

A-7



STATE OF NEW JERSEY

In the Matter of Phillip Morris and
Tony Coleman,
Burlington County Jail

CSC DKT. NOS. 2016-971 & 2016-
1017
OAL DKTS. NO. CSV 17361-15 &
177363-15
(Consolidated)

DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 20, 2017 BW

The appeals of Phillip Morris, County Correction Sergeant, 60 working day suspension, on charges and Tony Coleman, County Correction Officer, Burlington County Jail, 10 working day suspension, on charges, were heard by Administrative Law Judge Lisa James-Beavers, who rendered her initial decision on September 15, 2017. No exceptions were filed.

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 (Commission), at its meeting on October 18, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to modify the 60 working day suspension to a 30 working day suspension for Phillip Morris and uphold the 10 working day suspension for Tony Coleman.

Since the penalty for Phillip Morris has been modified, he is entitled to 30 days of back pay, benefits and seniority pursuant to *N.J.A.C. 4A:2-2.10*. However, neither he nor Coleman are 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 Morris' penalty was modified by the Commission, charges were sustained and major discipline was imposed. Thus, neither he nor Coleman have prevailed on all or substantially all of the primary issues of the appeal. Consequently, as they have failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12(a)*, counsel fees must be denied.

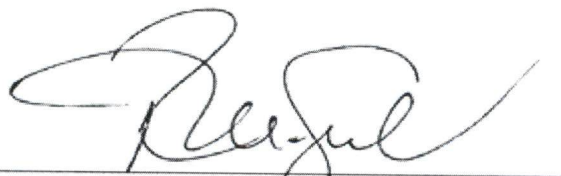
ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining Phillip Morris and Tony Coleman was justified. The Commission therefore modifies Phillip Morris' 60 working day suspension to a 30 working day suspension and upholds Tony Coleman's 10 working day suspension. The Commission further orders that Phillip Morris be granted 30 days of back pay, benefits and seniority. The amount of back pay awarded is to be reduced and mitigated as set forth in *N.J.A.C. 4A:2-2.10*. An affidavit of mitigation shall be submitted by or on behalf of Morris 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.

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
OCTOBER 18, 2017

A handwritten signature in dark ink, appearing to read 'R. Czedo', is written over a horizontal line.

Robert M. Czedo, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 17361-15
AGENCY DKT. NO. 2016-971

**IN THE MATTER OF
PHILLIP MORRIS,
BURLINGTON COUNTY JAIL.**

**IN THE MATTER OF
TONY COLEMAN,
BURLINGTON COUNTY JAIL.**

OAL DKT. NO. CSV 17363-15
AGENCY DKT. NO. 2016-1017
(CONSOLIDATED)

Mark W. Catanzaro, Esq., for appellant Phillip Morris

Jeffrey N. German, Esq., for appellant Tony Coleman

Andrew C. Rimol, Esq., for respondent (Capehart and Scatchard, attorneys)

Record Closed: July 29, 2016

Decided: September 15, 2017

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

STATEMENT OF THE CASE

Appellants Phillip Morris and Tony Coleman appeal their suspensions for sixty days and ten days, respectively, imposed by respondent Burlington County Jail (Jail) as a result of an incident of excessive force by another corrections officer that occurred on July 12, 2015. The Jail alleges that the appellants failed to intervene and failed to

accurately report that the excessive force had occurred. Morris and Coleman are not charged with the excessive use of force. They argue that they had no knowledge of excessive force being used against an inmate at the time in question.

PROCEDURAL HISTORY

Phillip Morris

On July 15, 2015, the Jail served Morris with a Preliminary Notice of Disciplinary Action charging him with incompetency, inefficiency or failure to perform duties; conduct unbecoming a public employee; neglect of duty; and other sufficient cause. N.J.A.C. 4A:2-2.3(a)(1), (6), (7) and (12). "Other sufficient cause" includes violations of sections 1006, 1012, 1013, 1015, 1018, 1023, 1043, 1044, 1064, 1165, 1150 and 1170 of the Jail's Policy and Procedures Manual with regard to an incident that occurred at the Jail on July 12, 2015. On July 29, 2015, the Jail served Morris with an Amended Preliminary Notice of Disciplinary Action charging him with incompetency, inefficiency or failure to perform duties; conduct unbecoming a public employee; neglect of duty; and other sufficient cause, N.J.A.C. 4A:2-2.3(a)(1), (6), (7) and (12), specifically, violation of Policy and Procedures Sections 1006, 1012, 1013, 1015, 1018, 1023, 1043, 1044, 1064, 1065, 1150 and 1170, with regard to the above incident. On August 25, 2015, the Jail served Morris with a Final Notice of Disciplinary Action sustaining the charges and imposing a sixty working day suspension. On August 31, 2015, Morris appealed.

