order, or administrative decision). (See R-2.) Pursuant to DOC policy, any of these violations may result in a penalty up to removal even on a first offense. (See R-15.)

Maj. Paldino reviewed the surveillance video of the incident. (R-3.) The responding officers, including the appellant, were responding to the scene after SCPO McGlassion had called a "code 33" over his radio. A "code 33" can be either an inmate/inmate disturbance, or an inmate/staff disturbance. When the appellant arrived on the scene and saw K.W. being removed from his cell by SCPOs DeMartine and McGlassion, he acted properly in trying to bring K.W. to the ground.

On his arrival at the scene, the appellant reported that SCPO McGlassion yelled "weapon" indicating that K.W. was in possession of a weapon (see R-7 at DOC 99) even though no weapon was found on K.W. or at the scene. Although Maj. Paldino asserted that "no weapon was found period," based on the information he had at the time, the appellant had reason to believe K.W. had a weapon on his person at the time. (Nov. 29, 2021, Tr. at 158:9.) Under the circumstances presented, the appellant was justified in acting to bring K.W. to the ground, securing his right arm, and applying strikes to that arm to get K.W. to open his hand to show there was no weapon in it.

A corrections officer may use physical force where an inmate resists lawful orders to comply, but the force applied must be "reasonable and necessary." While an officer like the appellant may make strikes to the torso to gain an inmate's compliance with an order consistent with DOC policy, the use of force must be reasonable. When the appellant can be seen in the video surveillance standing over another officer and striking at K.W. over the other officer's back, Maj Paldino felt that the appellant could not even tell what he was striking at but continued to strike at K.W. At that point, K.W. was

“not resisting anymore he’s trying to defend himself” and, in view of the force being applied by SCPO Cardona towards his head, K.W. was “entitled to do so.” (Nov. 29, 2021, Tr. at 169:17-23.)

K.W. was on the ground and was putting his hands around his head to protect himself from the blows being delivered by SCPO Cardona, who reported that he was striking K.W. in the head with a can of O.C. spray. (R-7 at DOC 25-26.) SCPO Cardona can be seen in the surveillance video clearly striking K.W. in the head area with his right hand as K.W. is on the ground and SCPO Cardona has his can of O.C. spray still in his right hand as he is striking K.W. with that hand. (R-3) “The fact that [the appellant] can see [SCPO Cardona] striking [K.W.] in the head with a canister, he was basically obligated to put a stop to that because that was illegal force.” (Nov. 29, 2021, Tr. at 170:16-19.) While K.W. was not placing his hands behind his back in compliance with the appellant’s verbal orders to do so, “[SCPO Cardona] is striking him in the head . . . what do you expect, not on an inmate, but any other human being to do?” (*Id.* at 174:13-14.) “The inmate is not resisting . . . he’s trying to protect himself.” (*Id.* at 175:6-8.)

The inmate could not comply with orders to move his hands behind his back under the circumstances because “he can’t. No human being is going to do that when he is being hit in the head with a metallic object. I couldn’t do it.” (Nov. 29, 2021, Tr. at 185:5-7.) The officers involved could all see K.W. was no longer resisting. They could see SCPO Cardona “using the canister” on K.W., and they had an obligation to stop SCPO Cardona from continuing to strike K.W. because “using that canister on him, that’s possibly deadly force and serious[] bodily harm being done to that inmate” and the appellant had “an obligation to try to stop that from going on” (*id.* at 187:8-18) but he’s still swinging “blindly” at K.W. (*Id.* at 193:7.) The fact that K.W. was not in a position where he could comply with the appellant’s orders because he was protecting himself from SCPO Cardona’s blows makes the continued application of force to make him comply under these circumstances unreasonable.

Assistant Commissioner Aaron Erven has served as the Assistant Commissioner of DOC and Director of Training and Professional Development since August 2021. Prior to that, Asst. Comm. Erven was the DOC Director of Training since December 2016. Prior to that position, Asst. Comm. Erven served as a sergeant for eleven years and a DOC officer for twelve years before that. In his current role, Asst. Comm. Erven oversees the DOC Academy, the in-service training and recruiting unit for DOC staff, and professional development for DOC staff seeking promotions within the DOC. (See R-9 (Asst. Comm. Erven's resume).)

