A-2

STATE OF NEW JERSEY

In the Matter of Raymond Acevedo
Newark Public School District

CSC DKT. NO. 2016-2349
OAL DKT. NO. CSV 01877-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: FEB 27 2017 BW

The appeal of Raymond Acevedo, Security Guard, Newark School District, removal effective October 15, 2015, on charges, was heard by Administrative Law Judge Margaret M. Monaco, who rendered her initial decision on January 26, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on February 22, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision. However, given the serious ramifications of the types of misconduct demonstrated in this matter, the Commission recommends that the appointing authority provide clear guidance and/or in-service training on proper techniques to handle such situations.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Raymond Acevedo.

Re: Raymond Acevedo

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
FEBRUARY 22, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
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Nicholas F. Angiulo
Assistant Director
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 01877-16
AGENCY DKT. NO. 2016-2349

IN THE MATTER OF RAYMOND ACEVEDO,
NEWARK PUBLIC SCHOOL DISTRICT.

Arnold Shep Cohen, Esq., for appellant Raymond Acevedo (Law Offices of Oxfeld Cohen, attorneys)

Bernard Mercado, Associate Counsel, for respondent Newark Public School District (Charlotte Hitchcock, General Counsel, attorney)

Record Closed: October 27, 2016 Decided: January 26, 2017

BEFORE **MARGARET M. MONACO**, ALJ:

STATEMENT OF THE CASE

Appellant Raymond Acevedo appeals his removal from employment as a security guard with respondent, the Newark Public School District (the District). The District took this action based upon charges of conduct unbecoming a public employee and other sufficient cause stemming from an incident that occurred on October 2, 2015, involving appellant and a seventh-grade student.

PROCEDURAL HISTORY

The District issued a Preliminary Notice of Disciplinary Action dated October 14, 2015, informing appellant of the charges of conduct unbecoming a public employee and other sufficient cause issued against him. Following a departmental hearing on October 21, 2015, the District issued a Final Notice of Disciplinary Action dated December 14, 2015, sustaining the charges and providing for appellant's removal from employment effective October 15, 2015. Appellant filed an appeal, and the Civil Service Commission transmitted the matter to the Office of Administrative Law, where it was filed for determination as a contested case. The hearing was held on August 8, 2016. After the conclusion of the testimony, the record remained open for the receipt of post-hearing submissions. The parties filed briefs in support of their respective positions, and the record closed upon receipt of the last submission.

FACTUAL DISCUSSION AND FINDINGS

At the hearing, the District presented three witnesses: Eric Ingold, B.T., and Ginamarie Mignone. Appellant testified on his own behalf and offered testimony by Aquilla Williams. Certain facts surrounding this matter are largely undisputed. Based upon a review of the testimony and the documentary evidence presented, I **FIND** the following preliminary **FACTS**.

Appellant has been employed by the District as a ten-month security guard since March 1997. Appellant is approximately 5' 8" tall and weighs over 200 pounds.

At the time of the incident the student involved, B.T., was twelve years of age and in the seventh grade. B.T. is approximately five feet tall and weighs approximately 100 pounds.

Eric Ingold is employed by the District as the executive director of the Office of Safety. He has been employed by the District for two and one-half years and previously worked for the Newark Police Department for approximately twenty years. His duties as

executive director include overseeing the day-to-day operations of the Office of Safety, including security guards.

Ginamarie Mignone is the principal at the school in issue. Part of her duties entails supervising security staff at the school.

This matter involves an incident that occurred on October 2, 2015, between appellant and B.T. shortly before the end of the school day. Appellant and another security guard, Sean Jacobs, were working at the school on that date.

A video from a surveillance camera at the school was introduced at the hearing. (R-1.) The video, which has no audio, shows the second-floor hallway of the school on October 2, 2015. Lockers and doorways are situated on the left side of the hallway, and closer to the view of the camera is a water fountain. On the right side of hallway, from the view closest to the camera, are two doors that lead to a stairwell. The next doorway area leads into the boys' bathroom, but the bathroom door cannot be seen in the video. Other doorways are situated farther down on the left side of the hallway. Under the surveillance camera, a portion of two steps can be seen. Throughout the video students can be seen at lockers, moving about the hallway and in and out of the doors that presumably lead to classrooms.