Tony Coleman

On July 21, 2015, the Jail served Coleman with a Preliminary Notice of Disciplinary Action charging him with incompetency, inefficiency or failure to perform duties; conduct unbecoming a public employee; neglect of duty; and other sufficient cause, N.J.A.C. 4A:2-2.3(a)(1), (6), (7) and (12), specifically, violation of Policy and Procedures Sections 1021, 1023, 1036, 1043, 1044, 1065, 1150 and 1170, with regard to an incident that occurred at the Jail on July 12, 2015. On September 3, 2015, the Jail served Coleman with a Final Notice of Disciplinary Action, which sustained the charges

and provided for a ten working day suspension. On September 9, 2015, Coleman appealed.

The Civil Service Commission transmitted the two cases to the Office of Administrative Law (OAL) where they were filed as contested cases on October 28, 2015, pursuant to N.J.S.A. 11A:2-14, N.J.S.A. 52:14B-2(b), and N.J.A.C. 4A:2-2.8. I held hearings on June 28, 2016. The record closed after receipt of written summations on July 29, 2016.

STIPULATIONS OF FACT

1. Tony Coleman (Coleman) began employment with the Burlington County Department of Corrections in the position of County Corrections Officer on August 28, 2006.
2. Phillip P. Morris (Morris) began employment with the Burlington County Department of Corrections in the position of County Corrections Officer on September 30, 2002, and was promoted to Sergeant on August 23, 2009.
3. The Burlington County Jail (Jail) is located at 54 Grant Street, Mt. Holly, New Jersey 08060.
4. On September 27, 2012, Coleman received and acknowledged receipt of the Jail's Standard Operating Policies and Procedures.
5. On September 27, 2012, Morris received and acknowledged receipt of the Jail's Standard Operating Policies and Procedures.

FACTUAL DISCUSSION

The following facts are undisputed. On July 12, 2015, an inmate was brought in by the State Police to the Jail. The two appellants and Officer Salter were bringing him into the facility. The inmate became belligerent and the officers had to take him to the ground to restrain him. Officer Salter used excessive force while the inmate was on the ground. The incident was recorded by the jail cameras.

Respondent's Case

Captain Matthew Leith

Matthew Leith testified that he has been with the Burlington County Corrections Department for sixteen and a half years. He became administrative captain in June 2015 when he was promoted from administrative lieutenant. He handles disciplinary actions for the jail as well as handles department hearings, reviews incident reports and makes recommendations to the warden. He reviews video if it exists, reviews reports and makes recommendations of discipline.

On July 12, 2015, the medical department reported that an inmate said that he had been assaulted at the jail. The inmate had been taken to detention at night. Leith reviewed the video of the hallway in which the inmate said the incident occurred. (R-12.) He described what was shown on the video as the inmate was being led in through the sallie port. Booking is to the left at the entry way to the jail. Sergeant Morris was to the left of the screen and Salter was to the right. Trailing behind is Officer Coleman. After the mark of 1:21:08, the inmate began resisting the officers and Salter put his hand to the inmate's mouth. Sergeant Morris got the OC can out and sprayed. Salter, at 1:21:12, then applied his hand to the inmate's mouth a second time. Coleman was behind and Morris was trying to control the wrists of the inmate. They took the inmate down to the floor in a standard procedure. Salter was at the feet of the inmate and Morris was looking down toward the inmate when Salter delivered a kick to the inmate. That is the first incident of excessive force that Morris and Coleman witnessed. It is generally never necessary to kick or stomp an inmate except sometimes in self-defense. There was no legitimate purpose to Salter's deliberate kick to the midsection of the inmate at 1:21:14. The second kick delivered to the inmate he believes Morris saw. Again, there was no legitimate law enforcement purpose to the second kick. It appears that the inmate was sliding down the hallway on his back. Morris was stepping along with the movement of the inmate at 1:21:17. Morris then put away his OC can and, at 1:21:18, there was a third kick. Morris took a step to the left of the screen. It appears Morris could see the third kick since he was standing between Salter and the

inmate. Morris did not engage with the inmate during the fourth kick; however, there was nothing obstructing Morris' view as the kick was delivered with Morris looking over the inmate. Morris then went down to the floor to secure the inmate at 1:21:22. That is what he should have done and was trained to do. A code was called and officers responded to the call. In all, there were four kicks to the inmate that he believed were excessive use of force. He never saw Morris attempt to stop the conduct while he was there. Captain Leith concluded after reading all the reports associated with the incident that Morris witnessed excessive use of force and failed to report it or take action. He believes that Morris left out of his report facts regarding the excessive use of force by Salter. (R-6.)

