



STATE OF NEW JERSEY

In the Matter of Michael Lewis
Burlington County Jail
Department of Corrections

CSC DKT. NO. 2014-2165
OAL DKT. NO. CSR 2922-14

DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: September 3, 2014 PM

The appeal of Michael Lewis, a County Correction Officer with Burlington County Jail, Department of Corrections, of his removal effective March 4, 2014, on charges, was heard by Administrative Law Judge Lisa James-Beavers, who rendered her initial decision on July 30, 2014, modifying the removal to a six-month suspension. No exceptions were filed by the parties.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on September 3, 2014, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the penalty has been modified, the appellant is entitled to back pay, benefits, and seniority, pursuant to *N.J.A.C. 4A:2-2.10*, following the six-month suspension. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C. 4A:2-2.12(a)*, the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See *Johnny Walcott v. City of Plainfield*, 282 N.J. Super. 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, the charges were

sustained. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12(a)*, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his position.

ORDER

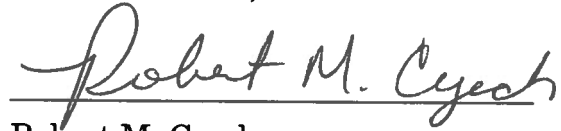
The Civil Service Commission finds that the appointing authority's action in removing Michael Lewis, was not justified. Therefore, the Commission modifies the removal to a six-month suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority for the period following his six-month suspension to the date of actual reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Pursuant to *N.J.A.C. 4A:2-2.10*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

Counsel fees are denied pursuant to *N.J.A.C. 4A:2-2.12*.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*. After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
SEPTEMBER 3, 2014

A handwritten signature in cursive script, reading "Robert M. Czech", written over a horizontal line.

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
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attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 2922-14

AGENCY DKT. NO. N/A

2014-2165

**IN THE MATTER OF MICHAEL J.
LEWIS, BURLINGTON COUNTY
CORRECTIONS DEPARTMENT.**

Mark Catanzaro, Esq., for appellant Michael J. Lewis (Law Offices of Mark Catanzaro, attorneys)

Laurel B. Peltzman, Esq., for respondent Burlington County Corrections Department (Capehart & Scatchard, attorneys)

Record Closed: June 30, 2014

Decided: July 30, 2014

BEFORE **LISA JAMES-BEAVERS, ALJ:**

STATEMENT OF THE CASE

Michael Lewis, appellant, appeals the action of the respondent, Burlington County Corrections Department, in removing him for conduct unbecoming a public employee, neglect of duty and other sufficient cause.

PROCEDURAL HISTORY

On January 9, 2014, the Burlington County Corrections Department issued a Preliminary Notice of Disciplinary Action charging appellant with: N.J.A.C. 4A:2-2.3(a)6: Conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)7: neglect of duty; and N.J.A.C. 4A:2-2.3(a)12: other sufficient cause, specifically violation of policy and procedures sections 1021, 1023, 1036, 1038, 1043 and 1148. On February 11, 2014, the Department held a removal hearing. A Final Notice of Disciplinary Action issued on March 4, 2014, sustaining the charges and removing appellant effective on that date. The specifications provided:

On January 5, 2014, at approximately 1800 hrs., while in uniform & on the property of the County of Burlington, specifically in the Corrections Department parking lot, you engaged in Conduct Unbecoming a Public Employee & Law Enforcement Officer. You failed to maintain professionalism & Self Control by engaging in threatening & assaultive conduct by arguing with Officer Anthony Roberts and engaging in a physical fight in violation of workplace violence.

Appellant appealed to the Civil Service Commission, which transmitted the case to the Office of Administrative Law (OAL) for a hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The case was filed at the OAL on March 11, 2014. The case was scheduled for and heard on June 13, 2014. A hearing date was scheduled for June 20, 2014, but the parties advised there would be no witnesses. The record closed after receipt of written submissions on June 30, 2014.

STIPULATION OF FACTS

1. Officer Lewis ("Lewis") was hired by Burlington County on January 14, 2008.
2. Burlington County Detention Center/Corrections Work Release Center Policy #1023 states that "all law enforcement officers of the Burlington County Correction Department shall be responsible to observe, comply, strictly adhere, and enforce all rules, regulations and to follow the policies

and procedures contained herein and any amendment promulgated and approved by the Jail Administrator.” Attached hereto as Exhibit J-1.

