STATE OF NEW JERSEY

In the Matter of Steven Mitchell, Mid-State Correctional Facility, Department of Corrections	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2020-2597 OAL Docket No. CSR 06951-20	

ISSUED: SEPTEMBER 20, 2023

The appeal of Steven Mitchell, Senior Correctional Police Officer, Mid-State Correctional Facility, Department of Corrections, removal, effective May 8, 2020, on charges, were heard by Administrative Law Judge Jeffrey N. Rabin (ALJ), who rendered his initial decision on August 9, 2023. 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 on September 20, 2023, adopted the ALJ's Findings of Facts and Conclusions and his recommendation to uphold the removal.

Upon its *de novo* review of the ALJ's thorough and well-reasoned initial decision as well as the entire record, including the exceptions filed by the appellant, the Commission agrees with the ALJ's determinations regarding the charges, which were substantially based on his assessment of the credibility of the witnesses and the video of the incident in question. In this regard, 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. In this regard, the ALJ found the appointing authority's witness credible. Moreover, the ALJ indicated the witness's testimony regarding the video of the incident was credible. In this regard, the ALJ noted that he also viewed the video multiple times, stating:

> Major Abrams did not witness the Incident firsthand; his testimony centered on the rules and regulations allegedly violated by appellant. Major Abrams, however, also offered credible narration of the video evidence proffered herein. Additionally, this court has been afforded opportunities to watch and review the video evidence, resulting in the above-referenced findings of additional fact.

The ALJ made numerous detailed findings based on his assessment of the credible evidence, including the video, and presented logical and reasonable explanations for those findings. Upon its review, the Commission finds nothing in the record or the appellant's exceptions, aside from what was noted previously, to question those determinations or the findings and conclusions made therefrom.

Similar to its assessment of the charges, the Commission's review of the penalty is also *de novo.* In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock,* 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center,* 96 *N.J.A.R. 2d* (CSV) 463. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison,* 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). Even when a law enforcement officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense may nevertheless warrant the penalty of removal where it is likely to undermine the public trust. In this regard, the Commission emphasizes that a law enforcement officer is held to a higher standard than a civilian public employee. *See Moorestown v. Armstrong,* 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied,* 47 *N.J.* 80 (1966). *See also, In re Phillips,* 117 *N.J.* 567 (1990).

Clearly, the appellant's egregious misconduct in this matter warrants removal from employment. As indicated by the ALJ:

> Appellant's actions during the Incident were particularly concerning because he had been given a refresher training on the proper use of force and de-escalation only four days prior to the Incident. I do not necessarily agree with respondent that appellant was completely ill-suited to the position of a CO but would agree with Major Abrams that misconduct such as appellant's violated the public trust and could inhibit the ability of the Department to properly maintain order, trust, and confidence in its facilities.

The Commission wholeheartedly agrees that the appellant's actions in this matter fall well short of what is expected of a law enforcement employee are more than deserving of removal from employment. As such, the Commission finds the penalty of removal neither disproportionate to the offenses nor shocking to the conscious.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore upholds that action and dismisses the appeals of Steven Mitchell.

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 20TH DAY OF SEPTEMBER, 2023

Allison Chris Myers

Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
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Civil Service Commission
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 06951-20
AGENCY DKT. NO. N/A
2020-2597

IN THE MATTER OF STEVEN P. MITCHELL, MID-STATE CORRECTIONAL FACILITY, NEW JERSEY DEPARTMENT OF CORRECTIONS.

Robert K. Chewning, Esq., for appellant Steven P. Mitchell (McLaughlin Nardi, LLC, attorneys)

Bryce K. Hurst, Deputy Attorney General, for respondent Mid-State Correctional Facility (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: May 15, 2023 Decided: August 9, 2023

BEFORE **JEFFREY N. RABIN**, ALJ:

STATEMENT OF THE CASE

Appellant, Steven P. Mitchell (Mitchell or appellant) has appealed the termination of his position with respondent, Mid-State Correctional Facility (respondent or MSCF), for violating N.J.A.C. 4A:2-2.3(a)(6): Conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(11): Other sufficient cause; Human Resource Bulletin 84-17 ("HRB 84-17") C-3: Physical or mental abuse of an inmate; HRB 84-17 C-5: Inappropriate physical

contact or mistreatment of an inmate; HRB 84-17 C-7: Fighting or creating a disturbance on state property; HRB 84-17 C-8: Falsification; HRB 84-17 C-11: Conduct unbecoming an employee; HRB 84-17 D-7: Violation of Administrative Procedures and/or Regulations involving safety and security; and HRB 94-17 E-1: Violation of rule, regulation, policy, procedure, order or administrative decision, for an incident that occurred on February 8, 2020 (the Incident) with inmate D.B.

PROCEDURAL HISTORY

On May 11, 2020, appellant Mitchell was served with a Final Notice of Disciplinary Action (FNDA), calling for appellant's termination, effective May 8, 2020.