The DOC's use of force policy allows officers to know what level of force they may use and when to use it. Officers are trained on the use of force policies annually. Asst. Comm. Erven conducts and leads use of force training classes at DOC. Attendees to these training sessions are taught on issues of inmate restraint, how to control an inmate's movement and assist in their compliance as well as the use of mechanical restraints as needed. Part of the DOC's force training is to train officers to gain control over an individual's arms and legs—once an officer has control of an arm or leg, they are trained to keep control of that limb until mechanical restraints can be applied to keep control over the limb.

A Use of Force Committee (UFC) was formed within the DOC in October 2019. The purpose of the UFC is to "uniformly look at" use of force incidents within the DOC. Asst. Comm. Erven is the chair of the UFC due to his role in DOC's training programs. SID and DOC Office of Employee Relations may refer use of force matters to the UFC for review. Asst. Comm. Erven has reviewed approximately twenty to twenty-five cases as part of the UFC. The UFC decisions are determined by a majority vote of the members who determine whether the use of force at issue was reasonable or excessive. The conclusions of this review are documented on a form. (See R-10.)

Asst. Comm. Erven was familiar with the appellant from his role on the UFC. The April 21, 2020, incident was referred to the UFC for review by SID and the Office of Employee Relations. The committee reviewed the surveillance footage (R-3), reports,

and medical documentation. The UFC voted five to zero that the force employed in this matter was excessive. (R-10.)

From Asst. Comm. Erven's review of the video footage (R-3), he noted that the initial response from the appellant to tackle K.W. was a reasonable use of force because the appellant believed that a weapon was involved and taking K.W. to the ground was an appropriate step in gaining control over him and possibly recovering any weapon he may be possessing. The appellant was responding to a radio call of a "code 33" which is an urgent call to respond to an assault. After K.W. was brought to the ground, Asst. Erven testified that an officer like the appellant must continue to assess the situation as they move through it. From the video (R-3) he reviewed, he believed the appellant was not assessing the situation and acting accordingly. When the appellant took control of K.W.'s right arm and initially struck that arm to get K.W. to open his hand to ensure there was no weapon in that hand, the appellant was employing acceptable force under the situation presented. Once the appellant moves to the other side of K.W. and there is another uniformed officer in the melee between K.W. and the appellant, the appellant continued striking at K.W. over the other officer's back. At that point, the appellant was acting and employing force when he did not have a proper assessment of the situation. The appellant continued to utilize force against K.W. once it was clear that K.W. was no longer combatting or resisting. Once an officer can see that a subject is no longer offering resistance, they are obliged to stop using force or to de-escalate the use of force. The appellant appeared to continue to employ force without looking at K.W. to confirm if additional force was necessary. Once K.W. was on the ground and no longer resisting, the officers should have applied mechanical restraints to restrain K.W.

Jared Brown has worked as a corrections officer with DOC since his graduation from the DOC Academy in Sea Girt, New Jersey, in 2014. Following his graduation from the Academy, Brown worked as a correctional police officer on a working test period at DOC's Rahway facility and was promoted to SCPO after his working test period ended. He transferred to GSYCF and has been an SCPO there since 2016. Brown has never been the subject of any prior disciplinary actions at DOC. As part of

his training in the Academy, and annually during his tenure with the DOC, Brown was trained in the use of force policies. DOC policy requires officers to exercise the “utmost restraint” in use of force. (Dec. 1, 2021, Tr. at 264:9-16.)

In 2020, Brown worked the 2:00 p.m. to 10:00 p.m. or ‘second shift’ at GSYCF. (Id. at 215:24.) On April 21, 2020, Brown was working his usual shift as the housing south I officer. Around 5:00 p.m., inmates at GSYCF were beginning their daily recreational activities, and he heard a “code 33” call on his radio. Brown described a “code 33” as a “most extreme and dangerous situation” (id. at 218:14-16) and, based on the call, Brown could tell that there was a fellow officer involved in the situation rather than a fight between GSYCF inmates. When the call came in, it sounded to Brown like the officer involved was in distress.

Brown was in the South I area of GSYCF when he heard the call, and responded to West I. When he arrived, he could see officers physically removing an inmate from a cell. Brown knew that whenever an officer has hands on an inmate, it is a serious situation—particularly if the officers are inside an inmate’s cell. Brown knew the two officers involved but was not familiar with K.W. because Brown did not ordinarily patrol this unit at GSYCF. Consistent with his training, Brown acted to take K.W. to the ground. While he was trained to cuff an inmate in this situation, Brown did not have handcuffs with him at that time. Once he hit the ground with K.W., he heard SCPO McGlassion yelling “weapon, weapon” at the top of his voice.