3. Burlington County Detention Center/Corrections Work Release Center Policy #1036 states that “all officers and employees shall be courteous, civil and respectful to their superiors, subordinates and all other individuals that may have contact with. An officer shall promote professionalism at all times and shall be orderly, maintain decorum, control temper, be patient and use discretion.” Attached hereto as Exhibit J-2.
4. Burlington County Detention Center/Corrections Work Release Center Policy #1043 provides that “Officers must maintain a high degree of self-control at all times. There shall be no corporal punishment: no officer/employee shall strike or lay hands on an inmate or other person unless it is in self-defense, prevent injury to other person, property, prevent an escape, quell a disturbance or to enforce a valid order given by a supervisor. In such cases only that force necessary to accomplish the mission will be used.” Attached here as Exhibit J-3.
5. Burlington County has a Workplace Violence Policy (Policy #1148) that applies to all County employees. The policy is attached hereto as Exhibit J-4.
6. Lewis received a copy of the Burlington County Workplace Violence Policy on May 13, 2011. Acknowledgement attached hereto as J-5.
7. Lewis received a copy of all of the Burlington County Detention Center/Corrections Work Release Center’s policies on September 27, 2012. Acknowledgement attached hereto as J-6.
8. On January 9, 2014, Lewis was served with a Preliminary Notice of Disciplinary Action. Preliminary Notice of Disciplinary Action attached hereto as Exhibit J-7.

9. An agency hearing took place on February 11, 2014.
10. On March 4, 2014, Lewis was sent (certified mail) a Final Notice of Disciplinary Action. Final Notice of Disciplinary Action attached hereto as Exhibit J-8.

TESTIMONY

Lieutenant Matthew Leith testified that he is the administrative lieutenant in charge of policy and procedure, as well as disciplinary actions. He testified as to the various policies that apply at the Burlington County Department of Corrections, including the policy on workplace violence. (J-4.) He testified that there is zero tolerance for off-duty conduct. Sworn law enforcement officers, he said, are never off duty and must hold themselves to a higher standard. Failure to uphold that responsibility is considered neglect of duty. The self-defense policy, 1043, means that officers have the right to defend themselves, but if there is a way to get out, they have to get out of it. There is no automatic right to hit back. Lieutenant Leith also identified the disciplinary history of Lewis. (R-1.) He noted that Lewis was not charged with violating the use of force policy. The use of force policy includes self-defense and when an officer can defend himself. Lieutenant Leith clarified that he did not become administrative lieutenant until February 2014, after the present incident. He agreed that there was a continuum for the use of force such that an officer can use whatever force is used on him plus an additional level up. Thus, upon physical contact with an officer, the officer can use more physical force than was used on him or her. The "plus one" continuum is gleaned from the policy manual. He agreed that in 600 pages of policy the only place where self-defense is defined is in the use of force policy.

Officer Scott Strohmets testified that he is a twenty-four-year corrections officer. He was an internal affairs investigator from October 6, 2006, to March 2014. He became aware of the incident involving Lewis because on January 5, 2014, Sergeant Roberts called his personal cell phone saying he was involved in a fight with Lewis. Strohmets asked him where he was and he said he was on the way to his house.

Strohmetz then told him to return to work to submit an incident report. Strohmetz said Roberts should have called his immediate supervisor or the supervisor on duty. Roberts came in and submitted a report to him. (R-2.) Strohmetz then spoke to the warden who said that he would alert the supervisor on duty. Lewis also submitted a report later that evening, but Strohmetz does not know how he came to submit it. (R-3.) Strohmetz conducted an investigation and recorded a statement of Lewis. (R-4.) He also collected evidence and reports from other officers and secured the videotape of the parking lot where the incident occurred. After his investigation, he gave his report to the warden along with his conclusion. He concluded that both Lewis and Roberts engaged in a physical fight and that both had the opportunity to leave without engaging in an argument and did not. (R-6.) Strohmetz also concluded that the fight was planned. Strohmetz did not take a taped statement from Roberts because his attorney requested that he not be interviewed. He did not speak to the supervisors on Roberts' shift. Strohmetz was not aware that Hernandez submitted an incident report subsequent to his own investigation.