Captain Leith testified to the various policies and procedures that he believed Morris violated in connection with the incident. He believes Morris violated Paragraphs 6, 7 and 14 of Policy Section 1006. (R-8.) The sergeant is responsible for those under him. Morris also violated Sections 1012, 1013, 1015 and 1018. (R-9.) He also violated Section 1043, which requires an officer to prevent injury to other persons. (R-9.) He violated Section 1044 because based on the video the officer should have been stopped. He also violated Section 1065 because he cannot make a false or misleading report and Captain Leith believes that he witnessed Officer Salter kicking the inmate, but did not note such action in his report.

Captain Leith testified that Morris violated the use of force policy, Section 1150, that by not reporting that it happened, it was like he did it himself. (R-10.) Similarly, he violated the policy on reporting incidents, Section 1170, in that a sergeant must submit clear and concise reports and not leave out crucial facts. He also believed Morris neglected his duty to report the actions of his subordinates. There is no dispute that Morris received a copy of the policies in question. (R-13.) Morris' duties, according to Captain Leith, are to prevent abuse from occurring and stop it if he sees it. Morris failed to do so in this instance.

Captain Leith then viewed the recording of the incident with regard to Officer Coleman. Although Coleman was trailing the inmate and Morris initially, Coleman

closed in to assist and restrain the inmate. Coleman was looking down toward the inmate as the kick was delivered. He did not appear to be doing anything that would prevent him from seeing the kick. When the second kick was delivered, Coleman was still bent over the inmate. When the third kick was delivered, he was still bending down over the inmate with no obstruction. The fourth kick was difficult to see where Coleman was as he was right behind Officer Salter. The video regarding Coleman starts at 1:21:07 and stops at 1:21:23. There were only six or seven seconds during which the actual action took place. He believed that Coleman had to see and, therefore, had an obligation to report excessive force. Coleman did not report any excessive use of force. Thus, Captain Leith believes that Coleman violated Policies 1021, 1023, 1036, 1043, 1044 and 1065. (R-9.) Coleman also should have reported the incident pursuant to Section 1150. (R-10.) He believes that Coleman omitted facts to cover up the excessive force. He has a duty to submit an accurate report under Policy 1170. (R-11.) There is no question that Coleman received the policies in question. (R-14.) Captain Leith testified that the primary task of the officers is the safety and security of the facility. The excessive use of force goes against that primary task. He and the warden discussed the penalties to be imposed for hiding that illegal activity took place. Morris had a greater duty to report than Coleman did. Coleman left out the use of force in his report. (R-7.)

Captain Leith further testified that the inmate was being moved to detention because he would not comply with questions being asked by Coleman. They were thus going to bypass the usual medical examination until the inmate calmed down. The Jail stresses the importance of inmates being checked out. It is also a crime for an inmate to cause bodily fluids to be placed on an officer due to possible infectious diseases. The inmate had threatened to spit on the officers. The inmate is shown in the tape turning his head to the left indicating a spitting motion. He agreed that there are approximately six or seven problematic seconds from 1:21:12 to 1:21:19 when the last kick is given by Salter. An officer or sergeant must pay attention to the inmate, the team and the other officers around. He agreed that at some point Morris used his left hand to call the Code 2 that there is a disruptive inmate. He does not know for sure what Morris saw; but he believes from the video that he saw the kicks.

Captain Leith testified that officers know that there is video throughout the jail and Morris knows that there were cameras especially at the point of intake where they were. The reports are made by the officers and sergeants involved and go up to the lieutenant, then to the captain's packet which contains all the reports. The other captain will also go over what occurred prior to Captain Leith coming on. The officers do not have access to the video prior to writing their reports. They have to prepare the reports by the end of their shift. A report by Nurse Mary Murphy indicates that following the Code 2 the inmate was brought to the infirmary, evaluated and returned to custody. Another nurse's report, that of Rachel Watson, notes that the inmate was pepper sprayed and also had a medium cut. Nothing in the report indicated that the inmate had been kicked or stomped. None of the parties to this incident were interviewed. The internal affairs department was disbanded in 2014, so interviews are not done. They are not trained investigators, so they do not investigate. He estimates he looked at the video three to five times before charging Morris and Coleman. When Captain Leith looked at the video he had already been told there was a potential problem. He agreed that reports are not always consistent with each other when an incident occurs and not every officer sees things that take place. He believes Morris was looking in the direction of the inmate being kicked.