Appellant can first be seen at approximately 2:46:36 p.m. He enters the hallway from the area under the surveillance camera. Appellant is seen interacting with a student at a locker and then walking down the hallway away from the camera. Another security guard can also be seen walking down the hallway toward the camera, interacting with students and then walking down the hallway in the other direction. The other security guard enters a doorway on the left (at approximately 2:49:24 p.m.) and appellant enters the same doorway less than five seconds later (at approximately 2:49:28 p.m.). Appellant exits the room a few minutes later (at approximately 2:51:20 p.m.) and walks down the hallway away from the camera. The other security guard exits the room less than a minute after appellant (at approximately 2:51:51 p.m.) and can be seen holding the door open. B.T. exits the room and runs down the hallway toward the camera for approximately three seconds (from approximately 2:52:02 p.m. to

approximately 2:52:05 p.m.). The other security guard runs down the hallway after B.T. and approaches B.T. by the wall near the bathroom entrance. B.T.'s back is against the wall and the security guard stands in front of B.T. and blocks his path without touching B.T. with his hands. The guard appears to be talking to B.T. Appellant can be seen walking in the direction of the security guard and B.T. The security guard calmly walks with B.T. down the hallway to the area where appellant is situated. At approximately 2:52:18 p.m., appellant can be seen with his right arm around the front of B.T.'s neck and throat area. Appellant's right hand is holding onto B.T.'s shoulder. Because other students are in the area, appellant cannot be clearly seen putting B.T. in this position. Appellant walks B.T. down the hallway in this position until they reach the entrance to the bathroom. During this period, B.T. is not touching appellant's arm or body. B.T. can be seen flailing his right arm in the air while his left arm is holding a white piece of paper. At the area just outside the bathroom entrance, appellant can be seen turning around and pushing B.T. face first into the bathroom entrance while continuing to hold B.T. around the neck. Another student enters the bathroom before appellant and B.T. (at approximately 2:52:27 p.m.). B.T. and appellant enter the bathroom entrance approximately two seconds after that student (at approximately 2:52:29 p.m.), and the student exits out of the bathroom less than five seconds later (at approximately 2:52:32 p.m.). When appellant and B.T. are in the bathroom, the other security guard, who is holding a backpack and clothing, enters the entrance to the bathroom (at approximately 2:52:47 p.m.); the guard exits the bathroom less than a minute later (at approximately 2:53:07 p.m.); and the guard then stands in the doorway area of the bathroom, essentially blocking any entrance, for less than one minute (to approximately 2:53:48 p.m.). The guard then reenters the bathroom, and appellant exits the bathroom approximately one minute later (at approximately 2:54:33 p.m.), followed by the other security guard and then B.T. B.T. is no longer being held, and they all leave the area together through the doors to the stairwell.

Incidents that occur at the school between a security guard and a student must be documented by security staff in an Incident Report. Appellant authored an Incident Report (R-3) in which he described the events that occurred as follows:

> On Friday time 2:50 p.m. I . . . and Security Jacobs was call[ed] to go to Room 311 & 310. When I arrived I saw [B.T.] pushing against Jacobs and yelling out loud and was out of control so I tried to calm him down so he ran out of the class. Jacobs ran after him and caught up with him in the hallway near the boys['] bathroom. [B.T.] started to run again. I grab[bed] [B.T.] and walk[ed] him to the nearest room which was the bathroom for his own safety. Also Jacob[s] walk[ed] in the bathroom. We tried to calm him down again. [B.T.] told Jacob[s] to go get his book bag so Jacobs went to get his book bag. [B.T.] pushed me and tried[ ] to run out. I push[ed] him back and told him to calm down. At that time Security Jacobs return[ed] to the bathroom with his book bag and his sweater[;] [he] return[ed] back in one minute. We got a radio call so Jacobs step[ped] out to receive the radio call and return[ed] in the bathroom in a minute. At that time [B.T.] had calm[ed] down and we all left out of the bathroom to the main office.

After being apprised of the incident, Mignone spoke to B.T., appellant, Jacobs, and another student on Monday, October 5, 2015, and documented her interviews in a Report of Incident. (R-5.) Mignone also reviewed the videotape and contacted the Office of Institutional Abuse. The record is bereft of evidence that B.T. sustained injury as a result of the incident. Ingold testified that he saw no documentation that B.T. had been injured and Mignone observed no visible injury to B.T. when she interviewed him on October 5, 2015.

