

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning counsel fees are finally resolved.

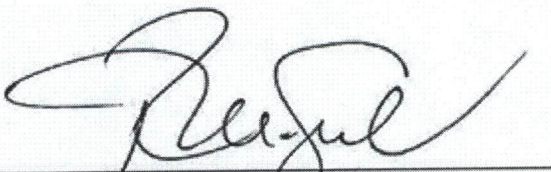
ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Neal Armstrong. The Commission further orders that appellant be granted 10 days back pay, benefits, and seniority. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C. 4A:2-2.12*. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of counsel fees.

The parties must inform the Commission, in writing, if there is any dispute as to counsel fees 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 shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION
OCTOBER 4, 2017



Robert M. Czedz, Chairperson
Civil Service Commission

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and
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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 199-16

AGENCY DKT. NO. 2016-1367

**IN THE MATTER OF NEAL ARMSTRONG,
CUMBERLAND COUNTY
DEPARTMENT OF CORRECTIONS.**

Daniel Rosenberg, Esq., for Neal Armstrong, appellant (Daniel M. Rosenberg & Associates, LLC, attorneys)

Theodore E. Baker, Esq., County Counsel, for Cumberland County Department of Corrections, respondent

Record Closed: July 14, 2017

Decided: August 25, 2017

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

Respondent, Cumberland County Department of Corrections (hereinafter Appointing Authority), suspended appellant Neal Armstrong for ten working days. The Appointing Authority alleges that appellant, a corrections officer, falsified an official document by not properly documenting the use of force on an inmate by another officer after an incident that occurred in the Cumberland County Jail on February 25, 2015.

Appellant was charged with violation of N.J.A.C. 4A:2-2.3(a)(12), "Other Sufficient Charges; Falsification of an Official Document" (J-8).

PROCEDURAL HISTORY

On July 15, 2015, the Appointing Authority issued a Preliminary Notice of Disciplinary Action setting forth the charges and specifications made against appellant. After a departmental hearing on September 9, 2015, the Appointing Authority issued a Final Notice of Disciplinary Action (J-8) on September 16, 2015, sustaining the charges in the Preliminary Notice and assessing a suspension of ten working days. Appellant appealed, and the matter was filed at the Office of Administrative Law on December 30, 2015, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on April 24, 2017. The parties submitted post-hearing brief and the record closed on July 14, 2017.

FACTUAL DISCUSSION

Neal Armstrong has been employed by the Appointing Authority as a Corrections Officer since 2008. He received training during the first three weeks of his employment but has never received training on how to write a use of force report. He drafts five to ten use of force reports every day. His understanding is that he is only responsible for documenting his actions and not force used by other officers. He has never before documented another officer's conduct in a use of force report and prior to this February 25, 2015 incident, has never been advised that he was incorrectly drafting his use of force reports. Armstrong did not prepare an incident report for the incident on February 25, 2015.

On February 25, 2015, Armstrong was called to C dorm in the old jail for assistance with a fight between inmates. Upon arrival, one inmate was observed to have visible signs of having been involved in a physical altercation. This inmate was handcuffed and taken to the medical wing. The other inmate involved in the fight was in the shower. Armstrong ordered him out of the shower and noticed his face was bleeding and swollen. Several other officers were also called to assist. The inmate

took his time coming out of the shower and called the officers names. Although the inmate's bunk was inspected and no weapons were found, another inmate handed him something before he was handcuffed and taken to the medical wing. The inmate initially refused to comply when instructed to place his hands behind his back to be cuffed. Armstrong was standing in front of the inmate and was head butted by the inmate. The officers took him to the ground, handcuffed him and escorted him to the medical wing without further incident. Approximately ten minutes later, Armstrong prepared his use of force report (J-3). J-3 makes no reference to the head butt and only describes the actions taken by Armstrong and not the other officers involved.