After bringing K.W. to the ground, Brown grabbed his left hand and applied “hammer strikes” to K.W.’s closed fist to compel him to open his hand so Brown could check for a weapon in his hand. (Id. at 231:15-232:10.) K.W. unclenched his hand, and Brown did not find a weapon in that hand, so he released K.W.’s arm to move to K.W.’s other side to check his other hand for a weapon. Brown was not able to determine if K.W.’s other hand had a weapon in it. He could see at the time that SCPO McGlassion’s head was bleeding and that he was injured.

Brown applied blows with his fist to K.W.'s "green zone" to get him to comply with his orders to place his hands behind his back. (Id. at 237:19-22.) The "green zone" is the torso of the body where force can be applied with the least risk of serious injury to the person. (Id. at 289:15-24.) He was trying to get K.W. to stop positioning and to get his hands behind his back. Brown did not recall the actions of SCPO Cardona from that day and did not see him striking K.W. in the head during the incident. (Id. at 287:5-14.) K.W. was on the ground laying on his side during the incident and Brown was unsure if he was trying to hide a weapon on his person. K.W. did not comply with Brown's verbal orders to put his hands behind his back and he was using force to obtain K.W.'s compliance. Brown gave K.W. a direct order to place his hands behind his back, and K.W. did not comply, so Brown continued to strike at K.W. to gain his compliance. Once K.W. complied and put his hands behind his back, Brown stopped striking K.W.

After the incident, Brown completed a handwritten report of the incident and gave it to Sgt. Ward, who was his area supervisor. (R-7 at DOC-99.) Brown did not complete the typewritten Use of Force report submitted as R-7 at DOC-101-102, and does not know who submitted that report.

Based upon the testimony and documentary evidence, and having had the opportunity to observe the appearance and demeanor of the witnesses, I **FIND** the following additional **FACTS**:

7. At approximately 5:50 p.m. on April 21, 2020, SCPO McGlassion was patrolling housing unit West One at GSYCF. (R-7 at DOC 98.)

8. During this patrol, SCPO McGlassion and SCPO DeMartine went inside cell 84, the cell which housed GSYCF inmate K.W. (Ibid.) During their interaction inside K.W.'s cell, SCPO McGlassion deployed his O.C. spray against K.W. (Ibid.)

9. SCPO McGlassion radioed a "code 33" indicating that an officer or inmate was being assaulted. (Nov. 29, 2021, Tr. at 18-23; Dec. 1, 2021, Tr. at 218:13-19.)

10. The appellant, and other GSYCF officers, responded to the housing wing in response to SCPO McGlassion's call. (Id. at 221:1-4.)

11. The first officers to arrive on the scene in response to SCPO McGlassion's call were the appellant, SCPO Cardona and SCPO Furentes. (R-3; Nov. 29, 2021, Tr. at 109:19-22.)

12. As SCPO Cardona, SCPO Fuentes, and the appellant arrive to the scene, SCPOs McGlassion and DeMartine were physically removing K.W. from his cell and into the hallway outside the cell. (R-3.)

13. Seeing K.W. in a physical struggle with SCPOs McGlassion and DeMartine, the appellant acted to tackle K.W. to the ground upon arrival at the cell. (Id.) The appellant, K.W., and SCPOs McGlassion and DeMartine all fell to the ground together. (Id.)

14. SCPO Cardona arrived at the scene with an O.C. canister in his hand. After K.W. and the other officers fall to the ground, SCPO Cardona is also on the ground near K.W.'s head. (Id.)

15. One of the officers at the scene shouted "weapon" to inform the responding GSYCF officers that they believed K.W. had a weapon on his person. (Nov. 29, 2021, Tr. at 158:9.)

16. SCPO McGlassion also had a visible injury to his head from his interaction with K.W., and blood from that injury was visible by the appellant and other officers responding to the scene. (Dec. 1, 2021, Tr. at 247:21-248:1; Id. at 231:8-15; Id. at 237:15-20.)

17. While K.W. is on the ground, SCPO Cardona begins to strike K.W. in the head/face area with the metal O.C. canister multiple times while K.W. is on the ground. (R-3.)

18. The appellant grabbed K.W.'s arm and delivered multiple fist blows to K.W.'s arm in an effort to get K.W. to open his hand to check for a potential weapon. (Dec. 1, 2021, Tr. at 231:15-18.)