Apart from the evidence that forms the foundation of the above findings of fact, a summary of other pertinent testimony follows.

The Testimony

B.T.

B.T. testified that appellant came to his classroom when it was time to leave school; appellant indicated that B.T. had been called through the main office; and appellant "dragged" B.T. out of the classroom. He described that, while in the hallway, appellant placed him in a headlock and pulled him down the hallway to the bathroom. B.T. stated that he did not like being held in that position, which was uncomfortable, and

B.T. could not breathe. He denied that he made any threats to appellant when appellant was taking him to the bathroom. According to B.T., after appellant took him into the boys' bathroom, appellant placed B.T. against the bathroom wall and punched B.T. three times in the chest. He described appellant's action as a "medium" hit that "hurt." B.T. admitted that, after appellant hit him, B.T. hit or punched appellant back to defend himself. B.T. described that he ran after appellant when appellant was leaving the bathroom and hit appellant in the back for approximately five seconds. The other security guard entered the bathroom and told B.T. to calm down and stop hitting appellant. B.T. informed the other security guard that appellant had hit him.

Eric Ingold

Ingold testified that the use of physical force against a student is only permitted in limited circumstances and, in such cases, only the minimum amount of force needed may be used. He described the importance of security guards acting appropriately for the school environment. Ingold explained that a security guard's actions reflect the actions of all security guards and, if the image or perception of security guards is compromised, this makes the job of security personnel more difficult when having to handle situations in the future. He added that, when a security guard acts inappropriately, it has a negative effect on the school environment and the perception of security personnel.

Ingold's knowledge of the incident is based on his review of the video and reports submitted. He characterized the contact that appellant made with B.T. as an inappropriate "choke-hold." Ingold testified that a security guard is not permitted to grab a student around his/her neck or throat area, which is not safe. He further described that the video did not depict B.T. making any threats, brandishing a weapon, causing a disturbance or taking physical action that would necessitate the use of force. Ingold testified that it was also inappropriate for appellant to walk with B.T. down the hallway while keeping B.T. in the choke-hold around his neck and to take this action in the view of other students who were in the hallway at that time. He stated that under the circumstances it was inappropriate for appellant to take B.T. into the bathroom, which was out of the camera's view. Ingold testified that a security guard is not allowed to

take a student into a bathroom alone, and it is not standard procedure for security to bring a student into the bathroom. He noted that there were other open areas in the hallway, such as the area under the surveillance camera, which would have been a suitable location for dialogue with the student and where the student could have been controlled. Ingold further described that it was not appropriate for appellant to push the bathroom door open with B.T. in front of the door since it exposed the student to injury if someone were walking out of the bathroom at the same time as B.T. was entering with appellant's arm around his neck. With regard to the entire series of events (e.g., the choke-hold, traveling in the hallway, bringing the student in the bathroom), Ingold testified that appellant failed to act appropriately in processing the student, and his actions violated safety procedures and protocols.

Ingold testified that appellant's Incident Report also did not match what Ingold observed on the video. The video did not depict that the student ran again as stated in appellant's report. Appellant's report further did not mention that any physical force had been used. Ingold did not consider the bathroom to be a safe place to put B.T. as stated in appellant's report. He explained that placing a student in a bathroom could be warranted in certain limited circumstances, such as an active-shooter situation.

In his opinion as the executive director of the Office of Safety, the District was justified in taking disciplinary action against appellant. He recommended discipline up to and including termination.

Ginamarie Mignone

Mignone testified that security guards are not permitted to hold a student around the neck or to strike a student. She described the importance for security guards to act in an appropriate manner for the school environment. Mignone explained that staff must model behavior that the school wants the children to portray. Staff must model respect in order to gain the students' respect and, as the school does not want students to use physical force when trying to resolve problems, it expects staff to do the same. Mignone described that when a security guard acts inappropriately, it affects the culture of the school and the way the school is perceived.

