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STATE OF NEW JERSEY

In the Matter of Giovanni Colon,
Department of Corrections

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket No. 2016-1452

Request for Reconsideration

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ISSUED: DEC 17 2015

(CSM)

Giovanni Colon, a former Senior Correction Officer with the Edna Mahan Correctional Facility, Department of Corrections, represented by Colin M. Lynch, Esq., requests reconsideration of the attached decision rendered on August 19, 2015, which upheld his removal.

By way of background, he appellant was removed on charges of conduct unbecoming a public employee and other sufficient cause. Specifically, it was asserted that on January 26, 2015, the appellant used excessive force against an inmate. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case. In her initial decision, the Administrative Law Judge (ALJ) concluded that while the appointing authority did not sustain the charge of conduct unbecoming a public employee because the appellant did not violate the use-of-force policy, it sustained the charge of other sufficient cause when he elected to follow a disobedient inmate rather than call a supervisor and maintain an arm's length distance. Accordingly, the ALJ recommended modifying the removal to a 40 working day suspension. In his exceptions, the appellant argued that the ALJ erred by charging him, *sua sponte*, with violating an alleged policy requiring officers to maintain an arm's length distance from inmates and he was only charged with using excessive force against the inmate. In upholding the removal, the Civil Service Commission (Commission) determined that the appellant's actions supported the charge of other sufficient

cause because his use of force would not have been necessary but for his instigation and exacerbation of the incident.

On reconsideration, the appellant states that he was not charged with violating any policy concerning maintaining an arm's length distance from the inmate. Therefore, he argues that the decision of the Commission to unilaterally charge him with this infraction violated his due process rights. Additionally, the appellant argues that the Commission's upholding of the excessive use-of-force charge is arbitrary and not supported by material evidence in the record. In this regard, he states that an agency head may only reject or modify any findings of fact as to issues of credibility by stating with particularity the reasons for stating the findings. The appellant maintains that the ALJ found his testimony credible and the Commission did not state with any specificity why it overturned these credibility determinations. The appellant also contends that his removal violated the doctrine of progressive discipline.

In response, the appointing authority, represented by Peter Jenkins, DAG, presents that it had other sufficient cause to discipline him for failing to follow Corrections Academy training policy instructing officers to keep an arm's length between themselves and inmates. It also states that the Commission properly conducted an independent review of the record and specified the findings of fact it agreed with and the ones it rejected. Finally, given the seriousness of the incident, the appointing authority maintains the appellant's removal was justified.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

In the present matter, the appellant has not satisfied the standard for reconsideration. It is well established that the ALJ and the Commission only have jurisdiction to adjudicate disciplinary charges and specifications which were sustained at the departmental level hearing. *See Hammond v. Monmouth County Sheriff's Department, 317 N.J. Super. 199 (App. Div. 1999)*. In the prior matter, the Commission thoroughly reviewed all of the appellant's exceptions he filed and determined that it was evident that his invasion of the inmate's personal space, in a situation that was already heated, served to escalate the situation, which supports the charge of other sufficient cause. Thus, without such action, the need for any physical interaction would not have even been necessary. Regardless, the charge against the appellant could have been amended to include a violation of the arm's-length policy for the appellant's conduct of violating the inmate's personal space in a heated situation,

which caused the incident. This amendment would not have prejudiced the appellant, since the specifications underlying the charges in the PNDA and FNDA clearly subsumed the allegation that he did not maintain an arm's-length distance from the inmate. Thus, the appellant was on notice of the accusations against him via the sustained specifications. Further, as stated in the prior decision, the appellant's conduct in this regard is unbecoming and considered excessive because his use of force would have been wholly unnecessary but for his instigation and exacerbation of the incident.

With respect to the credibility determinations, 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 v. Public Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004). In this case, the Commission did not overturn any of the ALJ's credibility determinations. Rather, it accepted her determination that the appellant moved toward the inmate because he did not know where she was going or what she was going to do next, and that when he did act, he did so because he thought the inmate was on the point of punching him. However, the ALJ also found Major Tompkins and Senior Investigator Caldwell's testimony credible with regard to the facility's expectations with regard to proximity between officers and inmates, and officers are generally expected to maintain an arm's length between them and inmates.