19. Finding no weapon in K.W.'s hand, the appellant released K.W.'s arm and moved to the other side of K.W. in an attempt to grab K.W.'s other arm to check for a weapon in his other hand. (Id. at 234:17-23.)
20. In an effort to protect his head from the continuing blows being delivered by SCPO Cardona, K.W. moved his arms and hands into a defensive position to shield his head from SCPO Cardona's O.C. canister. (R-3.)
21. Despite the appellant's verbal orders to K.W. to place his hands behind his back (Dec. 1, 2021, Tr. at 235:7-15), K.W.'s arms remained in a defensive position protecting his head from SCPO Cardona's blows from his O.C. canister. (R-3; R-7 at DOC 25-26; Nov. 29, 2021, Tr. at 170:16-19.)
22. While K.W. is on the ground with his arms and hands being utilized in a defensive posture against the blows from SCPO Cardona and his O.C. canister, the appellant delivered several fist strikes to K.W.'s torso, striking K.W. in an effort to get K.W. to comply with his verbal order to place his hands behind his back. (R-3.) Some of these fist strikes were delivered over the back of SCPO Fuentes who had moved to a position between the appellant and K.W., obstructing the appellant's view of K.W. as the appellant delivered further fist strikes to K.W.'s torso. (Id.)
23. After approximately a minute after the struggle in the hallway began, additional GSYCF officers arrive on the scene and assist in securing K.W. (Id.)
24. K.W. was brought to his feet with his hands behind his back and escorted out of the area by GSYCF officers. (Id.)
25. No weapon was found on K.W.'s person or at the scene of the incident following DOC's internal investigation. (Nov. 29, 2021, Tr. at 158:9.)
26. After the incident, SCPO McGlassion was taken to the GSYCF infirmary, where he was treated for a "1-2 inch laceration to the right side of his head," redness on his knee, and scratches to his right hand. (R-7 at DOC 96.)

27. After the incident, K.W. was also taken to the GSYCF infirmary, where he was decontaminated for O.C. exposure, and treated for a "5 cm scratch below the right eye, superficial bruises and scratche[s] to the right shoulder and back." (Ibid.)

These factual findings are supported by a residuum of legal and competent evidence in the record.

LEGAL ANALYSIS AND DISCUSSION

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 properly execute 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 from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987); N.J.S.A. 11A:2.21; N.J.A.C. 4A:2-1.4(a). The authority must show 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, 90 N.J. 550 (1982). An appeal requires the OAL 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 County Bd. of Social Serv., 197 N.J. Super. 307 (App. Div. 1984).

The appellant's status as a corrections officer subjects him to a higher standard of conduct than ordinary public employees since corrections officers, like police, are held to a high standard of professional conduct because when a corrections officer fails in their duties, they may imperil others. Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980). Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965). Maintenance of strict discipline is important in military-like settings such as police departments, prisons, and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 317 (App. Div. 1967). Strict discipline of corrections officers is necessary for the safety and security of other corrections officers and the inmates in their charge. Henry, 81 N.J. at 578. As the Appellate Division explained, this higher standard of conduct and behavior is necessary because:

The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not properly operated, have a capacity to become "tinderboxes."

[Bowden v. Bayside State Prison, 268 N.J. Super. 301, 306 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).]

Charge of other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12) for violation of DOC Human Resources Bulletin (HRB) § 84-17 C.8 – falsification: intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation.

One of the charges against the appellant is a violation of DOC HRB 84-17 § C.8 for "provid[ing] false information in connection with this matter." (R-2.) DOC's HRB 94-17 § C.8 prohibits the "intentional misstatement of material facts in connection with work, employment application, attendance, or in any record, report, investigation or other proceeding." (R-15 at DOC 163.) The respondent asserts that the appellant provided "misleading statements during his SID investigation." (Respondent's Reply Br. on Motion for Summary Decision at 8.) The respondent focuses this charge on the

statements given by the appellant in his interview with SID on September 23, 2020, when he stated that he “threw a punch . . . probably a couple” at K.W. during the incident. (R-6.) While the respondent has previously argued that the video surveillance showed that the appellant delivered “more tha[n] ‘probably a couple’ [of] punches at K.W” (Respondent’s Motion for Summary Decision at 13), the distinction between the throwing of “a few” or “a couple” of punches and the actual number of punches delivered by the appellant during the incident must be examined in light of the charge levied.