An appeal was filed by appellant on May 26, 2020, and the matter was transmitted to the Office of Administrative Law (OAL), where it was filed on May 26, 2020, for determination as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A hearing was conducted via Zoom due to Covid-19 protocols, on February 21, 2023. Briefs were received by May 15, 2023, and the record closed on that date. The date for issuance of this Initial Decision was extended nunc pro tunc until August 14, 2023.

FACTUAL DISCUSSION

Testimony

For respondent

Sean Abrams was the Administrative Major at MSCF, overseeing policies, procedures, and discipline. He did not witness the Incident firsthand. Exhibits R-11 and R-12 were the Level 1 and Level 3 policies regarding use of force, which required that corrections officers (COs) utilize the utmost restraint and never use any excessive force.

COs learn this at the Academy and then receive yearly training. Appellant received a use-of-force-training refresher on February 4, 2020.

At 52:10 of the surveillance footage, appellant relinquished control of his duty belt, which contained security equipment. It was never appropriate to remove security equipment in front of inmates.

At 52:20, appellant failed to de-escalate the interaction with the inmate D.B. Appellant should have put a handout and told D.B. to move back; appellant had sufficient space to do so. Appellant could have used pepper spray, because use of hands was more severe than pepper spray.

Appellant appeared to be the aggressor because he threw the first punch. COs were not supposed to initiate violence.

At 52:30, appellant continued to strike D.B., although it appeared that three other COs were trying to secure D.B.

Appellant violated the Department's policy regarding the use of force. His actions constituted abuse of an inmate and fighting. The rules and regulations require that no officer act in a way that would violate any Department rules or policies or violate the public trust as a CO. COs were held to a higher standard. The rules and regulations also controlled the use of security equipment, requiring that a CO must have his duty belt under his control at all times.

HRB 84-17 (R-16) covered discipline and sanctions.

HRB 84-17 C-3 prohibited physical or mental abuse of an inmate, such as excessive force or mental or verbal abuse. Removal was the mandated penalty for a C-3 violation. Fighting, inmate abuse, and excessive force created the risk for retaliation, riots, or attacks on staff by the inmates, thus creating safety and security concerns.

HRB 84-17 C-5 covered inappropriate physical contact with an inmate. The penalty ranged from an official written reprimand through removal, depending on the totality of the circumstances surrounding the charge.

HRB 84-17 C-7 addressed fighting or creating a disturbance. The penalty ranged from an official written reprimand through removal, depending on the totality of the circumstances surrounding the charge.

HRB 84-17 C-8 covered falsification. The penalty was a range of discipline from a written reprimand to removal, depending on the severity of the actions.

HRB 84-17 C-11 addressed conduct unbecoming. The penalty was a range of discipline from a written reprimand to removal, depending on the severity of the actions.

HRB 84-17 D-7 was for violation of rules related to safety or security. The penalty was a range of discipline from a written reprimand to removal, depending on the severity of the actions.

HRB 84-17 E-1 covered violations of rules, regulations, policies, or procedures. The penalty was a range of discipline from a written reprimand to removal, depending on the severity of the actions.

Appellant's conduct constituted physical abuse of an inmate, a violation of Department policies.

For appellant

Appellant **Steven P. Mitchell** became a CO on March 18, 2019, and went to work at MSCF, a prison for male inmates with drug and alcohol issues. Appellant went through two weeks of job training, one regarding the facility and policies and one of hands-on training. He was designated a "general assignment" (GA) CO, meaning he would receive assignments daily from the desk sergeant. This often included "MED Line" and "MAT Line" (Medicated Assisted Treatment program). He learned how to

perform assignments from watching senior officers and reviewing post orders (written instructions). Not every assignment had post orders. MED and MAT lines did not have post orders.

Two COs administered regular medication on the MED Line, such as vitamins and supplements, then administered Suboxone (for opioid withdrawal) on the MAT Line. MED Line was done first and took thirty to forty-five minutes. MAT Line started immediately after MED Line and took at least two hours. These were conducted in the cafeteria area. After inmates completed MED Line, they were sent back to their housing unit. After they received Suboxone they were required to sit down so the Suboxone strip could dissolve. A CO would check to make sure the Suboxone had dissolved before the inmate could return to his unit. A sergeant would be in the sergeant's office.

There were MAT Line rules: no food or drinks were allowed, no talking was permitted, and inmates were prohibited from moving their tongues or manipulating their mouth. One CO handled the medication line, then checked each inmate to make sure that the medication dissolved, which took fifteen to twenty minutes. The second CO monitored the two tables where inmates were seated. This process was required because inmates tried to "cheek" Suboxone, trying to keep it from dissolving so they could later use the dosage as currency or to save up enough strips to use to get high. If an inmate was caught cheeking Suboxone, the CO was to contact the sergeant who would then handcuff the inmate and remove him to a holding cell so he could be charged for the rule violation.

Appellant was assigned MED and MAT Lines the day of the Incident, along with CO Alexander Trust, who had not done the lines before. The sergeant on call was Sergeant Michael Persing. Persing was not in the sergeant's office the entire time appellant was handling the lines. Because this was Trust's first time, appellant called the inmates to receive medication and then checked them, while Trust monitored the inmates at the tables waiting for the Suboxone to dissolve.