Mignone testified that it was inappropriate for appellant to hold B.T. with his arm around B.T.'s neck. She articulated the policy in the building that staff should not put a hand on a student unless the child is endangering himself/herself or others. Based on her review of the videotape, B.T. did not appear to be endangering himself or others. She testified that it also was not appropriate for appellant to walk down the hallway holding B.T. in that manner and to take B.T. into the bathroom alone. Mignone noted that there were available areas other than the bathroom that could have been used, such as the area in the hallway under the surveillance camera. Mignone testified that she wrote in her Report of Incident exactly what appellant told her, during his interview, had occurred. Appellant's version of the incident as recorded in Mignone's report was as follows:

> At approximately 2:45 Acevedo was called to go upstairs to room 310 to get [B.T.] . . . . When Acevedo arrived at the room Mr. Jacobs (security guard) was there trying to talk [B.T.] into leaving the classroom. [B.T.] is yelling and pushing Jacobs. [B.T.] ran into the hallway. Jacobs catches up with him and tries to calm him down. [B.T.] started pushing Acevedo and [B.T.] went into the bathroom. Jacobs and Acevedo follow him. In the bathroom [B.T.] is yelling and Acevedo is trying to calm him down. [B.T.] leaves the bathroom.
>
> [R-5.]

Mignone noted that appellant's version to her differed from what can be seen on the video. Appellant did not mention in his account the need to restrain B.T. or put B.T. in a headlock or put his arm around B.T.'s neck. Appellant also did not mention that he put B.T. in the bathroom and, instead, reported that B.T. ran into the bathroom. During her interview with B.T., he relayed that appellant punched him three times when they were in the bathroom.

Mignone testified that the manner in which appellant processed B.T. violated school policy. She further described that appellant's actions caused disruption to the

operations of the school, and his actions affect the culture and environment of the building, such as the trust that students and/or the community has in school staff.

Raymond Acevedo

Appellant testified that on October 2, 2015, he was initially assigned to the front desk and later assigned to walk the upstairs hallways. He described that a call came over the radio from the office indicating that security was needed to bring B.T. downstairs. Appellant responded to the call, and Jacobs was in the classroom when appellant arrived. According to appellant, B.T. was disruptive, B.T. was yelling and punching Jacobs, and B.T. then ran out of the classroom. Appellant and Jacobs ran after B.T.; Jacobs ran faster than appellant and approached B.T. next to the bathroom; and B.T. and Jacobs then walked down the hallway toward appellant.

Appellant testified that, as B.T. and Jacobs were approaching, appellant noticed that B.T. was getting ready to run again. At that point appellant extended his right arm straight out to stop B.T. He described that B.T. grabbed appellant's arm "real tight" and held it. B.T. was walking backwards, and B.T. turned appellant around, wrapped appellant's arm around B.T.'s upper chest and held appellant's arm around his body. According to appellant, he tried to take his arm away from B.T.'s chest, but B.T. had him off balance, B.T. forcibly held and had control of appellant's arm, and B.T. overpowered him. Appellant did not deny that, at that time, B.T. was not destroying school property, he did not have a weapon, and he was not a physical threat to other students or staff members. As to whether there was any reason to physically restrain a student under these circumstances, appellant responded that if a child is trying to run and could be injured by falling, he is going to stop him, and he stopped B.T. before he had taken off. Appellant denied that he put or had B.T. in a choke-hold, denied that he grasped B.T.'s upper left shoulder while walking down the hallway, and denied that his arm was around B.T.'s neck, stating that it was around B.T.'s chest.

Appellant testified that he went into the bathroom with B.T., believing that it was the safest and nearest area to calm B.T. down and try to talk to him. He reasoned that someone could get hurt if they went down the stairs, so he walked into the bathroom

with B.T. when the bathroom door opened as another student was coming out. Appellant denied that he pushed B.T. against the door to open it. When asked whether other students could have been in the bathroom, so it was not a safe area, appellant responded that it was time to go home. He described that soon afterwards, Jacobs came into the bathroom; B.T. asked Jacobs to get his belongings; and Jacobs left to get them. According to appellant, when he was alone with B.T., B.T. was pushing and punching appellant. Appellant denied that he struck B.T. but admitted that he pushed B.T. back. Subsequently, Jacobs returned with B.T.'s belongings, B.T. calmed down, and they all walked out of the bathroom.