Strohmetz explained that he is no longer with internal affairs because Civil Service determined that he did not have the proper qualifications as a result of a desk audit that showed that he never took the appropriate test. Ultimately, Strohmetz based his conclusion on the argument in the officers' dining room that led to the fight. The reports Strohmetz received during his investigation indicated that Roberts and Lewis were going to meet in the parking lot after work and that information is what led to his conclusion it was a planned fight. Lewis could have left the lot, but did not. Ultimately, however, Roberts was the aggressor and came across twenty-five to thirty yards and struck Lewis first. He confirmed that Roberts went to his car, but never started it and just waited. Strohmetz could not point to anything written that obligated Lewis to leave the parking lot.

William McDonnell testified that he has been a corrections captain in the County of Burlington for six or seven years. He was in charge of supervising the staff when Roberts and Lewis were corrections officers in Burlington County. He recalled Roberts complaining about Lewis about a year prior to testifying in approximately April 2013. Before the officers began working twelve-hour shifts, they worked eight-hour shifts and

Roberts' shift would follow Lewis's. Lewis worked from 7:00 a.m. to 3:00 p.m. and Roberts worked 3:00 p.m. to 11:00 p.m. Roberts complained that Lewis did not accomplish things and then Roberts had to complete what did not get done. He asked Roberts if he had a problem, but Roberts said he did not. McDonnell told Lewis that tasks have to be done before he left his shift and Lewis moved on. He received no subsequent complaints. He wrote a report about Roberts' complaint when Strohmertz mentioned the incident that had occurred. (R-7.) He sent his report to the warden.

Eugene Royster testified he had been a corrections officer at Burlington County Jail for ten years. On January 5, 2014, he was working the 6:00 a.m. to 6:00 p.m. shift. Royster then clocked out and went to leave with Lewis who was his ride home. He left the building with Lewis. At the car in the parking lot, Lewis got out a cigarette and Royster got his phone out. Lewis stood by the car on the driver's side while he got his phone out of the side panel of the car and stood by the right side of the car. He did not initially see Roberts, but later saw him standing by his car in the rearview mirror. Next, he heard Lewis and Roberts yelling at each other. He then saw them standing face to face when he looked up. He saw Roberts with two open hands up in Lewis's face. They then began to fight for about thirty to forty seconds and then Officer Curtis came to assist. The whole episode took three or four minutes. After the fight, he asked Lewis how he was. Lewis had a couple of abrasions on his forehead and scratches. Royster also thought that the problems between Lewis and Roberts began when they both worked on B Wing. He wrote a report on January 5, 2014. (R-8.) Royster noted that no phones or cigarettes are allowed inside the jail for the duration of the twelve-hour shift. He never heard Lewis say he expected to fight Roberts or he was going to fight Roberts. Royster did not see Roberts approach Lewis, but saw when they were face to face. Roberts ended up on top of Lewis who was on the ground until Officer Curtis pulled Roberts off of him. Lewis did not go after Roberts after Curtis pulled him off. Using pictures, Royster identified the marks on Lewis's face after the altercation. He did not see Roberts after the altercation. (P-1, P-2 and P-3.)

Monique (M.L.) Curtis testified that she has been a corrections officer at Burlington County Jail for over eleven years. She left after her shift at 6:00 p.m. with her husband, Officer Leonard Curtis. She saw Roberts leaning on his car next to her

vehicle in the parking lot. She did not see Lewis. M.L. Curtis went to her vehicle and started to warm it up. She spoke to Roberts and asked if everything was okay. He was leaning on his car and she thought it may have broken down. Roberts said everything was okay, so she got in her vehicle and started it up. Curtis moved her vehicle up slightly to get over a puddle of slush so her husband could get in the car. She then saw Lewis go to his vehicle, start it and then get out and begin to smoke a cigarette. She began to hear yelling within thirty seconds of her getting in the car. Roberts told Lewis to keep his name out of his mouth. Lewis said he did not know what Roberts was talking about and Roberts gave a response that she could not make out. Curtis did not see Lewis try to get back into his car. After the yelling, within seconds, she saw Roberts walk behind his vehicle and go toward Lewis and approach him face to face. Roberts was yelling in Lewis's face and Lewis yelled back at him as they were nose to nose. She saw Roberts strike Lewis in his face and they began fighting each other. Curtis started yelling for them to stop, but they did not stop fighting. The lot was open to the public and anyone could have seen what took place. The fight lasted anywhere from forty-five seconds to two minutes. She and the other officers restrained and separated the officers. She identified the vehicles in the parking lot on the video. Her vehicle was the one slightly behind Roberts' red Taurus. According to the videotape, the fight occurred at 6:15 p.m. She drafted an incident report when she returned to work setting forth the events to which she testified. (R-10.) Curtis made it clear that, during the fight, Roberts was on top of Lewis when they were on the ground.