The day of the Incident, inmate D.B. was called to the MAT Line by appellant. Appellant had no prior interactions with D.B. When he was called, D.B. took the

required sip of water and received his strip of Suboxone. He showed the nurse and appellant that he had placed the strip on his tongue then proceeded to a table. When called to the window the first time to see if his dose had dissolved, D.B. initially refused to lift his upper lip as appellant had requested, but then complied. Appellant determined that D.B.'s Suboxone was above his gum line and therefore D.B. was attempting to cheek his Suboxone strip. Appellant told Trust, who went to inform the sergeant. The sergeant did not take any action, so appellant and Trust jointly decided to sit D.B. again to wait for the strip to dissolve.

As he began to sit, D.B. became agitated, and began cursing and threatening appellant. Appellant told him to remain silent, but D.B. ignored the order. D.B. was soon called for a second check, and appellant saw pieces of the Suboxone strip still in D.B.'s mouth. Appellant did not report this to the sergeant. Rather, appellant and Trust reseated D.B. Appellant then called D.B. for a third check. Appellant removed his duty belt containing pepper spray, his radio and Narcan, and left it on a table to tuck in his shirt. Just then D.B. stood up aggressively, walked away from the table, cursed at appellant, clenched his fists and dared appellant to fight him. Appellant ordered D.B. to unclench his fists and put his hands behind his back; D.B. ignored appellant's orders and assumed a boxer's stance. Appellant felt threatened. His adrenalin was flowing from D.B.'s threats. D.B. walked towards him, and at 10:50:27 both men were in boxers' stances, standing one foot apart. They began to do a boxer's dance, and D.B. appeared to try and strike first by throwing a couple of jabs but at that moment he was not close enough to appellant to make contact. Because he did not have his duty belt on, he had no choice but to throw punches and strike D.B. Appellant had been trained that physical force such as throwing punches had to be used first, because it was less severe than using a baton or O.C. (pepper) spray. He continued to strike D.B. after D.B. had been taken to the ground. Appellant hit D.B. six times.

Ten minutes after the Incident, appellant was ordered to the sergeant's office to write a special custody report. Union representative Taylor Mazer was there to assist appellant and Trust to write their reports. Mazer and Sergeant Persing made appellant rewrite his report several times in that three-hour period. Appellant testified that one of the changes he was told to make was changing the report of the orders he gave D.B.

from "un-ball" to "unclinch" his fists.

Appellant was not the aggressor during the Incident. Trust stated the same in his report. He did not provide false information in his reports or during the investigation.

The within matter was appellant's first discipline at MSCF.

Credibility

In evaluating evidence, it is necessary to assess the credibility of the witnesses. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness' story in light of its rationality or 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." In re Perrone, 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 also reject testimony as "inherently incredible" 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).

Further, "'[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.), cert. denied, 10 N.J. 316 (1952). 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. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

Sean Abrams testified in a clear, precise manner. His short answers displayed a great amount of knowledge regarding "use of force" policy and familiarity with other pertinent policies, rules and regulations. He did not witness the Incident but provided lay testimony as to procedures and penalties for rule violations. He testified in a calm manner on cross-examination.

Appellant **Steven P. Mitchell** testified in a calm, soft-spoken manner. He was knowledgeable as to the Department rules and procedures. He remained calm on cross-examination and answered all questions clearly.

While much of his testimony seemed believable, I found his claim that he was not an "aggressor" to be something of a misrepresentation; inmate D.B. clearly was disobeying rules and commands, and began yelling and issuing threats, and challenged appellant to fight and assumed a boxing stance, but appellant removed his belt and straightened his uniform in a manner so as to appear as if he was preparing to engage in a fight; D.B. never connected on any punch, and committed no physical assault on appellant, and appellant could have walked away or offered additional verbal commands for D.B. to stand back. I found it clear from the video evidence that appellant threw the first punch and threw the first punch that landed. He then continued punching even after D.B. was subdued. Appellant cited to Trust's report which said D.B. threw the first punch, but appellant clearly landed the first punch.

Appellant's interpretation of the rules differed from Abrams, particularly when he testified that he had been trained to employ physical force before using pepper/O.C. spray.

While appellant's testimony regarding the Incident itself deserves some weight, his interpretation of the policies, rule and regulations, and the training he received, were not deserving of weight.

Therefore, after reviewing the testimony, the video evidence and the other evidence presented, and the summary briefs of the parties, I **FIND** the following **FACTS**:

Appellant started as a CO at MSCF on March 18, 2019; MSCF was a prison for male inmates with drug and alcohol issues; appellant received two weeks of job training, one regarding the facility and policies and one of hands-on training; use of force policies was taught to COs at the Academy and again during annual refresher training; appellant received a use-of-force-training refresher on February 4, 2020.