Captain Leith testified that Coleman was not involved in the take down of the inmate. He watched the video three to five times because he wanted to be accurate. He saw the excessive use of force immediately upon watching the video. He agrees that Coleman's perspective is not the camera's perspective. Coleman's duty was to maintain control of the inmate and it appeared that he grabbed the back of the inmate's jumper. Coleman never said he was subject to OC spray. Coleman is not required to report what he does not see. He reviewed the recording again and it appears that at the time of the first kick, 1:21:14, Coleman's eyes are on the inmate and not on Salter. No one knows how the cut on the inmate's chin got there. He believes that it was part of Salter's kick of the inmate, but he does not know. Coleman did not report that the OC spray had any effect on his eyes. The facts set forth in Coleman's incident report are true, but he believes that there was an omission of the excessive use of force. He did report that the inmate was taken down and sprayed, which is use of force. Coleman's

shift was 6:00 p.m. to 6:00 a.m., twelve hours. The inability to take statements came from a union decision saying that they are not trained investigators and should not interview. They were asked to disband the internal affairs department.

In order to make his recommendation, Captain Leith reviewed the video, incident reports, inmate file and medical file. He believed that based on those items, there was enough for him to charge Officer Coleman and Sergeant Morris. Neither Coleman nor Morris sought any medical attention as a result of the OC spray. He noted that the camera in the jail does not record like a videotape, rather it is a series of still shots.

Sergeant Philip Morris' Case

Sgt. Philip Morris testified that he has been with the Department of Corrections for fourteen years, seven years as a sergeant. On July 12, 2015, he worked the shift from 6:00 p.m. to 6:00 a.m. That night, there were two night supervisors and one lieutenant on duty. His duty is to assign duties to the shift officers and ensure the safety and the security of the facility.

On July 12, 2015, Morris received a call from Intake that a rowdy inmate was coming in to the facility. The procedure for a new inmate is that they place him into a holding tank while processing. He went to the area where the inmate is strip searched and changed into a jail uniform. The inmate was noncompliant, so he had to get taken to segregation. The inmate was angry and may have been on drugs. Segregation is a more restrictive form of punishment.

Due to his belligerence, the inmate was handcuffed to be taken to prehearing detention. He got argumentative with Officer Salter when the escort began. The officers must hold onto him when escorting. They told him to stop resisting. He tried to spin away from the wall and spit at one of the officers. Morris got the OC spray and administered it. The inmate was taken to the ground. He called a Code Two with his other hand on a radio. After being taken down, the inmate was still resisting restraint. The inmate had been on his feet when the OC was sprayed. The inmate was squirming

and trying to resist the whole way. The inmate calmed down after several commands to do so. Sergeant Morris testified that he never saw Officer Salter kicking the inmate. He was aware that everything in that hallway was videotaped. He took the inmate straight to the clinic to be seen and evaluated for the OC spray. There were no injuries. After they finished in the infirmary, they took him to preliminary hearing segregation. He later submitted a report. (R-6.) He did not view the video, but wrote his report based on memory. The kick to the inmate was never reported to him either. He was never questioned about the event. The inmate only complained of the OC spray in his eyes.

Morris testified that if he witnessed excessive force being used, he would have an obligation to report it. He also would have an obligation to stop it. He was trying to call the code and control the inmate at the same time. When walking down the hall he was about one and one-half feet from the inmate. When Officer Salter's foot came down on the inmate, there was nothing blocking his view of the inmate. He agreed that the kicks to the inmate occurred at twenty-one minutes and fourteen seconds into the video going to approximately twenty minutes and eighteen seconds into the video. Thus, the whole incident took place within approximately four seconds. He agreed that his primary responsibility is the safety and security of the facility and that he has a duty to be aware of what is going on with his officers and inmates. He did not report any other person that was affected by the OC spray. He agreed that the inmate was treated for a cut on his chin, but does not agree that the inmate had actually complained of that. He heard the inmate complain only about the pepper spray. He only became aware of what he was accused of when the captain came to his house and served him with the charges. He then went to a hearing, but had never been questioned before that. As of the date of hearing, Salter had been suspended. (R-17.)