Enrique Hernandez testified that he is a sergeant in the identification admissions department. He knows Lewis and Roberts as former employees who worked on the 6:00 a.m. to 6:00 p.m. shift with him. Mr. Hernandez testified that he was in the unit with Lewis serving disciplinary charges to inmates when he had a conversation with Lewis at his desk. He was investigating an assault in the detention unit where inmates were located and he sat down at a desk to document what he had found. He had a brief conversation with Lewis who said that he and Roberts had words in the locker room. He did not say what the words were. Hernandez briefly told him that Lewis may not like Roberts, but he just has to brush it off his shoulders. He did not say anything other than for him to let it go. He would have written it out if the conversation said that there was going to be a fight or words to that effect. Hernandez testified that he has

heard guys talk "trash," but it is generally nothing serious. He did not tell Lewis to contact the captain or the warden. He did not believe there was a need because he did not know there was a history between Lewis and Roberts. He did not feel it was necessary to write a report. If Lewis said he had felt threatened, he would have done something. The hearing officer asked him to draft a report in February after hearing Lewis's testimony.

Hernandez agreed that the supervisor's role is to look into problems, but Lewis did not have his full attention at the time because he was already investigating an assault involving inmates. Although he had already served inmates with charges, he was still recording statements. He was aware that Roberts was an aggressive person work-wise. By that, he means he is not laid back. Hernandez was not Lewis's supervisor on the day in question. He has never seen words exchanged between officers escalate into a fight. Lewis never said he was afraid something would happen between him and Roberts.

William Nunn testified that he was the corrections sergeant over Lewis on the day of the incident. He initiated a conversation with Roberts sometime in 2013 to tell Roberts that he had heard things around the jail that he and Lewis had personal issues. He was being proactive in trying to ensure that it would not escalate. Apparently Lewis's wife, from whom he was separated, was the source of some of the animosity between Roberts and Lewis. Nunn asked Roberts what was going on and Roberts denied there were any problems. Nunn did not draft a report then, but after the disciplinary hearing he was asked to draft an incident report. (R-12.) He never spoke to Lewis about these issues. Roberts said nothing was going on and he was satisfied.

On the day in question, Nunn was their sergeant on duty. Nunn continued that he used to be a lieutenant, but he has been demoted to sergeant. He has been with the jail for twenty-two years. Although he heard rumors that Lewis and Roberts were having problems, he did not talk to Lewis. Lewis was also on his shift at the time. Both were working 6:00 a.m. to 6:00 p.m. They also had the same days. He accepted what Roberts said; however, in hindsight, he does not know if Roberts was telling him the truth.

Leonard Curtis testified that he has been an officer at the Burlington County Jail for ten years. After his shift ended at 6:00 p.m. on January 5, 2014, he went to his vehicle and saw Roberts leaning against his car. He did not recall if Roberts' car was running, but upon looking at his report, he remembered that the car was not running at the time. He saw Lewis come out later and stand next to his car smoking a cigarette. Curtis's wife then pulled up her vehicle next to him and he heard Roberts yelling at Lewis saying words, but he does not recall what. He then saw Roberts run behind his vehicle and in front of Lewis. They started to fight. He called for Roberts to stop and pulled Roberts off of Lewis. He then told them both to go home. Roberts started the physical contact by shoving Lewis in the face. The fight ended up with Lewis on the ground and Roberts on top of him, so he grabbed Roberts away from Lewis.