Appellant was a "general assignment" (GA) CO, receiving daily assignments from the desk sergeant, which often included "MED Line" and "MAT Line" (Medicated Assisted Treatment program); MED and MAT lines did not have post orders (written instructions), and COs learned how to perform MED and MAT Lines from observing senior officers; two COs were assigned to MED and MAT Lines, and a sergeant would be in the sergeant's office; there were MAT Line rules: no food or drinks were allowed, no talking was permitted, and inmates were prohibited from moving their tongues or manipulating their mouths; MED Line was performed first, and MAT Line started immediately after. After inmates received Suboxone (for opioid withdrawal) in the MAT Line they were required to sit at tables to wait for the Suboxone strip to dissolve, which took fifteen to twenty minutes; a CO would check to make sure the Suboxone had dissolved before the inmate could return to his unit; one CO handled the medication line, then checked each inmate to make sure that the medication dissolved, while the second CO monitored the two tables where inmates were seated; many inmates tried to "cheek" Suboxone, trying to keep it from dissolving so they could later use the dosage as currency or to save up enough strips to use to get high. If an inmate was caught cheeking, the CO was to contact the sergeant who would then handcuff the inmate and remove him to a holding cell so he could be charged for the rule violation.

Appellant was assigned MED and MAT Lines the day of the Incident, February 8, 2020, along with CO Alexander Trust, who had not handled MED and MAT Lines before; the sergeant on call was Sergeant Michael Persing; appellant monitored the medication portion of the MAT Line while Trust monitored the inmates at the tables. On the day of the Incident, inmate D.B. was called to the MAT Line by appellant; appellant

had no prior interactions with D.B.; D.B. took the required sip of water and received his strip of Suboxone; D.B. showed the nurse and appellant that he had placed the strip on his tongue, then walked to a table; when called to the window the first time to see if his dose had dissolved, appellant determined that D.B.'s Suboxone was above his gum line and therefore D.B. was attempting to cheek his Suboxone strip; appellant told Trust, who went to inform Sergeant Persing. Persing did not take any action, so appellant and Trust told D.B. to sit down again to wait for the strip to dissolve; D.B. became agitated, and began cursing and threatening appellant. Appellant told D.B. to remain silent, but D.B. ignored the order.

D.B. was called for a second check, and appellant saw pieces of the Suboxone strip still in D.B.'s mouth; appellant did not report this to the sergeant but rather he and Trust reseated D.B.; appellant then called D.B. for a third check; at 10:52:10 a.m., in front of inmates seated at the tables, appellant removed his duty belt containing pepper spray, his radio and Narcan, and left it unattended on a table. D.B. then stood up, walked away from the table, cursed at appellant, clenched his fists and dared appellant to fight him; appellant ordered D.B. to unclench his fists and put his hands behind his back; at 10:52:20 a.m., D.B. ignored appellant's orders and assumed a boxer's stance; D.B. walked towards appellant, and at 10:52:27 a.m. both men began boxing. Appellant threw the first punch, which did not touch D.B., then both appellant and D.B. threw punches which did not land; appellant did not have his duty belt on at this time, and did not use O.C./pepper spray or other weapons to push D.B. away from him, nor did he offer any verbal commands for D.B. to stand back; at 10:52:30 a.m., appellant struck D.B. with his fist then pushed D.B. to the ground. Three other COs came to secure D.B.; appellant struck D.B. five to ten more times as D.B. was being secured; D.B. was removed from the MAT Line area by the other Cos and D.B. suffered visible bruises and lacerations to his face.

The within matter was appellant's first discipline at MSCF; appellant completed a report regarding the Incident which did not indicate he had taken off his duty belt, and which indicated that D.B. threw the first punch, and which did not indicate that appellant punched D.B. additional times while he was on the ground being secured by other COs.

LEGAL ARGUMENT AND CONCLUSION

The issue is whether the respondent, MSCF, had proven by a preponderance of the credible evidence that it acted properly in terminating appellant's employment as a Corrections Officer for Conduct unbecoming a public employee, Other sufficient cause, Physical or mental abuse of an inmate, Inappropriate physical contact or mistreatment of an inmate, Fighting or creating a disturbance on state property, Falsification, Violation of administrative procedures, regulations, policies, orders or administrative decisions, involving safety and security, for the Incident that occurred on February 8, 2020.

In a civil service disciplinary case, the employer bears the burden of providing sufficient, competent and credible evidence of facts essential to the charge. N.J.A.C. 4A:2-1.4. Thus, respondent had both the burden of persuasion and the burden of production and was required to demonstrate by a preponderance of the competent, relevant and credible evidence that appellant committed the charged infractions listed in the Final Notice of Disciplinary Action. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). See generally Coleman v. E. Jersey State Prison, OAL Dkt. No. CSV 01571-03, Initial Decision (February 25, 2004); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550, 560 (1982); In re Darcy, 114 N.J.Super. 454, 458 (App.Div. 1971).

The Court in In re Polk, 90 N.J. 550, 560 (1982) held:

> This jurisdiction has long recognized that the usual burden of proof for establishing claims before state agencies in contested administrative adjudications is a fair preponderance of the evidence. In Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), we observed that: "In proceedings before an administrative agency, . . . it is only necessary to establish the truth of the charges by a preponderance of the believable evidence and not to prove guilt beyond a reasonable doubt." See In re Suspension or Revoc. License of Kerlin, 151 N.J. Super. 179, 184 n.2 (App. Div. 1977) ("Where disciplinary proceedings with respect to a profession or occupation are vested in an administrative agency in the first instance, the charges must be established by a fair preponderance of the believable evidence").