The appellant in this matter told SID during his September 23, 2020, interview that he administered “a few” close fist strikes to K.W.’s torso. (R-6.) The common definition of “a few” is “consisting of or amounting to only a small number.” Merriam-Webster, Definition of Few, available at <https://www.merriam-webster.com/dictionary/few> (last visited December 7, 2021). The appellant also asserted that he delivered “probably a couple” of punches during the incident. (R-6.) The term “couple,” which derived from the Latin word “copula,” which means “bond” is often applied to pairs but is also often utilized to refer “to an indefinite but still small number of people or things.” Merriam-Webster, ‘Couple,’ ‘Few,’ and ‘Several’: The Definitive Guide, available at <https://www.merriam-webster.com/words-at-play/couple-few-several-use> (last visited December 8, 2021). While the appellant’s choice of words may be open to interpretation with respect to the precise number of blows he delivered during the incident, I **CONCLUDE** that the respondent has failed to sustain its burden to demonstrate that the appellant’s statement given during his September 23, 2020, interview with SID contained an intentional misstatement.

Further undercutting this charge is the fact that, to sustain the charge, an alleged misstatement must also be “material.” (R-15 at DOC 163.) A statement is “material” where “it could have affected the course or outcome of that proceeding or the disposition of the matter.” New Jersey Courts, Model Jury Charge, Perjury N.J.S.A. 2C:28-1, Revised March 30, 1993. See also N.J.S.A. 2C:28-1(b). In the present matter, whether one finds that the appellant delivered “a small number” of punches at K.W.’s torso, a large number of punches, or even a single punch is largely immaterial in

this matter with respect to determining whether the appellant's force applied during the incident on April 20, 2020, was excessive—since even a single punch if administered improperly can be deemed excessive force. As Maj. Paldino asserted in his testimony, the allegation of excessive force in this matter is based on the premise that, because K.W. was actively engaged in a defensive posture protecting his head with his arms and hands from SCPO Cardona's blows from his O.C. canister, the appellant's application of force, any force, to get K.W. to comply with verbal orders to move his hands behind his back under the circumstances was improper and excessive.

SID also had a video recording of the incident at the time of their interview which they reviewed with the appellant which provided them with independent verification of exactly how many blows were delivered by the appellant in the April 20, 2020, and that video footage was reviewed with the appellant during his SID interview. While reasonable minds may argue on the preciseness of the appellant's choice of words to describe whether the number of blows he delivered during the April 20, 2020, incident were "a few," "a couple," or many more, the precise descriptor applied by the appellant during his SID interview had no effect on the course or outcome of that proceeding or the disposition of that investigation to be properly considered "material" since SID could readily ascertain the precise number of blows delivered by reviewing the video surveillance already in their possession. See N.J.S.A. 2C:28-1(b). I **CONCLUDE** for the reasons detailed above that the appellant's alleged misstatements on this point were not material and the respondent has failed to sustain their burden on the charge of Other Sufficient Cause, in violation of N.J.A.C. 4A:2-2.3, for violating DOC HRB § 84-17 C.8 Falsification: intentional misstatement of material fact in connection with work employment application, attendance, or in any record, report, investigation.

Charges of conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6) and other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12) for violation of DOC Human Resources Bulletin (HRB) § 84-17 C.3—physical or mental abuse of an inmate; C.5 inappropriate physical contact or mistreatment of an inmate, patient, client, resident, or employee; C.11 conduct unbecoming an employee, and E.1 violation of a rule, regulation, policy, procedure, order, or administrative decision.

“There is nothing more serious than the use of excessive force by those who have custody over inmates.” In the Matter of Phillip Morris, Burlington County Jail, OAL Dkt. No. CSV 17361-15, Initial Decision (September 15, 2017) adopted, Comm’n (October 20, 2017) <http://lawlibrary.rutgers.edu/oal/search.html>. The use of non-deadly force by DOC custodial staff against persons may be justified under limited circumstances, including:

1. To protect self or others against the use of unlawful force;
2. To protect self or others against death or serious bodily injury;
3. To prevent damage to property;
4. To prevent escape;
5. To prevent or quell a riot or disturbance;
6. To prevent a suicide or attempted suicide; or
7. To enforce correctional facility regulations where expressly permitted by [DOC] regulations or in situations where a custody staff member with the rank of Sergeant or above believes that the inmate’s failure to comply constitutes an immediate threat to correctional facility security or personal safety.

[N.J.A.C. 10A:3-3.3.]

The use of force by on-duty custody staff members, such as the appellant, is governed by N.J.A.C. 10A:3-3.2, which states:

- (a) In any case that a custody staff member uses force while on-duty, the custody staff member shall only use that force that is objectively reasonable under the totality of the circumstances as known by the custody staff member at the time force is used.
- (b) A custody staff member may use the amount of force reasonably necessary to accomplish the law enforcement objective. If the individual resists, the custody staff member may increase the degree of force as necessary to accomplish the law enforcement objective but as soon as the individual submits, the custody staff member shall reduce the degree of force used.