Curtis further testified that Lewis did not attempt to get back in the car as he was exchanging words with Roberts. The words were being exchanged back and forth with Lewis yelling at Roberts and Roberts yelling at Lewis. Both officers were punching each other as well. He did not recall Lewis saying, "I'm not going anywhere." He did not see any physical injury to Roberts, but it was dark. He wrote a report shortly after the event. (R-10.)

FINDINGS OF FACT

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** as follows. On January 5, 2014, Officers Roberts and Lewis exchanged words in the Officers' Dining Room (O.D.R.) about Lewis talking about him behind Roberts' back and Roberts said words to the effect, "O.k., we'll see at 1800 outside," (R-3.) Lewis described Roberts as "waiting" rather than "standing" by his car when he went out to the parking lot at 6:00 p.m. (R-3.) Roberts had not started his car when he "waited" for Lewis in the parking lot. Roberts' car was at least twenty-five yards from Lewis's car in the parking lot. Lewis came out to the parking lot after 6:00 p.m. with Royster, started his car and stood by his car smoking a cigarette. Royster stood by Lewis's car using his cell phone. Cigarettes and cell phones are not allowed in the jail during the officers' twelve-hour shifts. Roberts yelled

at Lewis calling him a "faggot" and Lewis yelled back eventually responding, "I'm not going anywhere." (R-4 at 3.) Roberts approached Lewis and placed his two hands up and pushed Lewis in the face before Lewis took any action against Roberts. A fight ensued. Lewis threw punches, but Roberts was quickly on top of Lewis striking him until Leonard Curtis pulled Roberts off of Lewis. Lewis was injured in the face as shown in photographs. There were no pictures to depict injuries to Roberts nor did anyone testify to seeing any.

CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 et seq. and the regulations promulgated thereto, N.J.A.C. 4A:1-1.1, govern a civil service employee's rights and duties. Pursuant to the Act, a public employee may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a). In an appeal from a disciplinary action or ruling by an appointing authority, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.A.C. 4A:2-1.4(a). That burden is to establish by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143, (1962); In re Polk, 90 N.J. 550 (1982).

In the present matter, respondent first charged Lewis with conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)6. "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of 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 complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). The Court in Emmons found that an offense need not be a violation of a 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 ." Id.

at 140. The specifications to this charge allege that on January 5, 2014, Lewis committed conduct unbecoming by engaging in threatening and assaultive conduct by arguing with Officer Anthony Roberts and engaging in a physical fight in violation of workplace violence. As set forth above, the facts are clear that Lewis engaged in a physical fight in the public parking lot with another corrections officer and I so **FIND**. I do not **FIND** that Lewis threatened Roberts. That version of events was set forth only in the hearsay statement of Roberts, which I do not find credible. Rather, I **FIND** that Roberts initiated the yelling in the parking lot and the fight. Nevertheless, Lewis came out of work and saw Roberts "waiting" by Roberts' car. Lewis did not get in his car at that point. Lewis did not do anything out of the ordinary in failing to go home immediately. The officers are not allowed cigarettes all day, so Lewis smoked in the parking lot. Officer Royster could not use his phone in the jail, so he used his phone in the parking lot. Lewis could have gotten in his car and driven off, but there was no rule mandating that Lewis leave the lot. However, when Roberts yelled at him, at that point, if he had any question about what Roberts was waiting for, the question was answered. At that point, instead of yelling back and saying, "I'm not going anywhere," Lewis could have gotten in his car and left the parking lot. He did not. Even Leonard Curtis, who testified for Lewis, wrote in his report that Roberts and Lewis "were exchanging abusive comments back and forth." (P-4.) Curtis was a credible witness and there is no reason to doubt that what he wrote at the time of the incident was also credible. Roberts was the clear aggressor in the fight, but Lewis's engagement in the yelling and the defiant, "I'm not going anywhere" invited a response that Lewis should have foreseen. Roberts engaged in a fight with Lewis that was inevitable. Therefore, I **CONCLUDE** that respondent proved by a preponderance of the credible evidence that Lewis committed conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6).

Regarding the neglect of duty charge, Leith testified that there is zero tolerance for off-duty conduct. He testified that sworn law enforcement officers are never off duty and must hold themselves to a higher standard. He said failure to uphold that responsibility is considered neglect of duty. Leith did not point to any policy that set forth a "zero tolerance" standard. His statement that law enforcement officers are held to a higher standard is widely accepted. However, it is a bit of reach to say that failing to uphold that standard of duty constitutes "neglect of duty." Lewis was involved in a

fight that he did not initiate verbally or physically. I **CONCLUDE** that respondent did not meet its burden of proving that Lewis neglected his duty by a preponderance of the credible evidence in the record.