A preponderance of the evidence has been defined as that which "generates belief that the tendered hypothesis is in all human likelihood the fact." Martinez v. Jersey City Police Dept., OAL Dkt. No. CSV 07553-02, Initial Decision (October 27, 2003) (quoting Loew v. Union Beach, 56 N.J.Super. 93, 104 (App.Div. 1959)). "Fair preponderance of the evidence" means the greater weight of credible evidence in the case; it does not necessarily mean the evidence of the greater number of witnesses but means that evidence which carries the greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975) citing Model Jury Charge, Criminal, 3:180. See also, Zive v. Stanley Roberts, Inc., 182 N.J. 436, 457 (2005)(applying the standard to a wrongful termination).

The burden of proof cannot be accomplished only by introducing hearsay evidence. N.J.A.C. 1:1-15.1(b). In the Matter of Nathaniel Parker, Juvenile Justice Commission, 2009 N.J. AGEN LEXIS 250, *14-15, OAL Dkt. No. CSV 02994-08 (April 15, 2009), the Court held, in relevant part,

> While hearsay evidence is admissible in administrative hearings, N.J.A.C. 1:1-15.5, in order to prove its case, the appointing authority must produce a residuum of competent evidence to prove any ultimate fact. Weston v. State, 60 N.J. 36 (1972). Although credible hearsay evidence may serve to buttress the foundation of credible competent evidence such as to provide a more satisfactory degree of proof of guilt, hearsay that is not otherwise admissible under the Rules of Evidence (thus competent) cannot by itself support an ultimate finding of fact.

The case before this court was unfortunate in that appellant had only been on the job for one year, and this case represented the first disciplinary matter against him, yet his employer, the respondent, sought his removal from his position. The issues herein must be addressed in two tiers: first, has respondent offered sufficient evidence to show that appellant's actions during the Incident violated the afore-cited rules and regulations, and second, was removal of appellant from his position warranted based on the penalties set forth in those rules and regulations? Department policy HRB 84-17 mandated removal if violated, and therefore the primary focus must be on whether it

was proven that appellant committed abuse of an inmate, inappropriate contact, and/or fighting.

The only participant in the Incident who testified was appellant Mitchell. Major Abrams did not witness the Incident firsthand; his testimony centered on the rules and regulations allegedly violated by appellant. Major Abrams, however, also offered credible narration of the video evidence proffered herein. Additionally, this court has been afforded opportunities to watch and review the video evidence, resulting in the above-referenced findings of additional fact.

Appellant testified that when called to the window the first time to see if his dose had dissolved, D.B. initially refused to lift his upper lip as appellant had requested, before complying. Appellant therefore had legitimate grounds to believe that D.B. might be attempting to violate the MAT Line rules and was possibly attempting to cheek his medication. A refusal to comply could be considered aggressive on the part of D.B. After D.B. submitted to the first check, appellant was able to see for himself that D.B.'s Suboxone was above his gum line, further confirming that D.B. was attempting to cheek his Suboxone strip.

Appellant's concerns were further realized when D.B. became agitated and began cursing and threatening appellant. At this point it was clearly D.B. who was acting aggressively. Appellant then ordered D.B. to remain silent, but D.B. refused to stop his verbal assault. Appellant's belief that D.B. was violating MAT Line rules and attempting to cheek his medication was further confirmed during the second check, when appellant saw pieces of the Suboxone strip still in D.B.'s mouth.

Up until then it was only D.B. acting in an improper manner. But at this point appellant began reacting to D.B.'s behavior. With D.B. seemingly attempting to goad appellant into a fight, appellant took off his duty belt. He testified that he did so as part of a regular practice of straightening his uniform. But seen on the video, it appeared as if he was taking off his bulky belt in order to be ready to engage in a fight with D.B. If it had been appellant's intent to de-escalate the situation, he would have either kept his

duty belt on or used some of the security tools on the belt; perhaps he could have taken the O.C. spray into his hands, to use if D.B. actually physically attacked him.

D.B. remained aggressive. After appellant removed his duty belt, D.B. stood up and walked away from the table, cursed at appellant, clenched his fists, and verbally dared appellant to fight him. Appellant properly used a verbal command to order D.B. to unclench his fists and put his hands behind his back. D.B. ignored appellant's orders, then assumed a boxer's stance and moved towards appellant, until they were approximately one foot apart.