With respect to penalty, as stated in the prior decision, 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). In this case, the appellant had a prior 30 working day suspension and had only been employed for just over two years. As a Senior Correction Officer, the appellant is expected to exercise restraint, and it was not necessary for him to follow the inmate when she was clearly walking away from him and complying with his order. Given

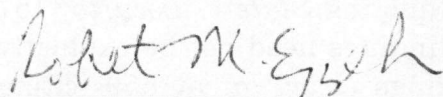
the egregiousness of the incident as well as his prior disciplinary history, the penalty imposed by the appointing authority was neither unduly harsh nor disproportionate to the offense and should be upheld. Therefore, appellant has not satisfied the standard for reconsideration.

ORDER

Therefore, it is ordered that this request for reconsideration be denied.

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 16TH DAY OF DECEMBER, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
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P.O. Box 312
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Attachment

- c. Colin Lynch, Esq.
Peter Jenkins, DAG
Joseph Gambino

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STATE OF NEW JERSEY

In the Matter of Giovanni Colon,
Department of Corrections

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FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket No. 2015-2827
OAL Docket No. CSR 05828-15

ISSUED: SEP 03 2015 (CSM)

The appeal of Giovanni Colon, a Senior Correction Officer with the Edna Mahan Correctional Facility, Department of Corrections, of his removal effective April 6, 2015, on charges, was heard by Acting Director and Chief Administrative Law Judge Laura Sanders (ALJ), who rendered her initial decision on July 14, 2015. Exceptions were filed on behalf of the appointing authority and exceptions and a reply to exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, including a review of the video of the incident, the Civil Service Commission (Commission), at its meeting on August 19, 2015, did not adopt the ALJ's recommendation to modify the removal to a 40 working day suspension. Rather, the Commission upheld the removal.

DISCUSSION

The appellant was removed on charges of conduct unbecoming a public employee and other sufficient cause. Specifically, it was asserted that on January 26, 2015, the appellant used excessive force against an inmate. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In her initial decision, the ALJ found that on the day of the incident, the appellant was working in the control booth when inmate B., a female who is classified as special needs, approached the booth and was trying to locate pictures

that had not been returned upon her release from detention. The appellant advised the inmate that he did not have the pictures and that she needed to return to her housing unit. The inmate left briefly, but returned, which culminated in the appellant taking her down to the ground. Upon the ALJ's review of the video of the incident, she indicated that inmate B. talked to the appellant inside the booth then walked away to the lower right, leaving the camera's view, and reappeared later threading her way rapidly through the tables from the rear back of the room to the side of the control booth. When she reaches the control booth door, the appellant appears, and almost immediately, inmate B. turns and begins walking back in the direction from which she came. After four to five steps, she turns toward the appellant and says something over her shoulder and the appellant begins to stride rapidly toward her. As the appellant begins to move, inmate B. turns and continues walking away. The appellant closes the space between them quickly, and, as he comes up behind her, inmate B. stops, and the appellant is inches behind her. Inmate B.'s left hand is lifted, clenching and unclenching and after a five to six second interval, the appellant pushes her which causes her to stumble. Inmate B. comes up on her feet, throwing punches, as the appellant closes in on her. At this point, a code is called which brought in other officers to help.

Senior Investigator Renee Caldwell testified that she interviewed inmate B., two other inmates and Senior Correction Officer James Garrity. During the interviews, inmate B. stated that when she approached the appellant the second time, he began screaming and cursing, told her to go back to her wing, and when she was heading there, he began speed-walking toward her and "he all of a sudden shoved [her] real hard." The other inmates indicated that they heard the altercation, saw the appellant walk toward inmate B., and push her. Garrity indicated that he saw the appellant push inmate B., "creating a distance." The appellant testified that when inmate B. started cursing at him and told him that she was not going to go down to the wing, he went to her to further explain that this would be her last order to go down to the wing. The appellant explained that he had to get closer to her to get her to go down to the wing and that his physical presence would reinforce the order. The appellant stated that he followed her because he was not sure where inmate B. was going and, that when he first walked over, her left hand was up a little bit and she said that she would not go to the wing until she punched him in the face. As the appellant felt that inmate B. was going to carry out her threat and strike, he stated that he took her to the ground.