Appellant testified that he had received no physical training from the District since he was hired in 1997, and he was never taught tactics regarding how to handle or respond to unruly children. Appellant admitted his awareness that it was inappropriate to hold a student around the neck, to place a choke-hold on a student, and to punch a student. Appellant testified that he would never place a choke-hold on a student or hurt a child, and denied that he placed or held B.T. in a headlock or punched B.T. Appellant admitted that his job duties include reporting any incidents, and his report did not contain the fact that appellant made physical contact with B.T. As to the statement in his report that B.T. ran again, appellant testified that B.T. was walking fast and getting ready to run. Appellant denied that he told the principal that he and Jacobs followed B.T. into the bathroom. Appellant agreed that, as a security guard, he is responsible for the health, safety and welfare of students under his care, and a security guard must follow the District's rules and regulations and make common-sense and reasonable decisions. Appellant articulated his belief that the actions he took regarding the entire incident were appropriate. He further described that he would have no problem acting in the same manner if the circumstances happened again, for the safety of the student.

Aquilla Williams

Aquilla Williams is employed by the District as a part-time per-diem security guard and was assigned to the school after the incident. According to Williams, she had an incident with B.T.; B.T. said to Williams that he would have her job the same way that he had appellant's job; and Williams was told by other staff not to "mess" with B.T.

because he can do whatever he wants. Williams testified that around November 2015 she also overheard B.T. bragging and laughing with another student that he got appellant fired. She articulated her view that appellant was a good security guard. Williams admitted that she was not working at the school at the time of the October 2, 2015, incident and had no direct knowledge regarding the interaction between appellant and B.T. on that date. She agreed that a security guard is not permitted to punch a student and expressed her view that it would be inappropriate for a security guard to take a student into a bathroom, due to the lack of cameras in the bathrooms. Although Williams expressed that a security guard can grab a child around the neck if necessary to restrain the student, she agreed that there is no need to restrain a student who is not displaying threatening behavior, possessing a weapon, or destroying property.

Analysis of the Testimony

In this matter, the District bears the burden of proving the disciplinary charge against appellant by a preponderance of the credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); see In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). 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). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Precisely what is needed to satisfy this burden necessarily must be judged on a case-by-case basis.

In undertaking this evaluation, it is necessary for me to assess 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's testimony. It requires an overall assessment of the witness's story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not

only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may also reject testimony as "inherently incredible" and when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Further, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

In judging the strength of the evidence and evaluating the credibility of the witnesses, I found Ingold and Mignone to be forthright and credible witnesses. They presented persuasive testimony vis-à-vis the actions they took and the school's procedures and protocols, coupled with the adverse impact to the school when a security guard acts inappropriately. No evidence suggests that either witness harbored a motive or bias to fabricate their version of the relevant facts. Plainly, on balance, appellant has the greater stake in the outcome of this proceeding since it involves the propriety of his removal from employment.

For her part, Williams had no direct knowledge regarding appellant's encounter with B.T. I further afford limited weight to her testimony recounting what B.T. allegedly said on later occasions, which is plainly hearsay. Indeed, even if B.T. made the alleged statement about getting appellant fired, this does not undermine B.T.'s credibility or

appellant's termination if appellant had taken inappropriate action in connection with dealings with B.T.

Succinctly stated, I found appellant's testimony regarding the events that transpired on October 2, 2015, to be riddled with inconsistencies, lacking internal consistency, inherently improbable, and not "hanging together" with, and discredited and overborne in significant respects by, other evidence in the record. A canvas of the totality of the evidence casts substantial doubt on the accuracy, reliability and believability of appellant's version of the events. I found appellant to be non-responsive to various questions during cross-examination and his rendition could not be reconciled with earlier statements appellant made. For example, at the hearing appellant offered a vastly different account than that portrayed in his Incident Report. In contrast to appellant's testimony and what can be seen on the surveillance video, the report that he authored shortly after the incident stated that B.T. "started to run again" after Jacobs caught up with him near the boys' bathroom. Appellant's Incident Report further omitted any reference to appellant making physical contact with B.T. in the manner captured on the video. And, appellant did not claim in that report that B.T. had punched him in the bathroom or that B.T. had wrapped appellant's arm around B.T. Rather, appellant then reported that he "grab[bed] [B.T.] and walk[ed] him to the nearest room which was the bathroom for his own safety." Appellant's account at the hearing is also irreconcilable with the scenario provided to the principal a few days after the incident. I reject appellant's testimony attempting to sidestep the statements he made during his interview, which was overborne by the testimony of Mignone, whom I found to be forthright and credible. In contrast to appellant's testimony and the surveillance video, during that interview appellant claimed that B.T. "started pushing [him] and [B.T.] went into the bathroom [and] Jacobs and [appellant] follow[ed] him." Further, appellant did not at that time disclose that he used any physical force against B.T. and appellant did not claim that B.T. had pushed or punched him when they were in the bathroom. Although the charges against appellant do not concern the appropriateness of his Incident Report, the inaccuracies and omissions in that report, which mischaracterized the incident as captured on the surveillance video, significantly impair appellant's credibility and raise substantial doubt as to the accuracy, reliability, and believability of