Up to this point, aside from a possible protocol violation for removing his duty belt, appellant had attempted to follow the Department rules and regulations and de-escalate the situation. However, when D.B. got close to appellant, both men adopted boxing stances, clearly with the intention of being ready to fight. This was not part of appellant's training, because at this point there had been no physical contact or physical assault and therefore no justification for the use of physical force based on the current circumstances. D.B. did not run at appellant and start hitting; he verbally provoked appellant into a fight like a boy in a schoolyard. Rather than striking appellant first, D.B. started dancing like a boxer in the ring. Appellant should have just backed away, but instead he adopted a boxer's stance and swung first, which was followed by D.B. swinging, with both men failing to hit the other. It was appellant, not inmate D.B., who landed the first strike. There was sufficient time and opportunity for appellant to have called to Trust to call a code or call for backup or bring O.C. spray, or for appellant to have simply walked away from D.B. until backup arrived. I **FIND** that under these circumstances there was no justification for the use of force by appellant.

Although appellant's initial punch did not make contact with D.B., it led to a continuation of the conflict. Both appellant and D.B. started throwing punches. At 10:52:30 a.m., appellant made the first contact when his fist struck D.B. Appellant then pushed D.B. to the ground, and hit D.B. several more times as three other COs were securing D.B. D.B. suffered visible bruises and lacerations to his face.

In one sense, it did not matter who the "aggressor" was. Inmate D.B. created

these circumstances by attempting to cheek his medicine and then verbally abusing appellant and trying to coax him into a fight. But the key to HRB 84-17 was whether appellant participated in the abuse of an inmate, inappropriate contact, and fighting.

Even if appellant had shown that the circumstances justified the use of force, nothing entitled appellant to continue punching D.B. while the other three COs were beginning to secure D.B. Per the NJDOC Human Resources Bulletin (R-16), physical or mental abuse of an inmate is defined as "a malicious act directed towards an inmate with the intent to cause pain, injury, suffering, or anguish." Again, one punch arguably might have been necessary to end an alleged threat or to secure an assailant, under the right circumstances—after all, when physical force is justified, a CO may strike with his hands, per the DOC Use of Force Policy, Level 1, Internal Management Procedure (R-11)—but continued punching by appellant demonstrated an intent to cause physical pain and injury against inmate D.B. Respondent claimed there were eleven additional hits, and appellant admitted to hitting D.B. six times. D.B. suffered multiple lacerations, bruises, and pain as a result of the repeated punches. Appellant himself indicated that his adrenaline was flowing as a result of D.B.'s verbal threats, and it therefore appeared that the adrenaline rush contributed to appellant continuing to strike the inmate.

Respondent correctly asserted that the use of force required officers to have an awareness of the circumstances surrounding him. In the Matter of Jared Brown, 2022 N.J. CSC LEXIS 544 *39 (April 27, 2022). The repeated strikes were not "objectively reasonable under the totality of the circumstances" as required by Department policy or regulations governing the use of force. (R-11 and R-12; N.J.A.C. 10A:3-3.2(a)). I **FIND** that appellant's actions constituted the abuse of an inmate.

Inappropriate physical contact included improper use of physical force or mistreatment of an inmate by a CO. There was no justification for any use of force against D.B., but even if appellant had arguably justified using one punch to end a threat and secure an inmate, nothing entitled appellant to continue punching D.B. while the other three COs were securing him. I **FIND** that the initial punch and continued punching of D.B. constituted an improper use of force and the mistreatment of an inmate by a CO.

Similarly, appellant violated the Department's prohibition of fighting: he removed his security belt for purposes of fighting, he removed a security belt which contained options for non-physical means of de-escalation, he assumed a fighter's stance, he engaged in boxing-like movement, and he punched D.B. repeatedly. I **FIND** that appellant had engaged in fighting during the Incident.

Appellant cited the Level 1 use of force procedure as stating, "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." (R-11.) Appellant submitted that physical force was defined as "contact with an individual beyond that which is generally utilized to affect a law enforcement objective. Physical force is employed when necessary to overcome an individual's physical resistance to the exertion of the custody staff member's authority or to protect person or property. Examples of physical force include, but are not limited to, wrestling a resisting individual to the ground, using wrist locks or arm locks, striking with the hands or feet, or similar methods of hand-to-hand confrontation." (R-11.)

Appellant has argued that he reasonably believed he needed to respond to D.B. with the use of physical force to protect himself and CO Trust from D.B.'s unlawful force and to maintain order in light of D.B.'s behavior. Appellant argued that after bringing D.B. to the ground, his continued use of force was justified, claiming that D.B. continued to resist being arrested by pulling on appellant's uniform in an attempt to choke or hit him. Accordingly, this continued use of force would comport with the use of force policy that allowed COs to continue employing force until the individual submitted.

Such an argument might bear weight if everyone involved agreed upon the same interpretation of facts. However, the parties viewed the facts and the video evidence differently. While appellant argued that force was absolutely necessary to stop the threat of a physical assault against a CO, the video evidence actually showed that appellant had options other than punching. He could have reported D.B.'s cheeking a

second time to the desk sergeant, who very likely would have then immediately had D.B. handcuffed and moved to a holding cell. Appellant could have turned and walked away from D.B. He could have immediately called for backup, to either prevent a fight or to simply arrest D.B. for violating MAT Line rules. If appellant had not put down his duty belt, he would have been in a position to use O.C. spray to thwart D.B.'s verbal threat of physical violence. Again, it must be noted that D.B. did not run at appellant and start hitting; he goaded appellant into a fight then start dancing like a boxer in the ring. Appellant should have just backed away, but instead he swung first, then D.B. swung, with both failing to hit the other. It was appellant who hit first. Dancing like a boxer in the boxing ring did not fit in with any definition of force set forth by appellant.