The ALJ found that inmate B. made the statements that the appellant attributed to her and that the appellant moved toward the inmate because he did not know where she was going or what she was going to do next. The ALJ also found that when the appellant came up behind inmate B., there was a pause, and, the video showed one of her hands up and working. Thus, the ALJ determined that the appellant did not just close and take action and that the long moment of stillness was indicative that when the appellant acted, he did so because he thought

inmate B. was on the verge of punching him. However, the ALJ also determined that the appellant did not call a supervisor as is required when an inmate fails to follow orders or maintain the required arm's length distance between himself and an inmate. Therefore, the ALJ concluded that while the appointing authority did not sustain the charge of conduct unbecoming a public employee because the appellant did not violate the use-of-force policy, it sustained the charge of other sufficient cause when he elected to follow a disobedient inmate rather than call a supervisor and maintain an arm's length distance. Accordingly, the ALJ recommended modifying the removal to a 40 working day suspension.

In its exceptions to the ALJ's decision, the appointing authority states that the appellant's use of force against an inmate with special needs was not justified as there was no immediate physical threat. In this regard, if inmate B. was verbally threatening, the appellant should not have followed her and the appropriate response was to call a supervisor. More significantly, since inmate B. was walking away, there was no need for the appellant to have gotten so close to her. Additionally, the appointing authority argues that the video confirms that inmate B. was not in a position to assault the appellant nor did she make any motion to do so as her left hand remained at her left side at hip level. Further, inmate B. did not make any sudden movements that she was about to hit the appellant and was simply standing with her back toward the appellant when she was violently pushed. Moreover, inmate B. is a special needs inmate and there was no basis to follow her when she was complying with his order or to get within inches of the inmate violating her personal space. Therefore, the appointing authority maintains that the proper penalty is removal.

In response, the appellant states that the appointing authority has failed to demonstrate that the ALJ's determinations were not supported by the record. However, he argues that the ALJ erred by charging him, *sua sponte*, with violating an alleged policy requiring officers to maintain an arm's length distance from inmates. In this regard, the appellant states that he was only charged with using excessive force against the inmate and not charged with a violation of the arm's length policy. Thus, since he was not charged with a violation of this policy, the appellant maintains the 40 working day suspension is improper.

Upon an independent review of the record, including a review of the video of the incident, the Commission concludes that the appointing authority has met its burden of proof in this matter regarding all of the charges. Further, for the reasons set forth below, the Commission determines that the penalty of removal should be upheld.

While the Commission agrees with the ALJ's description of the video, it is clear that the appellant improperly followed the inmate and came within inches of her, which instigated the incident. As noted by the ALJ, the appellant disregarded

procedures and elected to follow a disobedient inmate rather than call a supervisor, which was made worse by his coming within inches of her, instead of maintaining an arm's length distance. Although the appellant argues that he was not specifically charged with violating the arm's length policy, it is evident that his invasion of the inmate's personal space, in a situation that was already heated, served to escalate the situation, which supports the charge of other sufficient cause. Thus, without such action, the need for any physical interaction would not have even been necessary. In other words, the appellant's conduct in this regard is unbecoming and considered excessive because his use of force would have been wholly unnecessary but for his instigation and exacerbation of the incident. Such actions clearly adversely affect the efficiency of the operation of the facility. See *Karins v. City of Atlantic City*, 152 N.J. 532 (1998).

In determining the proper penalty, the Commission's review is *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).

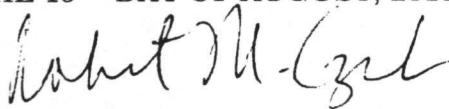
In this case, it is clear that removal is the proper penalty. As a Senior Correction Officer, the appellant is expected to exercise restraint, and it was not necessary for him to follow the inmate when she was clearly walking away from him and complying with his order. Additionally, it cannot be ignored that the appellant has a prior 30 working day suspension and is a short term employee, having only been with the appointing authority for just over two years. Further, the Commission is mindful 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). Accordingly, the Commission finds that the penalty imposed by the appointing authority was neither unduly harsh nor disproportionate to the offense and should be upheld.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. Therefore, the Commission affirms that action and dismisses the appeal of Giovanni Colon.