Consistent with the governing regulations, DOC's internal policies and procedures also set forth the standards that custodial staff, such as the appellant, are held to when employing force. DOC's applicable use of force policy requires that:

[S]taff members will use only that force that is objectively reasonable and necessary. The use of force shall never be considered routine. When custody staff is justified in using both mechanical and physical force, the utmost restraint will be exercised.

[R-13 at DOC 82.]

The policy at GSYCF further echoes both the governing regulations and the DOC policy on the use of force. (R-14 at DOC 46-47.)

It is undisputed that the appellant utilized non-deadly force on GSYCF inmate K.W. on April 20, 2020. The question, therefore, is whether the force utilized by the appellant that day was "objectively reasonable under the totality of the circumstances as known [to the appellant] at the time the force [was] used." N.J.A.C. 10A:3-3.2(a). Brown testified that he applied the force in question to obtain K.W.'s compliance with his verbal orders to place his hands behind his back. DOC regulations permit custodial staff to apply force "as necessary to accomplish the law enforcement objective" N.J.A.C. 10A:3-3.2, and it is undisputed that securing K.W. was a legitimate law enforcement objective when the appellant arrived at the scene on April 20, 2020.

The issue to be resolved is whether the force applied by the appellant was "necessary to accomplish" the otherwise legitimate law enforcement objective of securing K.W. The appellant, in his closing brief, contends that his strikes to K.W. "were intended to apply pressure on the inmate to become compliant." (App. Closing at 9.) Under the circumstances, however, K.W. was clearly engaged in an understandable act of physical self-preservation by utilizing his arms and hands to shield his head from the continuing blows from SCPO Cardona and his metal O.C. canister. The appellant notes that despite the verbal orders to K.W. from the appellant and other officers to place his hands behind his back, he "ignored their instructions and orders and continued with

non-compliant behavior.” (App. Closing at 11.) As Maj. Paldino testified, however, K.W. could not be expected to comply with the appellant’s verbal orders to place his hands behind his back under the circumstances presented because “[n]o human being is going to do that when he is being hit in the head with a metallic object.” (Nov. 29, 2021, Tr. at 185:5-7.)

While the appellant testified that he was not aware of SCPO Cardona’s actions during the incident, DOC’s policy notes that “concerted action and mutual protection are necessary in the proper performance of [their] duty.” (R-12 at Art. II § 4.) As a responding officer under the circumstances, the appellant was not acting alone, but in concert with the other responding officers and needed to be aware of their actions to act in concert to achieve the legitimate law enforcement activity of securing K.W. The appellant’s status as a law enforcement officer places his conduct under heightened scrutiny. His primary duty is to enforce and uphold the law. “He carries a service [weapon] on his person and is constantly called upon to exercise tact, restraint and good judgment.” In re Disciplinary Procedures of Phillips, 117 N.J. 567, 576-77 (1990) (quoting Moorestown, 89 Super. at 566). Being held to this heightened standard of conduct is one of the obligations the appellant undertook “upon voluntary entry into the public service.” In re Emmons, 63 N.J. Super. 136, 142 (App. Div. 1960).

As DOC’s policy reflects, the use of force by an officer should never be considered a routine act. (R-13 at DOC 82.) Officers are required to show the “utmost restraint” in using force and to do so only when the use of force is necessary. (Ibid.) This requires the officer to have an awareness of the circumstances before applying force. While the appellant testified that he was unaware of SCPO Cardona’s actions during the incident, it is clear that he should have made himself fully aware of the situation before making the decision to utilize force against K.W. The appellant continued to employ force to obtain compliance from K.W. while, due to the actions of SCPO Cardona, K.W. was engaged in an understandable and necessary act of self defense to shield his head from SCPO’s O.C. canister. The application of force by the appellant to coerce K.W. to retreat from his defensive posture to protect his head from SCPO Cardona under the circumstances was not going to be effective in obtaining a

legitimate law enforcement objective and had the effect of subjecting K.W. to further physical attack without a legitimate law enforcement objective to justify it. For these reasons, I **CONCLUDE** that the appellant's use of force against K.W. on April 20, 2020, was excessive in violation of DOC's Use of Force Policy (R-13), GSYCF Policy (R-14), DOC Human Resources Bulletin (HRB) 84-17 §§ C.3 and C.5, and N.J.A.C. 10A:3-3.2. Accordingly, I **CONCLUDE** that the respondent has met its burden of proof to sustain the charges of N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, for violation of HRB 84-17 §§ C-3; C-5; and E-11.