Further, despite the argument inherent in appellant's defense, that he needed to punch D.B. five or ten more times because D.B. was still struggling to avoid arrest, the video evidence showed that after appellant's first punch and pushing D.B. to the ground, three other COs had responded and were in the processing of securing D.B. Perhaps a second punch would have sufficed for D.B. to finally stop struggling, but the video showed that D.B. was in the custody of three COs and that no further physical force was required from appellant to subdue him, much less an additional five to ten punches. It was not unreasonable to conclude that D.B. might have grabbed appellant's uniform in self-defense, in an attempt to stop appellant from continuing to punch him.

The first three prongs cited by appellant for allowing for use of force had not been met. At the time appellant began using physical force against D.B., D.B. was not threatening acts of violence against appellant or Trust but was seeking to engage appellant in fisticuffs. D.B. issued no threat against MSCF property, nor was there a real threat of bodily harm or death. D.B. danced like a boxer, but never actually hit appellant, nor did he avail himself of any opportunity to use force against appellant while appellant was monitoring the MAT Line. D.B. did not grab anything to use as a weapon against appellant. Appellant might have more successfully argued that his continued use of physical force was necessary to prevent or quell a riot, because the Incident took place in a large public room (the cafeteria) and there had been many inmates there. But no evidence was offered to show that any other inmate had gotten involved in D.B.'s situation. In fact, it appeared that appellant had left D.B. for close to an hour waiting at

one of the tables for his dosage to dissolve, and there were only a few inmates still in the table area. There was no evidence that any other inmates remaining in the cafeteria while appellant was punching D.B. had to be corralled out of the cafeteria by Trust or other responding COs. Therefore, appellant failed to offer any justification or mitigation for his actions during the Incident.

I **CONCLUDE** that appellant violated HRB 84-17 C-3 by engaging in the physical or mental abuse of an inmate, HRB 84-17 C-5 for inappropriate physical contact or mistreatment of an inmate, and HRB 84-17 C-7, fighting or creating a disturbance on state property.

There were other charges alleged against appellant. Respondent charged appellant with conduct unbecoming a public employee. Conduct unbecoming has been described as an elastic phrase, encompassing 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)).

Additionally, the use of excessive force by a CO against an inmate under his care has typically been found to constitute conduct unbecoming a public employee. See, e.g., In the Matter of Jared Brown, 2022 N.J. CSC LEXIS 544 *39 (April 27, 2022); In the Matter of Edwin Garcia, 2008 N.J. AGEN LEXIS 619 (July 17, 2008); In the Matter of Phillip Morris and Tony Coleman, 2017 N.J. CSC LEXIS 730, *33 (Oct. 20, 2017); In the Matter of Joey McClary, 2016 N.J. AGEN LEXIS 113 (March 16, 2016). Having concluded that appellant had engaged in fighting and used excessive force, one may

then reach the conclusion that he had displayed conduct unbecoming a public employee. He violated Department rules regarding the use of force and failed to act with the utmost restraint. Abrams made it clear that appellant's actions caused the Department to lose trust in appellant's ability to execute his duties in a manner consistent with the high expectations of COs.

I **CONCLUDE** that appellant violated N.J.A.C. 4A:2-2.3(a)(6): Conduct unbecoming a public employee and HRB 84-17 C-11: Conduct unbecoming an employee.

Falsification stems from when there is an intentional misstatement of material fact in connection with work, records, reports, or investigations. (R-16.) COs are held to a higher standard and are expected to tell the truth. In re Phillips, 117 N.J. 567, 576, (1990); State v. Stevens, 203 N.J. Super. 59, 66 (Law Div. 1984). In the within matter, appellant submitted a report of the Incident which did not indicate that he had removed his duty belt and failed to state that he struck D.B. numerous times while D.B. was already face-down on the ground being secured by other COs. His report also stated that D.B. threw the first punch.

I **CONCLUDE** that appellant violated HRB 84-17 C-8: Falsification.

Based on the within conclusions, I further **CONCLUDE** that appellant violated HRB 94-17 E-1: Violation of rule, regulation, policy, procedure, order or administrative decision.

PENALTY

As stated herein, appellant's status as a corrections officer subjected him to a higher standard of conduct than other public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). COs, as members of law enforcement, represent "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 was important in military-like settings such as police departments, prisons, and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967).

Strict compliance with the policies and procedures of state prisons are crucial to maintaining the safety and security of the prison system. See Bowden v. Bayside State Prison, 268 N.J. Super 301 (App. Div. 1993). In Bowden, the Appellate Division took judicial notice that corrections facilities "if not properly operated, have a capacity to become 'tinderboxes.'" 268 N.J. Super. at 306. The unnecessary use of excess force can result in retaliatory action by other inmates, resulting in even larger or deadlier disturbances. See Henry v. Rahway State Prison, 81 N.J. 571 (1980). When officers fail to follow facility policies and procedures, they place everyone in the prison at risk and subvert the order and discipline in a prison, warranting removal despite past discipline. Id. COs are obligated to provide an environment free from physical abuse. Failure to do so warrants immediate removal. In re Herrmann, 292 N.J. 19, 32 (2007).