A video of the incident was recorded and entered into evidence (J-1). It is clear from a review of the surveillance video that another officer struck the inmate during the altercation. There were a total of four officers involved in the incident and no one told Armstrong that the other officer struck the inmate. The inmate made a complaint to the Cumberland County Prosecutor's office and they investigated. The Prosecutor's Office declined to prosecute three of the four officers involved, including appellant (J-5).

When Armstrong prepared the use of force report, he followed the order of his supervisor and training officer to "write what you did". This has always been the instruction he has received when drafting use of force reports. He did not lie to protect the other officer and asserts that he did not observe the other officer strike the inmate. Appellant was aware at the time of the incident that there were surveillance cameras in C wing and he knew that the incident was being recorded. He did not view the surveillance video until his interview at the prosecutor's office. It was not until he viewed the video that he became aware that the other officer struck the inmate.

FINDINGS OF FACT

The record in this matter includes documentary evidence and the testimony of the individuals who prepared the documents or had knowledge of the incidents they described. After carefully reviewing the exhibits and documentary evidence presented and after having had the opportunity to listen to testimony and observe the demeanor of the witness, I **FIND** the following to be the relevant and credible **FACTS** in this matter:

On February 25, 2015, Armstrong was called to C dorm in the old jail for assistance with a fight between inmates. Upon arrival, one inmate was observed to have visible signs of having been involved in a physical altercation. This inmate was handcuffed and taken to the medical wing. The other inmate involved in the fight was in the shower. Armstrong ordered him out of the shower and noticed his face was bleeding and swollen. Several other officers were also called to assist. Although the inmate's bunk was inspected and no weapons were found, another inmate handed him something before he was handcuffed and taken to the medical wing. The inmate initially refused to comply when instructed to place his hands behind his back to be cuffed. Armstrong was standing in front of the inmate and was head butted by the inmate. The officers took him to the ground, handcuffed him and escorted him to the medical wing without further incident. Approximately ten minutes later, Armstrong prepared his use of force report, makes no reference to the head butt and only describes the actions taken by Armstrong and not the other officers involved. Armstrong did not prepare an incident report. It is clear from a review of the surveillance video that another officer struck the inmate during the altercation. There were a total of four officers involved in the incident. The Cumberland County Prosecutor's office declined to prosecute three of the four officers involved, including appellant.

LEGAL ANALYSIS AND CONCLUSIONS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The Appointing Authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling

Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). (NOTE: Gaines had a substantial prior disciplinary history, but the case is frequently quoted as a threshold statement of civil service law.) "In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper remedy for a county treasurer who couldn't balance the books, after the auditors tried three times to show him how).

In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that "[t]he [MSB's] application of progressive discipline in this context is misplaced and contrary to the public interest." The court determined that Klusaritz's prior record is "of no moment" because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the county.

[In re Herrmann, 192 N.J. 19, 35-36 (2007) (citations omitted).]

Appellant's status as a corrections officer subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v.

Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

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

[Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).]

Appellant was charged with "Other Sufficient Charges; Falsification of an official Document," N.J.A.C. 4A:2-2.3(a)(12)." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.

Here, the Appointing Authority asserts that on February 25, 2015, appellant completed and submitted an incident report regarding an incident involving excessive use of force on an inmate by an officer. On June 19, 2015 appellant was interviewed regarding the incident and his verbal account was not consistent with his written account.

Appellant asserts that he did not falsify his use of force report and that he did not observe the other officer strike the inmate. In support of this assertion, appellant introduced two reports from Catherine M. Barber, Ph.D. (J-9a and J-9b). These reports contend that appellant's assertion that he did not see the other officer strike the inmate is consistent with the phenomenon of inattentive blindness, a known aspect of how the human visual perceptual process works. This phenomenon, according to Dr. Barber, is the failure to consciously perceive an otherwise salient object or event when attention and expectation are otherwise engaged; in other words, it is a failure to visually experience the appearance of an object or event that is easily seen once

noticed. Inattentional blindness typically occurs when attention is diverted, such as when the observer engages in an attentionally demanding task elsewhere, and does not expect the appearance of the object or event. Respondent objects to the reliance upon inattentional blindness because it is a net opinion and appellant's attention should have been focused upon the inmate. The incident occurred directly in front of him, yet he asserts that he did not see the other officer strike the inmate.