Lewis was also charged with violation of Policy and Procedures Sections 1021, 1023, 1036, 1038, 1043 and 1148. Taken in order, Policy #1021 requires officers to conduct themselves in the utmost professional manner at all times in the representation of the jail administration. Although everyone agrees that the parking lot incident was initiated by Roberts, one has to consider the totality of the circumstances. Finding the statement of Lewis to be more credible than that of Roberts as more consistent with the testimony of other witnesses, the incident started with the comment of Roberts in the O.D.R. during which Lewis tacitly agreed to continue their discussion at 1800 (6:00 p.m.) Strohmets believed that the two officers made an agreement to fight, but Lewis did not make a real threat and there was no mention of a fight. Further, Royster did not hear Lewis mention that he expected to fight Roberts when he left work. Lewis could have gotten in his car and driven off, but his failure to do so cannot be considered unprofessional. What can be considered unprofessional is the yelling in the parking lot that Lewis could have ignored and walked away from, but did not. Lewis was not the aggressor in this fight, but in responding in kind and saying, "I'm not going anywhere" and then not going anywhere, he challenged Roberts to do something about it and I so **FIND**. I therefore **CONCLUDE** that respondent proved by a preponderance of the credible evidence that Lewis acted in an unprofessional manner and violated Policy #1021 in connection with the events of January 5, 2014.

Policy #1023 sets forth that "all law enforcement officers of the Burlington County Correction Department shall be responsible to observe, comply, strictly adhere, and enforce all rules, regulations and to follow the policies and procedures contained herein and any amendment promulgated and approved by the Jail Administrator."

Policy #1023 is just a rule that says an officer has to obey the rules, so it is not violated unless Lewis violated another rule. Since I have found that Lewis acted unprofessionally by exchanging words with Roberts in the parking lot and doing just as he said and not going anywhere and concluded that his conduct therefore violated

Policy #1021, I **CONCLUDE** that respondent proved by a preponderance of the credible evidence that Lewis violated Policy #1023.

Policy #1036 states that "all officers and employees shall be courteous, civil and respectful to their superiors, subordinates and all other individuals that may have contact with. An officer shall promote professionalism at all times and shall be orderly, maintain decorum, control temper, be patient and use discretion." Roberts started the exchange of words in the parking lot and started the physical altercation. This makes the analysis of this provision complicated. On the one hand, as I have set forth above, Lewis's conduct in responding to Roberts' yelling at him in the parking lot and practically daring Roberts to do something to make him leave by saying, "I'm not going anywhere" was unprofessional. However, the question remains whether Lewis failed to be orderly, maintain decorum, control temper, be patient and use discretion when he did not get in the car at the point that Roberts yelled at him and drive off. I cannot conclude on the basis of the facts before me that he did not control his temper or be patient. Lewis was very patient and probably would have stayed there until Royster told him it was time to go home without any fight ever occurring were it not for Roberts. Lewis's yelling back at Roberts, however, was not acting orderly, maintaining decorum or using discretion. His engaging in the yelling in the parking lot was what led to the fight. In addition, as indicated by the investigation, Lewis did not use discretion when he tacitly agreed to see Roberts outside at 6:00 p.m. according to Lewis's interview with Strohmets. (R-3.) I therefore **CONCLUDE** that respondent proved by a preponderance of the credible evidence that Lewis did not act orderly, maintain decorum or use discretion and therefore violated Policy #1036.