Appellant Tony Coleman's Case

Tony Coleman testified that he had been employed as a corrections officer for ten years. He was on workers' compensation at the time of the hearing. On July 12, 2015, he was working a 6:00 a.m. to 6:00 p.m. shift. He was assigned to the intake section called "Booking" where they process inmates. He travels with a team in order to

get the inmate to a cell after taking him to the clinic. It was approximately 1:20 a.m. when the inmate in question was brought in. He was irate and kicking on the door. The State Police were arguing with him and the inmate was belligerent, yelling, screaming and cursing. He was not involved at that time. Once the sergeant opened the door and started speaking to him, the inmate refused to answer his questions. Sergeant Morris was unable to get him processed. As they were escorting the inmate, he was walking approximately six to eight feet behind. Coleman saw the resistance the inmate was giving and he heard an officer say the inmate tried to spit on him. Although he was looking in the direction of Officer Salter, he could not see in front of them. He ran up to assist when the OC was sprayed. The OC spray affected him and he was coughing and his eyes were watering. He was part of the take down and his head was down in order to focus on the inmate's head. He put his hand on the inmate's shoulder to keep from getting spit on. That is what he was trained to do. He was trained to focus on the head and shoulders. The inmate was still struggling and resisting and trying to turn his head. He did not want to get bitten or spit on by the inmate. He tried to hold his collar to keep him from moving around. He did not see any contact between Officer Salter and the inmate. He did not see Salter kick the inmate. The incident lasted only seconds. He went to the clinic with the inmate. He heard the inmate complain of being sprayed with the OC spray. He wrote his report after the shift. (R-7.) It reflects what he saw. If he saw more, he would have written it. He did not omit any facts and he knew that his supervisor would review the video of the hallway when it occurred.

Officer Coleman noted that at the time of the first kick, twenty-one minutes and fourteen seconds into the video, he was standing over the inmate's head and there was nothing in between his view of the inmate. He was trying to hold the inmate down and was looking at the inmate's head and his hand was on the inmate's collar. Again, there was nothing between him, the inmate and Officer Salter. He agrees that if he witnessed excessive force he would have had to report it. He did not reference the OC spray in his report. He did not find out what he was accused of until two days later.

FINDINGS OF FACT

Where facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is the value that a finder of the facts gives to a witness' testimony. It requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F. 2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself" in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521-522. See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Although it is true that the camera view is not the view that Morris and Coleman had at the time of the incident, their duty was to know what the inmate was doing as well as what was being done to the inmate. The best evidence is still the video itself, which demonstrates that Morris and Coleman were looking down at the inmate while the kicks were being delivered and the excessive force was occurring. Therefore, the self-serving testimony of Morris and Coleman is not credible when they say that they did not see any excessive use of force. The fact that they knew the camera was there does not mean that they knew the captain would actually view the video footage. Captain Leith testified that he does not view it regularly.

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** the following:

On July 12, 2015, Morris and Coleman became involved in an incident with an inmate where excessive force was used by Officer Salter. Officers Salter and Coleman

were under Morris' command at the time of the incident. The video of the incident, which is actually a series of still photographs, shows Morris and Coleman looking toward the inmate while the inmate is being kicked by Officer Salter. The CD shows that the entire incident took about six seconds. Sgt. Morris' primary responsibility is the safety and security of the facility. As the supervisor, he has a duty to be aware of what is going on with his officers and inmates. Morris had to have seen Officer Salter kick the inmate because the video shows him looking toward the action and because it was his duty to see it. Morris did not stop the excessive use of force or report that it occurred.

Coleman was initially way behind the inmate, but he came up to the inmate when Sgt. Morris sprayed the O.C. He put his hand on the inmate's shoulder to keep from getting spit on as he was trained to do. He had to have seen Officer Salter kick the struggling inmate when he came up to subdue the inmate. Coleman has a duty to report another officer's excessive use of force if he sees it. He saw the use of excessive force, but did not report it. Coleman's testimony that he was affected by the OC spray makes his testimony even less credible as he did not mention that he was so affected in his report.

Captain Leith did not undertake any additional investigation other than reading the reports and viewing the video.

CONCLUSIONS OF LAW

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his duties. N.J.S.A. 11A:1-2(a). Such a civil service employee

may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a).