In assessing the propriety of the penalty in any civil service disciplinary action, the primary concern is the public good. George v. North Princeton Developmental Center, 96 N.J.A.R.2d 465 (CSV) (1996). Factors to be considered are the nature of the offense, the concept of progressive discipline, and the employee's prior record. Id. Progressive discipline is required in those cases where an employee is guilty of a series of offenses, none of which is sufficient to justify removal. Harris v. North Jersey Developmental Center, 94 N.J.A.R.2d (CSV) (1994). Progressive discipline does not apply, however, where, as here, the offense committed is in itself sufficient to warrant removal. Id.; see also In re Stallworth, 208 N.J. 182, 196-97 (2011) (noting that some disciplinary infractions are so serious that removal is appropriate notwithstanding a mostly clean prior record.); In re Carter, 191 N.J. 474, 485-86 (2007) (in matters involving discipline of COs, public safety concerns may bear upon the propriety of dismissal); In re Herrmann, 292 N.J. 19, 33-34 (2007).

A singular incident that demonstrated an absence of judgment could be sufficient to warrant termination of an employee in a position that required public trust, like that of

a CO. In re Herrmann, 292 N.J. at 32. Progressive discipline was not a necessary consideration when a CO's actions could subvert order and discipline in a prison. Henry, 81 N.J. at 580. Some offenses are so egregious in nature that dismissal is appropriate regardless of the employee's prior disciplinary history. In re Herrmann, 292 N.J. at 33-34; In re Carter, 191 N.J. at 486.

Appellant had a clean record, with no record of discipline, although this was over a short one-year career as a CO at MSCF. He was still within the probationary first year of his employment with the Department. Appellant's actions during the Incident were particularly concerning because he had been given a refresher training on the proper use of force and de-escalation only four days prior to the Incident. I do not necessarily agree with respondent that appellant was completely ill-suited to the position of a CO but would agree with Major Abrams that misconduct such as appellant's violated the public trust and could inhibit the ability of the Department to properly maintain order, trust, and confidence in its facilities.

For a first violation for physical or mental abuse of an inmate, such as use of excessive force, HRB 84-17 C-3 called for removal. I **CONCLUDE** that respondent met its burden of proving by a preponderance of the evidence that it acted properly in terminating appellant's employment as a CO with MSCF.

ORDER

I **ORDER** that the disciplinary action of the respondent, Mid-State Correctional Facility, New Jersey Department of Corrections, in removing appellant Mitchell from his position as a Correctional Officer, is **AFFIRMED**, and that the within appeal is hereby **DENIED**.

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** pursuant to N.J.A.C. 1:1-18.6., by which law it 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.

August 9, 2023
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

JNR/nn/mph

APPENDIX

WITNESSES

For appellant

Steven P. Mitchell

For respondent

Sean Abrams

EXHIBITS

Joint

J-1 Final Notice of Disciplinary Action, dated May 7, 2020

J-2 Preliminary Notice of Disciplinary Action, dated April 13, 2020

J-3 Video of Mess Hall Incident - SCPO Mitchell

J-4 NJDOC Confidential Investigative Report, dated March 20, 2020

J-5 NJDOC Weingarten Administrative Rights for SCPO Mitchell, dated February 26, 2020

J-6 Video of Interview of SCPO Mitchell

J-7 NJDOC Special Custody Report by SCPO Mitchell, dated February 8, 2020

J-8 Video of Interview of Inmate D.B.

J-9 Mid-State Chart Notes for Inmate D.B., dated February 8, 2020

J-10 SCPO Mitchell's New Hire Documents

For appellant

A-6 Video of Interview of SCPO Alexander Trust

A-8 Video of Interview of Nurse Vivian Sprague

A-9 Video of Interview of Sgt. Michael Persing

A-15 Use of Force Report by OFC Selande, dated February 8, 2020

A-16 Use of Force Report by OFC Trust, dated February 8, 2020

A-17 Use of Force Report by SCPO Lomax, dated February 8, 2020

A-18 Use of Force Report by Sgt Baldizzone, dated February 9, 2020

A-23 NJDOC Special Custody Report by SCPO Trust, dated February 8, 2020

A-24 NJDOC Special Custody Report by OFC Selande, dated February 8, 2020

A-25 NJDOC Special Custody Report by OFC Lomax, dated February 8, 2020

A-26 NJDOC Special Custody Report by OFC Parks, dated February 8, 2020

A-45 Respondent's Answers to Interrogatories

A-46 Respondent's Revised Answers to Interrogatories

For respondent

R-11 DOC Use of Force Policy, Level 1, Internal Management Procedure

R-12 DOC Use of Force Policy

R-15 Law Enforcement Personnel Rules and Regulations

R-16 NJDOC Human Resources Bulletin