"Falsification of an official Document" is not defined in either the Cumberland County Department of Corrections Policy regarding Agency Training (J-6) or the Basic Course for County Corrections Officers prepared by the Division of Criminal Justice Police Training Commission (J-7). Falsification has been defined by Merriam Webster to be similar to misrepresentation or to give a false or misleading representation of an event, usually with an intent to deceive or be unfair. I do not **FIND**, nor can I **CONCLUDE** that appellant intentionally made a false statement in his use of Force Report. Appellant testified that he prepares five to ten Use of Force Reports each day and has never included actions of other officers. He also testified that he had always been instructed by his supervisor to "write what you did" in Use of Force Reports. This is what he did in the incident.

Respondent asserts that the deficiencies in appellant's report are serious enough to warrant a suspension. In support of this assertion, appellant relies, in part, on an unreported Appellant Division decision in the matter of Michael Biazzo, et al, Docket No. A-3537-13T1, decided September 22, 2016. In that case officers appear to have omitted information and delayed reporting an altercation involving an off-duty police officer. The ALJ in that case concluded that the appellants violated operating procedures and engaged in conduct inappropriate for an officer and neglectful of duty. In the case before me, however, Armstrong is not charged with conduct unbecoming or neglect of duty. Rather, he is charged with Other Sufficient Cause; Falsification of an Official Document.

Pursuant to N.J.A.C. 4A:2-2.5(a), an employee must be served with a PNDA setting forth the charges and statement of facts supporting the charges and afforded an opportunity for a hearing prior to the imposition of major discipline. Perhaps if appellant

were charged with conduct unbecoming or neglect of duty or a violation of a specific operating procedure or rule major discipline would be warranted.

I **CONCLUDE** that the Appointing Authority has not met its burden of proof that appellant falsified an official document. Appellant admittedly put the bare minimum in his use of force report but there is no evidence that other use of force reports, whether written by appellant or any other corrections officer, are more comprehensive.

Appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause. Appellant's conduct was not such that he violated this standard of good behavior. As such, I **CONCLUDE** that the Appointing Authority has not met its burden of proof on this issue.

DISPOSITION

I **CONCLUDE** that the Appointing Authority has not sustained its burden of proof as to the charge of violations of N.J.A.C. 4A:2-2.3(a)(12), "Other Sufficient Cause; Falsification of an Official Document."

Based upon the foregoing, it is hereby **ORDERED** that the determination to suspend the appellant in this matter be and hereby is **REVERSED**.

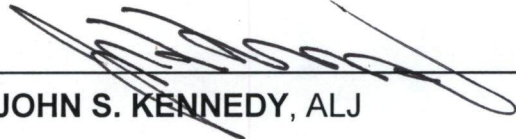
I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

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.

August 25, 2017

DATE



JOHN S. KENNEDY, ALJ

Date Received at Agency:

August 25, 2017

Date Mailed to Parties:

August 25, 2017.

/lam

APPENDIX
LIST OF WITNESSES

For Appellant:

Neal Armstrong, Appellant

For Respondent:

None

LIST OF EXHIBITS

Joint Exhibits:

- J-1 Surveillance video of February 25, 2015 incident
- J-2 IA interview of Appellant
- J-3 Appellant's Use of Force Report
- J-4 SIU Report of Sergeant Ortiz
- J-5 Harold Shapiro Declination Letter
- J-6 Policy 5.1 regarding training
- J-7 Agency Training Manual
- J-8 FNDA dated September 16, 2015
- J-9a Dr. Barber's August 21, 2016 Report
- J-9b Dr. Barber's October 21, 2016 Report
- J-10 CV of Dr. Barber
- J-11a Still photos from incident
- J-11b Still photos from incident
- J-11c Still photos from incident
- J-12 Appellant's disciplinary record SEALED