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 19TH DAY OF AUGUST, 2015



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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 05828-15

AGENCY DKT. NO. N/A

**IN THE MATTER OF GIOVANI COLON,
EDNA MAHAN CORRECTIONAL FACILITY.**

Sean Sprich, Union Representative, PBA Local 105, for appellant Giovanni Colon, appearing pursuant to N.J.A.C. 1:1-5.4(a)(6)

Kelly Lichtenstein, Deputy Attorney General, for respondent Edna Mahan Correctional Facility (John J. Hoffman, Attorney General of New Jersey, attorney)

Record Closed: July 9, 2015

Decided: July 14, 2015

BEFORE **LAURA SANDERS**, Acting Director and Chief ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Senior correction officer (SCO) Giovanni Colon (the appellant) appeals the action by the Edna Mahan Correctional Facility within the New Jersey Department of Corrections (the Department, or respondent) terminating his employment on grounds of conduct unbecoming a public employee and other sufficient cause, specifically, use of excessive force by shoving an inmate. He contends that he was facing imminent

assault by the inmate, such that pushing the inmate was within the Department's policies on use of force.

The Department served Colon through certified or registered mail a Preliminary Notice of Disciplinary Action (PNDA) dated March 12, 2015. A departmental hearing was held on March 30, 2015, and by Final Notice of Disciplinary Action dated April 6, 2015, he was terminated, effective on that date. SCO Colon appealed the termination to the Office of Administrative Law (OAL), where the appeal was filed on April 17, 2015. (N.J.S.A. 40A:14-202(d)). It was heard on July 9, 2015.

FACTUAL DISCUSSION AND FINDINGS

Some facts are not disputed. The incident occurred on January 26, 2015, around 3:35 p.m. Colon and another senior correction officer, James Garrity, were working in the control booth, next to the day room in the Stowe unit, when an inmate who is classified as special needs approached the booth. She had recently been released from detention, and was trying to locate pictures that had not been returned. Apparently, another inmate told her (erroneously) that SCO Colon had been the one who packed up her things when she was sent to detention. Colon said he did not have the pictures and that the day room was currently closed to inmates, so she needed to return to her housing unit. She left briefly, and then returned. Although the incident culminated in SCO Colon taking down the inmate, and a Code 33, the charges at the OAL are confined to the shove; they do not involve the events following it.

The DVD provided to the OAL did not have a freeze-frame feature, so the times provided in the following account are approximate. The relevant portion of the tape begins at minute 1:24, when inmate B., who is wearing glasses, approaches the control enclosure and talks to the two officers inside until 1:59, when she turns and walks to the lower right, leaving the camera's view. At minute 2:09, she reappears from the lower right, threading her way rapidly through the tables from the rear of the room back toward the side of the control booth, where all parties agree there is a door not visible to the camera. (At this point, one other inmate is much closer to the camera, partially obscuring the view, and in roughly the same time period another inmate is seen

wandering through.) Around minute 2:13, inmate B. reaches the control-room door, from which a person in a dark uniform appears (SCO Colon). Almost immediately, inmate B. turns and begins walking back in the direction from which she had come, which leads toward where her housing unit is located. SCO Colon remains by the door of the control booth. Inmate B. takes four to five steps (she is partially behind a pillar) then turns toward the camera, so her right side is toward SCO Colon and her body toward the camera, and says something over her shoulder. SCO Colon then begins to stride rapidly. As he begins to move, inmate B. turns and continues walking back toward the right and the housing unit. SCO Colon closes the space between them quickly, and as he comes up behind her, inmate B. stops, such that he is now inches from her. Her back is not square to him; she is somewhat angled, with her body partially toward the camera. Her left hand which is farthest from the camera, is lifted, and clenching and unclenching. The two remain in that position for a five- to six-second interval, then SCO Colon makes a sudden, strong, push. (The light is too poor to tell if it was one-handed or two-handed.) The shove causes inmate B. to stumble one long step forward. However, it was not hard enough to completely unbalance her; rather, she twists and comes up on her feet with both hands up, as he closes on her. All sides agree that from that point, she was throwing punches, and that Officer Garrity called in a Code 33, which brought other officers to help.