In appeals concerning major disciplinary actions brought against classified employees, the burden of proof is on the appointing authority. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is a preponderance of the credible evidence. In re Polk License Revocation, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958). The preponderance may also be described as the greater weight of credible evidence in a case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

Morris

The Jail charged Morris with: N.J.A.C. 4A:2-2-3(a)(1), incompetency, inefficiency, or failure to perform duties; 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 a violation of the BCDF Policy and Procedure Manual Section 1006, 1012, 1013, 1015, 1018, 1023, 1043, 1044, 1064, 1165, 1150 and 1170. Morris argues in his defense that the Jail's belief that Morris committed these violations does not equal proof. The Jail conducted no investigation other than Captain Leith replaying the video taken from another angle many times. Now, using hindsight that Morris did not have, the Jail seeks to find his actions in violation of his duties. Morris denies having seen and perceived excessive force being used and denies misrepresenting his report.

In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980). Given that Morris had a duty to supervise the officers under his command and be aware of any actions taken against an inmate that is

under his control, he failed to perform those duties in failing to stop Officer Salter and failing to report what he had done. Morris managed to see everything that the inmate was doing, so it is less than credible that he did not see Officer Salter kick the inmate when he was down on the ground. I therefore **CONCLUDE** that the Jail proved this charge by a preponderance of the credible evidence.

One of the grounds for discipline of public employees is "[c]onduct unbecoming a public employee." 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)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

In addition to the arguments above, Morris argues that it is patently unfair to judge his actions and charge him on the basis of a video that had to be replayed over and over in order to determine that he failed to stop or report the excessive use of force. I disagree. First, Captain Leith testified credibly that he saw the excessive use of force on his first viewing of the video. Further, his duty is to know what the officers under his command are doing and to secure the inmates in his custody. He cannot act like an uninterested bystander who is not trained to pay attention to all aspects of the jail. For a sergeant to fail to stop and report an officer who commits excessive use of force is conduct that has a tendency to affect the morale or efficiency of a governmental unit. I **CONCLUDE** that the Jail met its burden of proving by a preponderance of the credible evidence that Morris committed conduct unbecoming a public employee.

As neglect is a failure to perform duties or failure to provide the standard of care that the position requires, for the same reasons that the Jail proved failure to perform duties under N.J.A.C. 4A:2-2.3(a)(6), I **CONCLUDE** that the Jail proved by a preponderance of the credible evidence that Morris neglected his duty as a sergeant pursuant to N.J.A.C. 4A:2-2.3(a)(7).

Last, the Jail charged Morris with violating N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, specifically a violation of the BCDF Policy and Procedure Manual Section 1006, 1012, 1013, 1015, 1018, 1023, 1043, 1044, 1064, 1165, 1150 and 1170. Rather than go through each of these policies, which seems a bit like overkill, I note the following to be the most relevant to the conduct alleged. Captain Leith explained Sergeant Morris violated Paragraphs 6, 7 and 14 of Policy Section 1006 because the sergeant is responsible for those under him and these provisions require him to ensure that the officers comply with the rules of the Jail, stop rule infractions as they occur and supervise all corrections officers and inmate activities. I **CONCLUDE** that the Jail sustained its burden of proving that Morris violated those provisions of Section 1006. Sergeant Morris is also alleged to have violated Sections 1012, 1013, 1015 and 1018. (R-9.) These provisions collectively require the sergeant to accept and not evade responsibility for the conduct of his subordinates. I **CONCLUDE** that the Jail proved these charges. Section 1018 adds the duty to report any instance of misconduct or violation of rules on the part of a subordinate. By reporting only on the conduct of the inmate and not the conduct of Officer Salter other than taking him to the ground, he violated this provision as well and I so **CONCLUDE**. Although Captain Leith went on to describe how Morris also violated Section 1043, which requires an officer to prevent injury to other persons; Section 1044, because based on the video the officer should have been stopped; and Section 1065 because he cannot make a false or misleading report and he witnessed Officers Salter kicking the inmate, but did not note such action in his report, these charges are so similar to those I have already concluded were violated that I decline to make rulings on them. Suffice it to say that the Jail proved by a preponderance of the credible evidence that Morris violated N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause.

Coleman

The Jail charged Coleman with: N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency, or failure to perform duties; 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 a violation of the BCDF Policy and Procedure Manual Sections 1021, 1023, 1036, 1043, 1044, 1065, 1150 and 1170.

As set forth above, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Although Coleman's duty to intervene was not as great as that of Morris since Morris was his supervisor as well as the supervisor of Officer Salter, he still had a duty to report the use of excessive force. If Coleman saw the inmate taken down as he reported, he saw the kicks of Officer Salter. By only reporting on the conduct of the inmate and not that of Officer Salter, Coleman failed to perform his duty to report the conduct of Officer Salter. I therefore **CONCLUDE** that the Jail proved by a preponderance of the credible evidence that Coleman violated N.J.A.C. 4A:2-2.3(a)(1).