Policy #1043 provides that, "Officers must maintain a high degree of self-control at all times. There shall be no corporal punishment: no officer/employee shall strike or lay hands on an inmate or other person unless it is in self-defense, prevent injury to other person, property, prevent an escape, quell a disturbance or to enforce a valid order given by a supervisor. In such cases only that force necessary to accomplish the mission will be used." Leith testified that the self-defense policy, #1043, means that officers have the right to defend themselves, but if there is a way to get out, they have to get out of it. There is no automatic right to hit back. However, Leith noted that Lewis

was not charged with a violation of the use of force policy that specifically defines "self-defense" and how much force an officer is allowed to use when he is attacked. He also admitted that no policy he could name mandates a duty to get out. Policy #1043 does not set forth that condition. It says only that self-defense is an exception to the rule against striking or laying hands on another person. Clearly, Roberts came to Lewis quickly, which some witnesses described running to Lewis. Lewis acted to defend himself. Lewis was able to hit Roberts back, but all the witnesses agreed that Lewis was on the ground while Roberts struck him. The injuries to Lewis were demonstrated in photographs. No pictures of any injuries were presented of Roberts and no one supported Roberts' account that Lewis continued to go after him after Curtis pulled Roberts away. Based on the foregoing, I **FIND** that Lewis struck Roberts in self-defense after Roberts ran at him and placed his hands in his face. Therefore, I **CONCLUDE** that respondent failed to prove by a preponderance of the credible evidence that Lewis violated Policy #1043.

Last, respondent charged Lewis with violating the Workplace Violence Policy, #1148 (J-4.) Respondent states in its brief that it charged Lewis for violating this policy because Lewis engaged in intimidation, threats and physical blows involving Roberts. Respondent did not otherwise specify the portion of the four-page policy upon which it was relying. The workplace violence policy defines intimidation as "engaging in actions that includes [sic], but is not limited to stalking or behavior intended to frighten, coerce, or induce duress." The testimony of the witnesses corroborated that Roberts initiated the verbal and the physical contact. The evidence and witnesses did not support Lewis committing any acts that met this definition. The two had words in the O.D.R. and yelled at each other in the parking lot, but "I'm not going anywhere," does not constitute words intended to frighten, coerce, or induce duress. They were defiant words, but not intimidating. Threat is defined as the expression of intent to cause physical or mental harm. The threats respondent referred to were those articulated in Roberts' statement, but were not corroborated by any of the witnesses and therefore they were hearsay without a residuum of competent evidence to support it. N.J.A.C. 1:1-15.5. I do not find the account of events by Roberts to be credible in any event. Roberts' version that Lewis instigated the incident both in the O.D.R. and in the parking lot is not supported

by the weight of the evidence. Even assuming that Lewis tacitly agreed to meet Roberts in the parking lot, the threat and intimidation are missing.

Also, if the workplace violence applies to Lewis, it must apply to all of respondent's employees. Hernandez admitted that on the day of the incident, January 5, 2014, Lewis sought him out to let him know that he and Roberts had words. Hernandez told him to brush it off. Hernandez testified that Lewis did not have his full attention. The advice Hernandez gave is not set forth anywhere in the workplace violence policy under "warning signs" where it indicates that supervisors should be alerted to and aware of these indicators. Lewis did as he was supposed to by advising his chain of command that he and Roberts had words. Hernandez was to advise his chain of command once advised by Lewis. That did not happen. Nunn and McDonnell also were aware of tension between Lewis and Roberts, but only questioned Roberts about what they heard. They accepted Roberts' denial of any problems between the two.

Based on the substantial credible evidence in the record, I **FIND** that the threats and intimidation came from Roberts rather than Lewis. I **FIND** that Lewis reported to Hernandez that he and Roberts had words in line with the policy. I **FIND** that supervisors were aware of tension between Lewis and Roberts, but did not take action mandated by the workplace violence policy to quell the animosity between the two. I therefore **CONCLUDE** that respondent did not prove by a preponderance of the credible evidence that Lewis violated the workplace violence policy.

PENALTY

When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. N.Y. v. Bock, 38 N.J. 500 (1962). Where appropriate, concepts of progressive discipline involving penalties of increasing severity are used in imposing a penalty and in determining the reasonableness of a penalty. W.N.Y. v. Bock, supra, 38

In the present case, I have concluded that respondent proved by a preponderance of the evidence that Lewis committed conduct unbecoming a public employee, and violated Policies 1021, 1023, and 1036. I concluded that respondent did not prove that Lewis neglected his duty or violated Policies 1043 or the Workplace Violence Policy, 1148. The charges that were sustained were based on the facts that Lewis did not display discretion, decorum or professionalism when he exchanged words with Roberts in the parking lot when he knew or certainly should have known at that point that Roberts was waiting for him and looking for a fight. These charges should not be treated with the same severity as being the instigator of the words exchanged or the aggressor of the fight. The misconduct is not as grave.