Senior investigator Renee Caldwell testified that she interviewed inmate B., two other inmates, and SCO Garrity. She took the B. statement that forms part of her report. (R-2.) In it, the inmate states that when she approached Colon the second time he began screaming and cursing, telling her to go back to her wing. She was heading there when he began speed-walking toward her. She alleged he was "screaming [and] cursing like a madman. [She] was slightly turned to [her] right He all of a sudden shoved [her] real hard. [She] turned towards him hands raised to ward off any further attack." (*Ibid.*) Caldwell stated that she believed the inmate because her version matched the tape, which the inmate has never seen.

Caldwell also interviewed two of the three inmates that are seen on the tape. (She could not identify the third one.) One inmate, B.M., said she heard Colon yelling at B., then saw him walk toward her and push her. Inmate B. then swung at SCO Colon,

who took her to the ground. (R-4.) A second inmate, B.B., heard the officer tell B. to go to her unit, and inmate B. tell him she was going. She then saw SCO Colon get behind inmate B., and heard the two exchange words before she saw him push inmate B. (Ibid.) SCO Garrity told Caldwell he came out of the control room when he heard a verbal altercation between Colon and inmate B. The two were close in distance and he could not determine if inmate B. said anything to SCO Colon. He saw SCO Colon push inmate B., "creating distance. After which inmate B. lunged back towards" Colon. (Ibid.)

SCO Colon testified that when inmate B. appeared the second time, she said she was going to come into the control room and search for the pictures herself, which is why he went to the door. He again told her that she must return to her unit because the day room was closed. She started to comply, then stopped halfway, started cursing at him, and told him she was not going to go down the wing. He "went to her to further explain to her that this would be her last order to go down the wing." Asked why he got so close to her, he said, "At that time, I thought I had to get closer to get her to go down the wing." He thought his physical presence would reinforce the order. He also said that at the point at which he followed her, he was not sure where inmate B. was going. She could have been heading to the mess, where the food was set up, as well her unit, where she belonged. When he first walked over to her, her left hand was up a little bit, but then she said she would not go to her wing until she punched him in the face. After the push, he said his intention was to then call a Code 33, but when he saw her arms coming up, he then felt that she was about to carry out her threat and strike, so he took her to the ground. Colon acknowledged that while he did describe the punch threat in his Special Custody Report (R-3), he did not include any description concerning her fists. He testified that he pushed inmate B. in the shoulder, although he did not recall whether he used one hand or two.

The factual question is whether the video supports the inmate's hearsay version of what occurred, or Officer Colon's testimony. Unfortunately, the video has no audio, and the witness reports establish that a loud verbal exchange occurred but provide little more detail. There were some generalized allegations of chest-bumping that surfaced during the hearing, but the video does not seem to show anything physical before the

sudden shove. Thus, the question of what actually occurred is dependent on a weighing of the credibility of the witnesses, i.e., "an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it 'hangs together' with other evidence." Carbo v. United States, 314 F.2d 718 (9th Cir. 1963). "The 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.) (citation omitted), certif. denied, 10 N.J. 316 (1952).

I am persuaded by the two pauses—the first one that occurred while inmate B. initially appeared to comply with the order and walk away from the control-room door, and the second, much longer, one that occurred when SCO Colon stood next to her—that the inmate made the statements SCO Colon has attributed to her, and I so **FIND**. I also am convinced that SCO Colon moved toward the inmate because he did not know where she was going to go or what she was going to do next, and he thought he needed to ensure that she returned to her housing unit. At the second pause, when SCO Colon has come up behind inmate B., the video clearly shows one of inmate B.'s hands up and working. He did not just close and take action—there is a long moment of stillness, which convinces me, and I **FIND**, that when he did act, he did so because he thought she was on the point of punching him.