Because conduct unbecoming a public employee is 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, Coleman also violated this provision. There is nothing more serious than the use of excessive force by those who have custody over inmates. Coleman saw his fellow officer's actions because it was his duty to see excessive use of force and report on it. The failure to report it certainly affects the efficiency of the Jail. Therefore, I **CONCLUDE** that the Jail proved Coleman violated N.J.A.C. 4A:2-2.3(a)(6).

The next charge, neglect of duty, is similar to that of incompetency, inefficiency or failure to perform duties. The video surveillance footage showed that Coleman had an unobstructed view of the inmate at the time that Officer Salter delivered the kicks. I **CONCLUDE** Coleman's failure to try to stop them and failure to report the excessive use of force was neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7).

The last charge, N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, specifically refers to a violation of the BCDF Policy and Procedure Manual Sections 1021, 1023, 1036, 1043, 1044, 1065, 1150 and 1170. Captain Leith testified Coleman violated Policies 1021, 1023, 1036, which require an officer to conduct himself professionally; comply with all rules and policies; and be respectful to all individuals, respectively. Although these policies are rather general, based on my findings that Coleman was aware of the use of excessive force and did not try to stop it and did not report it, these charges are supported by the evidence. Section 1043 refers to the actual use of force, which Coleman was not alleged or proven to have used, so this charge is dismissed. Section 1044 requires officers to protect the rights of all individuals and perform their duties with honesty. The last sentence of the policy references mistreatment of an inmate, which also sounds like Coleman is being alleged to have committed the excessive use of force. Therefore, I think this charge is overkill and is not sufficiently supported.

Policy 1065 prohibits the making of false or misleading statements or written reports by intentional omission or misrepresentation of information known to an officer. I have found that Coleman saw the excessive use of force and did not include that information in his report. Whether he did so intentionally is hard to say, but he certainly neglected his duty to do so. The Jail has proven that Coleman violated N.J.A.C. 4A:2-2.3(a)12, other sufficient cause. I am dismissing the violation of Section 1065.

The Jail charged that Coleman also should have reported the incident pursuant to Section 1150. Because this charge only speaks to the failure to report on the use of physical force, the Jail has proven this charge as set forth above. Policy 1170 requires that the report be "accurate, chronological and truthful." What Coleman's report said was accurate, but it left out that physical force was used on the inmate. This constitutes a violation of the policy, so this charge is sustained.

In summary, regarding the charge of "other sufficient cause," I **CONCLUDE** that the Jail proved by a preponderance of the credible evidence that Coleman violated Policy Manual Sections 1021, 1023, 1036, 1150 and 1170.

The primary duty of the officers and supervisors is the safety and security of the facility. This makes it all the more baffling that there is no current mechanism to professionally investigate incidents like this at the Jail when they occur. Viewing the video should be followed up with interviews. In the present case, the video was useful, but in many instances the video will be useless or at best, ambiguous. The Jail's current handling of situations like this is unsustainable and the Jail should rectify it as soon as possible. Nevertheless, in the present case, I **CONCLUDE** that it proved the charges against Morris and Coleman by a preponderance of the credible evidence in the record.

PENALTY

N.J.S.A. 11A:2-19 and N.J.A.C. 4A:2-2.9(d) specifically grant the Commission authority to increase or decrease the penalty imposed by the appointing authority. In general, principles of progressive discipline apply to the discipline of officers. Town of W. New York v. Bock, 38 N.J. 500, 523 (1962). Typically, the Board (now the Commission) considers numerous factors, including the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. "Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990).

Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

Morris

The Jail suspended Morris for sixty days. Morris' conduct is worse than that of Coleman because he was the supervising officer at the time of the incident. As a

command officer, he sets an example for the other officers in the facility and is responsible for carrying out the goals and ideals of the administration. See Marino v. County of Union, CSV 7159-98, Initial Decision (March 19, 2001), <<http://njlaw.rutgers.edu/collections/oal/>>. His prior discipline consists of a letter reprimand and a five-day suspension for neglect in 2010.¹ (R-15.) In addition, he has many timeclock violations resulting in a letter. The Jail argues that Morris' conduct warrants a significant penalty that will both send a message that such conduct is not acceptable and deter any other officers from failing to report the use of excessive force on an inmate.