Lewis's prior disciplinary history since September 2011 includes two reprimands for abuse of sick leave and one for verification of time clock (VTC) or lateness. It also includes three one-day suspensions, two for abuse of sick leave and one for VTC or lateness. Lewis also had two three-day suspensions including one VTC or lateness and one for neglect of duty. I did not include counseling because counseling is supposed to be corrective rather than disciplinary. Lewis's disciplinary history included numerous letters for time clock violations. Thus, Lewis was not a model employee, but he did not receive any major suspensions and this is his first violation of each of the charges that the respondent was able to prove. This would have been his second neglect of duty violation, but I concluded that the respondent did not sustain its burden of proving neglect of duty.

Based on Lewis's disciplinary history and the gravity of the violations, I **CONCLUDE** that the appropriate penalty for Lewis is a six-month suspension. There is a difference between not taking action to stop a fight from occurring, that is, walking away, and actually causing the fight. The punches that Lewis gave Roberts were in self-defense. Roberts, who initiated the fight, should get a harsher penalty than Lewis. In so stating, I am taking into account the higher standard to which all law enforcement officers are held. The leap in discipline from a three-day suspension to a six-month suspension adequately takes the responsibility Lewis had to the public he serves into account.

ORDER

Based upon the foregoing, I **CONCLUDE** that the action of the Burlington County Jail in removing Lewis from the position of corrections officer effective January 9, 2014, was too harsh. Accordingly, it is **ORDERED** that his removal be and is hereby **MODIFIED** to reflect that Lewis served a six-month suspension for the violations of conduct unbecoming a public employee and other sufficient cause, specifically violations of Burlington County Jail policies 1021, 1023 and 1036. The charges of neglect of duty and violation of polices 1043 and 1148 are **DISMISSED**.

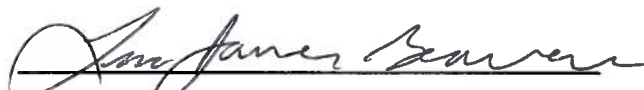
I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

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.

July 30, 2014

DATE


LISA JAMES-BEAVERS, ALJ

Date Received at Agency:

July 30, 2014

Date Mailed to Parties:

July 31, 2014

APPENDIX

LIST OF WITNESSES:

For appellant:

Officer Leonard Curtis

For respondent:

Lieutenant Matthew Leith

Officer Scott Strohmetz

Captain William McDonnell

Officer Eugene Royster

Officer Monique (M.L.) Curtis

Sgt. Enrique Hernandez

Sgt. William Nunn

LIST OF EXHIBITS

Joint:

J-1 Policies and Procedures #1021 and #1023

J-2 Policies and Procedures #1036 and #1038

J-3 Policies and Procedures #1043

J-4 Workplace Violence Policy

J-5 Acknowledgement of Receipt Workplace Violence Policy

J-6 Acknowledgement of Receipt S.O.P.s

J-7 Preliminary Notice of Disciplinary Action dated January 9, 2014

J-8 Final Notice of Disciplinary Action dated March 4, 2014

For appellant:

P-1 Photograph

- P-2 Photograph
- P-3 Photograph
- P-4 Burlington County Department of Corrections Incident Reports

For respondent:

- R-1 List of Sanctions and Charges for Michael Lewis
- R-2 Burlington County Detention Center Incident Report, January 5, 2014
- R-3 Burlington County Detention Center Incident Report, January 5, 2014
- R-4 Minutes of Board of Chosen Freeholders, January 6, 2014
- R-6 Investigation Report, Internal Affairs, January 6, 2014
- R-7 Memo to Warden Artis from Captain McDonnell, dated January 9, 2014
- R-8 Burlington County Detention Center Incident Report, January 5, 2014
- R-9 Video of parking lot incident, January 5, 2014
- R-10 Burlington County Department of Corrections Incident Report, January 5, 2014
- R-11 Memo to Captain M. Scholtz from Sergeant E. Hernandez, dated February 11, 2014
- R-12 Memo to Captain Scholtz from Sergeant Nunn, dated February 11, 2014