This does not, however, address the other part of the Department's charge, which is whether he should have followed the inmate when she verbally refused to comply with the order. One issue was the proper approach to an inmate who has a lengthy disciplinary history in the institution and who suffers from the kind of problems that place her in the special-needs category requiring additional psychiatric care. Major Allen Tompkins, who is a security major at Edna Mahan Correctional Facility, testified that SCO Colon put himself in the position he wound up in by getting too close; officers are taught at the Corrections Academy to keep an arm's length between themselves and the inmates. Asked whether it might be appropriate to use closeness as a control tactic, Tompkins said that if an inmate is agitated and walking away, refusing to follow an order, a correction officer should call his supervisor and report the problem. Senior investigator Renee Caldwell of the Special Investigations Division also pointed to the

decision to approach the inmate so closely as the provocation that created the problem. She noted that at the point at which SCO Colon is still near the door and the inmate has turned and is saying something to him, the inmate is not anywhere near him; it is he who closes the space, bringing them into close proximity. Asked whether he was trained to call a supervisor when an agitated inmate is refusing an order, Colon's answer left the impression that he was not prepared to say he never received that training, but that it was far from his mind on the day of the incident. Although the Department did not produce any documents to back up the testimony concerning training, both Major Tompkins and Senior Investigator Caldwell were persuasive as to the facility's expectations with regard to proximity between officers and inmates, and I **FIND** that officers generally are expected to maintain an arm's length between themselves and inmates, which did not occur here.

With regard to the shove itself, testimony from Major Tompkins established that correction officers are allowed to use force at one step above that of an inmate in order to gain control of a situation. Tompkins said that in the event that an inmate threatened an officer, pushing her away would fall within the Department's policy guidelines. Additionally, documents in the record established that the inmate incurred very significant penalties, including fifteen days in detention for attempted assault, 210 days' referral to administrative segregation and 210 days in lost community time as a result of the incident. Apparently, some of the penalties resulted from internal administrative processes that concluded after the time of Senior Investigator Caldwell's report, which incorrectly states that the inmate received lesser penalties. (R-4.)

LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). Here, as a result of the incident, SCO Colon is charged with (1) conduct

unbecoming, and (2) other sufficient cause, including violations of HRB 84-17, which prohibits physical or mental abuse of an inmate, patient, client, resident or employee, (conduct unbecoming is listed as an additional charge under HRB 84-17, but it is the same charge repeated, with a reference to the Department's disciplinary policy).

Conduct unbecoming is a term that encompasses actions adversely affecting the morale or efficiency of a governmental unit or having a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Conduct unbecoming has resulted in termination for physical or mental abuse of an inmate. (See, e.g., In re Harris, CSR 06275-14, Initial Decision (October 3, 2014), adopted, CSC (November 6, 2014), <<http://njlaw.rutgers.edu/collections/oal/>>. It also has been invoked in both terminations and lesser penalties for a combination of rule-breaking plus lying. In re Rodriguez, CSV 1482-09, Initial Decision (August 5, 2011), adopted, CSC (September 7, 2011), <<http://njlaw.rutgers.edu/collections/oal/>> (termination based on multiple failures to follow rules plus lying); In re Ricciardi, CSV 01851-06, Initial Decision (March 22, 2007), modified, CSC (May 11, 2007), <<http://njlaw.rutgers.edu/collections/oal/>> (six-month suspension); In re Ricigliano, CSV 04326-05, Initial Decision (April 12, 2006), adopted, CSC (June 22, 2006), <<http://njlaw.rutgers.edu/collections/oal/>> (fifteen-day penalty); In re Manson, CSV 2390-08, Initial Decision (September 5, 2008), adopted, CSC (October 10, 2008), <<http://lawlibrary.rutgers.edu/oal/search.shtml>> (Commission affirmed a twenty-day penalty against a police officer who had committed a rules infraction, and then failed to respond truthfully to internal investigators). However, it has not generally been invoked for lesser errors not accompanied by lying. Those have more generally resulted in charges of other sufficient cause in the form of failing to follow a rule.

As noted above, SCO Colon shoved the inmate because he believed she was on the point of punching him, and as Major Tompkins testified, the Department's use-of-force policy allows an officer who believes he is about to be assaulted to push the

inmate away. Therefore, I **CONCLUDE** that SCO Colon's action did not violate the Department's use-of-force policy, and the conduct-unbecoming charge has not been sustained.