appellant's testimony, including the actions he took when he was not in view of the surveillance camera and alone in the bathroom with B.T.

I further found improbable appellant's assertion that, despite appellant being approximately twice the size of B.T., B.T. overpowered him and forced appellant to wrap his arm around B.T.'s chest, and B.T. continued to overpower appellant and forcibly held appellant's arm around B.T.'s body when they travelled down the hallway and into the bathroom. Apart from this, appellant's version is discredited by the surveillance video. Although appellant claims that B.T. forcibly held appellant's arm around B.T.'s upper chest area, the video shows appellant's arm around B.T.'s neck area and that B.T. is not holding or touching appellant's arm while being held in this position. Appellant is also seen with his hand clamped down on B.T.'s left shoulder while B.T. is flailing his right arm in the air, with his left arm extended outward holding a white piece of paper.

Additionally, appellant's explanation as to why he took B.T. into the bathroom did not make sense. He could not answer how he knew that the boys' bathroom was clear of students and, thus, would be a safe area to process B.T. He did not address why another student exited the bathroom immediately after appellant entered the bathroom with B.T. Further, even if appellant believed the bathroom was empty at the end of the day, his action in taking B.T. into the bathroom, where he reasonably knew that he would be out of the surveillance camera's view, is highly suspect given the other available options that appellant could have used in the hallway, such as the open area near the surveillance camera. Simply put, on balance, I afford more weight to B.T.'s testimony addressing what occurred in the bathroom than the account offered by appellant.

Finally, I afford no weight to appellant's asserted claim regarding the lack of training that he received. In short, it is common sense that it is inappropriate and dangerous to grab and hold a student around the neck or throat area and to punch a student, and appellant acknowledged knowing the inappropriateness of taking these actions.

Based upon a review of the testimony and documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following additional pertinent **FACTS**:

When B.T. and Jacobs walked toward the area where appellant was situated, appellant grabbed B.T. from behind his body and had his right arm around B.T.'s neck and under his throat and appellant clamped down and secured his right hand on B.T.'s left shoulder in what Ingold characterized as a choke-hold. At the time appellant took this action, B.T. was not posing a danger to others, did not have a weapon, and was not otherwise destroying property. While holding B.T. in that position, appellant walked with B.T. down the hallway in the view of other students. While continuing to hold B.T. in that position, appellant forced B.T. to enter the boys' bathroom face first through the bathroom door. Appellant intentionally brought B.T. alone into the bathroom, which was not subject to view by the surveillance camera. There were other available areas in the hallway that appellant could have utilized in order to control or calm down B.T., to the extent that such action was necessary. When they were alone in the bathroom, appellant punched B.T. three times.

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1, et seq. 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. The issues to be determined at the de novo hearing are whether appellant is guilty of the charge brought against him and, if so, the appropriate penalty, if any, that should be imposed. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

An appointing authority may discipline an employee for conduct unbecoming a public employee and other sufficient cause. N.J.A.C. 4A:2-2.3(a)(6) and (12). Although the term "conduct unbecoming a public employee" is not defined in the New Jersey Administrative Code, it has been described as an "elastic" phrase that includes