In West New York v. Bock, 38 N.J. 500, 523 (1962), the New Jersey Supreme Court stated that a public employee's prior disciplinary record may be referred to, where appropriate, in assessing the reasonableness of a penalty for a current offense. However, exceptions to the application of "progressive discipline" have been made where certain acts are "so egregious in nature and/or so detrimental to the public welfare that immediate termination is warranted, notwithstanding a good disciplinary history." Curtiss v. East Jersey State Prison, CSV 12007-96, Initial Decision (Dec. 17, 1997), aff'd., Merit System Bd. (Jan. 27, 1998) <http://njlaw.rutgers.edu/collections/oal/>. In addition, law enforcement officers are held to a higher standard than a civilian public employee. See Moorestown v. Armstrong, 89 N.J. Super. 560 (App. Div. 1965), certify. Den. 47 N.J. 80 (1966). The leap from a five-day suspension to a sixty-day suspension is a great one and does not lend itself to the term "progressive discipline." Nevertheless, allowing excessive use of force to occur without trying to stop it and failing to report it is very serious. Based on the foregoing I **CONCLUDE** that a thirty-day suspension meets the goals that the Jail set forth in arguing for the sustaining of the sixty-day suspension, while still adhering to the concept of progressive discipline.

Coleman

The Jail imposed a suspension of ten days on Coleman. The Jail argues that Coleman had an affirmative duty to take action to stop his fellow officer from using

¹ It was agreed at the hearing that I would not look at the appellants' prior disciplinary history until I had concluded that they had violated N.J.A.C. 4A:2-2.3. I abided by that agreement.

excessive force on an inmate and to report such an incident. Coleman's disciplinary history consists of four reprimands for abuse for incidents in 2009, 2010, 2013 and 2014 and a one-day suspension for abuse for an October 27, 2014 incident. In addition, he has several timeclock violations.

As set forth above, using the concept of progressive discipline, I **CONCLUDE** that a ten-day suspension was an appropriate penalty for the violations that the Jail proved.

ORDER

I hereby **ORDER** that the charges in the Final Notice of Disciplinary Action against Phillip Morris be **AFFIRMED**. However, I **ORDER** the penalty modified from sixty days to thirty days.

I hereby **ORDER** that the charges in the Final Notice of Disciplinary Action against Tony Coleman be **AFFIRMED** except the charges that he violated Sections 1043, 1044 and 1065 of the BCDC Policy and Procedures Manual, which are **DISMISSED**. The suspension of ten days is **AFFIRMED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

September 15, 2017

DATE



LISA JAMES-BEAVERS, ALJ

Date Received at Agency:

September 15, 2017

Date Mailed to Parties:

September 15, 2017

cmo

APPENDIX
WITNESSES

For Appellants:

Sergeant Philip Morris
Officer Tony Coleman

For Respondent:

Captain Matthew Leith

EXHIBITS

For Appellants:

AM-1 Identified not admitted
AM-2 Identified not admitted

For Respondents:

- R-1 Preliminary Notice of Disciplinary Action (31-A) to Phillip P. Morris
- R-2 Amended Preliminary Notice of Disciplinary Action (31-A) to Phillip P. Morris
- R-3 Final Notice of Disciplinary Action (31-B) to Phillip P. Morris
- R-4 Preliminary Notice of Disciplinary Action (31-A) to Tony L. Coleman
- R-5 Final Notice of Disciplinary Action (31-A) to Tony L. Coleman
- R-6 Memo/Incident Report by Sgt. P. Morris to Lt. T. Blango, dated July 12, 2015
- R-7 Incident Report by T. Coleman, dated July 12, 2015
- R-8 Burlington County Detention Center Policies and Procedures Section 1006
- R-9 Burlington County Detention Center Policies and Procedures Sections

- 1012, 1013, 1015, 1018, 1021, 1023, 1036, 1043, 1044, 1064 and 1065
- R-10 Burlington County Detention Center Policies and Procedures Section 1150
- R-11 Burlington County Detention Center Policies and Procedures Section 1170
- R-12 Burlington County Detention Center GVideo Surveillance from July 12, 2015
- R-13 Standard Operating Policies and Procedures Acknowledgement by Phillip P. Morris, dated September 27, 2012
- R-14 Standard Operating Policies and Procedures Acknowledgement by Tony L. Coleman, dated September 27, 2012
- R-15 Employee Discipline History for Phillip P. Morris (R-15)
- R-16 Employee Discipline History for Tony L. Coleman (R-16)
- R-17 Letter to Phillip P. Morris from Mildred Scholtz, Jail Administrator/Warden, scheduling Loudermill Hearing for July 15, 2015