However, the Department did show that SCO Colon failed to follow the Department's policy when he elected to follow the disobedient inmate, rather than call a supervisor, which was made worse by coming within inches of her, instead of maintaining an arm's-length distance. Thus, I **CONCLUDE** that the Department did prove the charge of other sufficient cause in the form of violation of a policy.

The question then is penalty. The termination action was predicated on the existence of a second charge of conduct unbecoming. Although SCO Colon has only been a correction officer since March 2013, his record includes a proposed thirty-day suspension for conduct unbecoming related to an off-duty incident in which he was arrested for driving while intoxicated, hitting a parked car, and leaving the scene. His appeal of that suspension is pending as CSV 04585-15, which was filed on April 1, 2015. (See HRB 84-17, Personal Conduct, Number 11, for which the only penalty for a second infraction of conduct unbecoming is removal.) However, I have concluded that the Department did not prove the conduct-unbecoming charge, and thus the automatic termination is not applicable.

Here, the infraction could be viewed as a Safety and Security Precautions error, specifically, Number 7, violation of administrative procedures and/or regulations involving safety and security. Such infractions carry a range of penalties from an official written reprimand to removal. (R-7.) This is consistent with the general civil-service principles of progressive discipline. W. New York v. Bock, 38 N.J. 500, 523 (1962).

The Civil Service Commission (CSC), and its predecessor, the Merit System Board (MSB), have relied on an unpublished Appellate Division decision, Johnson v. State of New Jersey, Department of Corrections, Adult Diagnostic and Treatment Center, No. A-4382-99T3 (App. Div. 2001), wherein the court noted the lack of any case-law support for Johnson's position that matters under appeal to the MSB could

not be considered by the Board in its discretion as prior discipline relevant to the imposition of the penalty in the current matter and in line with the principle of progressive discipline. The court then proceeded to include the matter under appeal as part of Johnson's record. While unpublished decisions are not precedential, nevertheless the CSC and MSB have applied Johnson. In re Griffin-Staples, CSV 8810-07, Final Decision (July 22, 2008); see also In re Dinson, CSV 10891-10, Initial Decision (April 1, 2011), adopted, CSC (May 19, 2011), <<http://njlaw.rutgers.edu/collections/oal/>>.

Given that Colon's record includes a written warning for lateness, and a thirty-day suspension for a serious off-duty infraction, I **CONCLUDE** that a forty-day suspension is appropriate.

ORDER

For the reasons cited above, the termination is **NOT AFFIRMED**, and a forty-day suspension for violation of procedures and regulations is hereby **ORDERED**.

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 14, 2015

DATE



LAURA SANDERS
ACTING DIRECTOR AND CHIEF
ADMINISTRATIVE LAW JUDGE

Date Received at Agency: _____

Date Mailed to Parties: _____

/caa

WITNESSES

For appellant, Giovanni Colon

Giovanni Colon

For respondent, Edna Mahan Correctional Facility

Renee Caldwell

Allen Tompkins

EXHIBITS

Joint Exhibits

- J-1 Final Notice of Disciplinary Action dated April 6, 2015
- J-2 Preliminary Notice of Disciplinary Action dated March 12, 2015

For appellant, Giovanni Colon

- A-1 Disciplinary history related to incident of inmate B.

For respondent, Edna Mahan Correctional Facility

- R-1 DVD of incident on January 26, 2015
- R-2 New Jersey Department of Corrections Special Investigations Division Inmate Statement by inmate B., dated March 6, 2015
- R-3 New Jersey Department of Corrections Special Custody Report by SCO Colon, dated January 26, 2015
- R-4 New Jersey Department of Corrections Special Investigations Division Administrative Investigation by senior investigator Renee Caldwell, dated March 12, 2015
- R-5 Edna Mahan Correctional Facility for Women Level III, Internal Management Procedures, Use of Force and Security Equipment, Effective October 1, 2009, Revised September 5, 2014
- R-6 Department of Corrections Work History

R-7 Department of Corrections Human Resources Bulletin 84-17—As Amended