"'conduct which adversely affects the morale or efficiency'" of the public entity or "'which has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services.'" In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted); see Karins v. City of Atl. City, 152 N.J. 532 (1998). Unbecoming conduct need not be predicated upon a violation of the employer's rules or policies and may be based merely upon a violation of the implicit standard of good behavior. See City of Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955); In re Tuch, 159 N.J. Super. 219, 224 (App. Div. 1978). It has been recognized that a school security guard "holds an important position in the school community" and, "[s]imilar to law enforcement officers, security guards inherit a pedestal posture and are held to a higher standard of conduct than others who do not in their profession have a direct responsibility to uphold the law." Alton v. Newark Bd. of Educ., 92 N.J.A.R.2d (CSV) 478, 480. "The obligation to act in a responsible manner is especially compelling in a case involving a law enforcement official," In re Phillips, 117 N.J. 567, 576 (1990), who "must present an image of personal integrity and dependability in order to have the respect of the public." Moorestown Twp. v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966).

Against this backdrop, and in addition to appellant's claim that B.T. "put himself in a position that looked like a choke hold," which I reject, appellant contends in his brief that he "did not act inappropriately on October 2, 2015, but took appropriate action to quell a disturbance caused by B.T." The crux of appellant's argument is that B.T. was causing a disturbance in the classroom before he is observed on the video; appellant "was trying to quell the disturbance, which began in the classroom"; and appellant "used reasonable force in dealing with a disruptive, unruly student." Simply put, I do not embrace appellant's contentions.

Appellant's reliance on the alleged events in the classroom is misplaced. Apart from the fact that whatever occurred in the classroom hinges solely on appellant's testimony and was not corroborated by any witness or other competent evidence, the basis for appellant's discipline is not predicated on his actions in the classroom but his later alleged misconduct in the hallway. More importantly, any disruption that B.T. may have been causing in the classroom does not serve to justify appellant's actions in the

hallway. At the point appellant employed the tactics he did, no extraordinary circumstances existed, and there was no imminent threat that warranted physical intervention, especially the restraining maneuver around B.T.'s neck. The video shows that immediately before appellant took the actions he did, B.T. was not creating any disturbance in the hallway that would have required appellant to restrain or use any physical force against B.T. He was not posing a danger or threat to any person, destroying any school property, or brandishing a weapon. The only disruptive action that can be seen on the video is when B.T. ran down the hallway for approximately three seconds. However, at the time appellant physically restrained B.T. around his neck, the other security guard had already brought B.T. under control. Further, even if B.T. had been causing a disturbance by trying to run down the hall again as claimed by appellant, any intervention should have been accomplished without the use of physical force. Plainly, appellant could have brought B.T. under control in a manner similar to that previously used by the other security guard, who merely stopped in front of B.T. and blocked his path without touching B.T. with his hands. Instead of employing a similar approach, appellant made unwarranted, unreasonable, and aggressive physical contact with B.T.

In sum, there was no need or justification for appellant to restrain and use physical force against B.T., and it was particularly inappropriate for appellant to grab and hold B.T. around the neck and throat area. Appellant's contact and conduct was an improper, unnecessary, and unreasonable use of force and contravened District policy and protocols. The inappropriateness of appellant's conduct is compounded by the fact that he took the action he did in the presence of several young students. And, no emergency or disturbance existed that required appellant to remove B.T. from the area and place him alone in the bathroom with appellant. Indeed, the video shows that after appellant places his arm around B.T.'s neck, appellant then calmly walks B.T. down the hall without any degree of urgency, and other areas existed in the hallway that could have been used.

I **CONCLUDE** that the District has shouldered its burden of proving, by a preponderance of the credible, competent evidence, that appellant's conduct in connection with his dealings with B.T. was unprofessional and unbecoming a public

employee. Appellant's actions fall significantly short of the type of conduct that the public has the right to expect from a public employee charged with protecting the health and safety of elementary-school students. Appellant should be cognizant of the standard of conduct expected of his position given his lengthy career with the District. Clearly, appellant knew, or reasonably should have known, that it is unacceptable and unbecoming conduct to engage in aggressive physical contact with a student. Appellant's conduct was unwarranted, unjustified, and unreasonable. By engaging in the conduct he did, appellant failed to exercise good judgment and to act in a responsible manner with due regard to the safety of others. He failed to exercise tact and restraint during his encounter with B.T., and appellant conducted himself in a manner that failed to maintain the dignity and integrity of his position. Appellant engaged in conduct in violation of his responsibilities as a school security guard, and such conduct has a tendency to destroy the public's respect for public employees and confidence in the operation of the school. Appellant's behavior also has the likelihood of eroding the students' perception, respect, confidence, and trust in security guards who are there to protect and safeguard their well-being, and adversely impacting the educational environment and the proper operation of the school. Significantly, appellant's actions placed B.T. at risk of harm and could have resulted in injurious consequences.