The appellant has also been charged with conduct unbecoming a public employee. N.J.A.C. 4A:2-2.3(a)(6) and DOC HRB 84-17 § C-11. "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale of efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic 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 conduct complained of and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 150 A.2d 821, 825 (1959)). Such misconduct "need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Department of Ridgewood, 258 N.J.Super. 32, 40 (App.Div. 1992) (quoting Asbury Park v. Dep't of Civil Service, 17 N.J. 419, 429 (1955)).

As a law enforcement officer, the appellant represents "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J.Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons, and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J.Super. 317 (App. Div. 1967). The use of excessive force by a corrections officer against an inmate charged to his care is conduct unbecoming a public employee. See, e.g., In the Matter of Edwin

Garcia, CSV09777-07, Initial Decision (July 17, 2008), <http://lawlibrary.rutgers.edu/oal/search.html>; In the Matter of Phillip Morris, Burlington County Jail, OAL Dkt. No. CSV17361-15, Initial Decision (September 15, 2017), adopted, Comm'n (October 20, 2017) <http://lawlibrary.rutgers.edu/oal/search.html>; In the Matter of Joey McClary, Hudson County Department of Corrections, Initial Decision (March 11, 2016), adopted, Comm'n (June 21, 2016) <http://lawlibrary.rutgers.edu/oal/search.html>. I **CONCLUDE**, therefore, that the respondent has met its burden of proof to sustain the charges of Conduct Unbecoming a Public Employee under N.J.S.A. 4A:2-2.3(a)(6) and Other Sufficient Cause under N.J.S.A. 4A:2-2.3(a)(12) for violation of HRB § 84-17 C-11.

PENALTY

In West New York v. Bock, 38 N.J. 500, 522 (1962), which was decided more than fifty years ago, the New Jersey Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Herrmann, 192 N.J. 19, 29 (2007) (citing Bock, 38 N.J. at 522). The Bock Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations, and the like on one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Bock, 38 N.J. at 523-24.

"Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, Bock, 38 N.J. at 523, that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990). Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 205 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994). The respondent has proven by a preponderance of the credible evidence the

following charges against the appellant: Conduct Unbecoming a Public Employee, in violation of N.J.A.C. 4A:2-2.3(a)(6) and Other Sufficient Cause, in violation of N.J.A.C. 4A:2-2.3(a)(12), for violating HRB § 84-17 C-5, inappropriate physical contact or mistreatment of an inmate, C-11, conduct unbecoming an employee, and E-1, violation of a rule, regulation, policy, procedure, order or administrative decision. The respondent seeks to remove the appellant from his job as discipline for these charges. The remaining question to be resolved, therefore, is whether the discipline sought to be imposed in this case is appropriate.

Although the Civil Service Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's disciplinary history may be outweighed if the infraction at issue is of a serious nature. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980); Bowden v. Bayside State Prison, 268 N.J. Super. 301, 306 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994). The concept of progressive discipline is recognized in this jurisdiction, but:

That is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position, or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.

Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's own position involves public safety and the misconduct causes risk of harm to persons or property.

[In re Herman, 192 N.J. 19, 33-34 (2007), (citing Henry, 81 N.J. at 580).]

A singular incident of absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See Id. at 32.

It is uncontested that this is the appellant's first disciplinary action since he began his career with DOC in 2014. As the appellant noted in his closing brief, the appellant "has served the NJ DOC with distinction and without any form of [d]iscipline since his date of hire on November 10, 2014." (App. Closing at 8.) While the penalty of termination for a first-time offense is certainly a serious disciplinary penalty, appropriate focus must be given to the nature and seriousness of the appellant's current actions. The appellant's conduct on April 21, 2020, was a serious offense committed by someone in a safety-sensitive position and the penalty should reflect the same. Given the serious nature of these actions—even without a prior disciplinary history—imposition of major discipline would be warranted. (See R-15 (HRB 84-17 § C-3 noting penalty for first offense of physical abuse of an inmate is removal).) It appears that the appellant's actions here were not done out of malice, but rather a lack of awareness of the circumstances as they presented themselves when he made the conscious decision to employ force against K.W. The appellant's purpose in utilizing force against K.W. was intended to further a legitimate law enforcement objective, namely securing K.W. and getting K.W. to comply with verbal orders to place his hands behind his back. The appellant, however, failed to account for the circumstances of the situation which clearly prevented K.W. from complying with those verbal orders as he was actively and understandably engaged in an act of self-protection to shield his head and face against the strikes from SCPO Cardona who was actively striking K.W. in the head with a metal O.C. can. Despite this, the appellant employed force against K.W. where the circumstances of the situation were clear that the force the appellant was applying was not going to advance a legitimate law enforcement objective but would only add to the physical duress being applied to K.W. without lawful justification to do so.