The only remaining issue concerns the penalty that should be imposed. It is beyond debate that appellant's past disciplinary record may be considered for guidance in determining the appropriate penalty, and the principle of progressive discipline is applied in this state. See Bock, supra, 38 N.J. at 522. The seriousness of appellant's infraction must also be balanced in the equation of whether removal or something less is appropriate under the circumstances. See Henry, supra, 81 N.J. at 580. The New Jersey Supreme Court has recognized that the principle of progressive or incremental discipline is not a "fixed and immutable rule" that must be applied in every disciplinary setting. In re Herrmann, 192 N.J. 19, 33 (2007); In re Carter, 191 N.J. 474, 484 (2007). Rather, "some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." Carter, supra, 191 N.J. at 484. Progressive discipline is not a necessary consideration "when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable

for continuation in the position, or when application of the principle would be contrary to the public interest." Herrmann, supra, 192 N.J. at 33. In this regard, "progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property." Ibid.; see, e.g., Henry, supra, 81 N.J. at 580; Bowden v. Bayside State Prison, 268 N.J. Super. 301, 306 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994). The courts have also upheld the dismissal of employees for engaging in conduct unbecoming to their position without regard to whether or not the employee had a substantial past disciplinary record. Herrmann, supra, 192 N.J. at 34; see Div. of State Police v. Jiras, 305 N.J. Super. 476 (App. Div. 1997) (upholding dismissal of police officer where the infraction, an assault on a prisoner, was "so serious as to go to the heart of his capacity to function appropriately"). Public-safety concerns may also bear upon the propriety of an employee's removal from employment. See Carter, supra, 191 N.J. at 485.

The evidence reveals that appellant has no prior disciplinary record. However, the seriousness of appellant's infractions is a critical consideration in this case. While the incident involved a short duration of time, this does not mitigate the gravity of appellant's derelictions. Appellant's actions, regardless of how brief, were highly inappropriate and inexcusable, and violated the standards of the proper conduct expected of an elementary-school security guard. Appellant's irresponsible conduct could have resulted in injurious consequences to B.T. and cannot be countenanced. His unauthorized actions were antithetical to the proper functioning of the school, and his failure to safeguard those individuals whom he was charged to protect violated his basic obligations as a school security guard and demonstrates his unfitness to perform those duties. Appellant's failure to recognize or appreciate the inappropriateness and severity of his misconduct serves as further support for the conclusion that appellant is unsuitable for continuation in his position.

Based upon the totality of the circumstances, I **CONCLUDE** that appellant's unbecoming conduct is of a sufficiently egregious nature to warrant his termination notwithstanding the absence of any disciplinary history. I **CONCLUDE** that the District acted appropriately by removing appellant from his position.

ORDER

I **ORDER** that the charges of conduct unbecoming a public employee and other sufficient cause be and hereby are **SUSTAINED**. I further **ORDER** that, based upon the aforesaid sustained charges, appellant be and hereby is removed from his employment as a security guard with the District effective October 15, 2015.

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.

January 26 2017
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: January 27, 2017

Date Mailed to Parties: January 27, 2017

jb

APPENDIX

List of Witnesses

For Appellant:

Aquilla Williams

Raymond Acevedo

For Respondent:

Eric Ingold

B.T.

Ginamarie Mignone

List of Exhibits in Evidence

For Appellant:

None

For Respondent:

R-1 Surveillance video

R-2 Surveillance images

R-3 Office of Security Services, Incident Report, by Raymond Acevedo

R-4 Violence, Vandalism and Substance Abuse (VV-SA) Incident Report Form

R-5 Report of Incident dated October 5, 2015

R-6 Preliminary Notice of Disciplinary Action dated October 14, 2015

R-7 Final Notice of Disciplinary Action dated December 14, 2015

R-8 Newark Public Schools Policy, Conduct and Dress Code