As a law enforcement officer who is entrusted to utilize force which includes, when the proper circumstances are presented, the application of deadly force, the appellant must exercise "the utmost restraint" to ensure that their use of such force is "objectively reasonable and necessary." (R-13.) Here, the appellant failed to live up to that standard by applying force in a circumstance where it was no longer necessary and not reasonable to further a legitimate law enforcement objective. The action of employing excessive force against an inmate is egregious, and an institution such as

GSYCF cannot employ an individual who has committed such an act against a person in DOC's charge, even if the act is an aberration in an otherwise discipline-free career. Based upon the facts set forth in this matter, I **CONCLUDE** that removal is the appropriate discipline for the violations of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause.

Consequently, I **FIND** and **CONCLUDE** that the appellant's dismissal should be **SUSTAINED**.

CONCLUSION

After having considered all of the proofs offered in this matter, the impact upon the institution regarding the behavior by the appellant herein, and in light of the seriousness of the offense and in consideration of the appellant's prior disciplinary record, I **CONCLUDE** that the appellant's termination is within the law and associated regulations should be **SUSTAINED**.

ORDER

The respondent has proven by a preponderance of the credible evidence the following charges against the appellant: Conduct Unbecoming a Public Employee, in violation of N.J.A.C. 4A:2-2.3(a)(6) and Other Sufficient Cause, in violation of N.J.A.C. 4A:2-2.3(a)(12), for violating HRB § 84-17 C-5, inappropriate physical contact or mistreatment of an inmate, C-11, conduct unbecoming an employee, and E-1, violation of a rule, regulation, policy, procedure, order or administrative decision. Accordingly, I **ORDER** that these charges be and are hereby **SUSTAINED**. The respondent has failed to prove by a preponderance of the credible evidence the following charge against the appellant: Other Sufficient Cause, in violation of N.J.A.C. 4A:2-2.3(a)(12), for violating HRB § 84-17 C-8, falsification: intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation, or other proceeding. Accordingly, I **ORDER** that this charge be and is hereby **DISMISSED**.

I **ORDER** that the penalty of removal from his position is hereby **SUSTAINED**.

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.

March 10, 2022

DATE


DAVID M. FRITCH, ALJ

Date Received at Agency:

March 10, 2022

Date Mailed to Parties:

March 10, 2022

/dw

APPENDIX
LIST OF WITNESSES

For Appellant:

Jared Brown, appellant

For Respondent:

Ruben Baca, Senior Investigator, New Jersey Department of Corrections Special Investigations Division

Aaron Erven, Assistant Commissioner and Director of Training, New Jersey Department of Corrections

Ronald Paldino, Administrative Major, New Jersey Department of Corrections

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

None

For Respondent:

R-1 Preliminary Notice of Disciplinary Action, March 30, 2021

R-2 Final Notice of Disciplinary Action, July 14, 2021

R-3 Video Surveillance Footage, GSYCF, April 21, 2020

R-4 SID Investigations Report, February 25, 2021

R-5 Weingarten Notice, September 23, 2020

R-6 SID Interview of SCPO Brown, September 23, 2020

R-7 Preliminary Incident Reports, April 21, 2020

- R-8 Training Summary Report
- R-9 Assistant Commissioner Aaron Erven, CV
- R-10 DOC Use of Force Committee, Determination Form, March 26, 2021
- R-11 New Hire Orientation Checklist, October 24, 2019
- R-12 New Jersey DOC, Law Enforcement Personnel Rules and Regulations
- R-13 New Jersey DOC, Level 1 Internal Management Procedure, CUS.001.UOF.001, February 29, 2016
- R-14 Garden State Correctional Facility, Level III Internal Management Procedure, GS.228, April 2017
- R-15 New Jersey Department of Corrections, Human Resources Bulletin 84-17
- R-16 State of New Jersey, Office of the Attorney General, Division of Criminal Justice, Office of Public Integrity and Accountability, declination letter, September 10, 2020
- R-17 State of New Jersey, Office of the Attorney General, Division of Criminal Justice, Office of Public Integrity and Accountability, declination letter, November 30, 2021