



STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Lisa McGee,
Department of Corrections

CSC Docket No. 2018-1361

Minor Discipline Appeal

ISSUED: May 25, 2018

(SLK)

Lisa McGee, a Correction Sergeant, appeals her five-working day suspension issued by the Department of Corrections.

The record indicates that on September 19, 2016 an inmate verbally threatened a Senior Correction Officer (SCO) in the Central Reception and Assignment Facility. The SCO then called for his Area Supervisor, the appellant. The appellant arrived on the scene with two Escort Officers and another Correction Sergeant appeared later to assist. The appellant did not remove the threatened SCO from the immediate area and permitted him to open the cell door of the inmate who had just threatened him. Additionally, the SCO moved towards the inmate to assist with the escort before the appellant removed the SCO from the situation. The appointing authority indicated that the appellant's actions were in violation of policy and could have caused a serious incident to occur. The appellant was charged with incompetency, inefficiency or failure to perform duties and other sufficient cause, and violating departmental regulations. The appellant received a Preliminary Notice of Disciplinary Action for a 10 working day suspension and the appellant requested a departmental hearing. The hearing officer found that the appellant's actions of not immediately removing the threatened SCO was a violation of the appointing authority's Emergency Response policy negative contact rule which states that any staff member assaulted or threatened by an inmate will not be assigned to escort or otherwise have any further contact with that inmate and therefore sustained some of the charges. However, the hearing officer determined

that the appellant's actions did not warrant a 10 working day suspension and modified the discipline to a five working day suspension.

On appeal, the appellant states that the term "negative contact" is not defined in the administrative code regulations that govern the appointing authority. The appellant argues that one cannot be charged for wrong doing when there is no departmental definition or understanding as to what the wrong doing is. The appellant cites testimony from a management witness from the departmental hearing who stated that "negative contact" is only defined under the Emergency Response Code Policy and this was a routine escort and not an emergency. She presents that the inmate was compliant at all times and the outcome of the event was safe. The appellant states that of the custody staff members who were present, she was one of three supervisors, she was not the first supervisor who arrived on the scene, and she was not the most senior staff member. Yet, she was the only one who was disciplined. She represents that staff are supposed to receive annual training on the use of force and she still has not received training on the term "negative contact." The appellant indicates that only now, after this incident, has the appointing authority's regulations been updated to define "negative contact." The appellant submits a video of the incident to demonstrate that the situation was safe.

In response, the appointing authority asserts that this matter does meet the standard for review of minor discipline by the Civil Service Commission (Commission). The appointing authority states that on the date of the incident, an inmate began demanding his food and started yelling at the SCO, "I'm gonna fuck you up when you bust this cell." An incident report that was completed by a different officer than the one who was threatened indicated that the SCO opened the cell door after he was threatened by the inmate and that the appellant ordered the SCO to stop handcuffing the inmate while he was secured in the cell. This report further indicated that the appellant allowed the SCO to open the inmate's cell door after he had been threatened and the report indicated that he felt there was a safety issue. The incident was then investigated and during the investigation, the appellant admitted she allowed the SCO to open the door despite knowing that the inmate had threatened him. The appellant also stated to the Investigator that she was aware that an officer who is threatened by an inmate needs to be separated from that inmate and she had been previously counseled in October 2015 after a prior incident on the importance of separating custody staff from inmates who have threatened them. The Investigator reviewed the video and determined that the appellant did not remove the SCO from the area until after he reached out to make physical contact with the inmate which placed the safety of the staff and the inmate at risk. The appointing authority presents its internal Emergency Response regulations that indicate that supervisors shall ensure that any staff member who has been assaulted or threatened by any inmate will not be assigned or otherwise have any further contact with that inmate. The appointing

authority argues that the appellant's claims that the administrative code does not define "negative contact" is meritless because the code allows the appointing authority to have its own policies and its policies clearly state that threatened officers are not to have further contact with an inmate who has threatened them. It highlights that as an Area Sergeant, the appellant was trained on all emergency procedures and, even if she was not the senior supervisor, there is nothing in the code that relieves her of her responsibility to follow policy.

In reply, the appellant reiterates that she was the only supervisor on the scene who ordered the SCO out of the area; yet she was the only staff member charged. She presents a list of potential witnesses who could testify that these charges are harassment, retaliation¹, and treating her disparately. The appellant claims that the officer who wrote the incident report that claimed that the situation was unsafe should have been brought up on charges for cowardice as officers regularly deal with threatening inmates who are not secured. She cites case law that stands for the proposition that the reasonableness of force must be judged from the perspective of a reasonable officer on the scene and there is no case law to support the charges against her. The appellant explains that at the time of the incident, she and the other supervisors deemed it necessary to have the inmate handcuffed safely outside his cell as he was physically unable to get his arms together behind him and through the cell bars or food port. She notes that the unit was not equipped with handcuffing ports making it dangerous to attempt to forcibly place inmates in handcuffs at their backs while in their cells and this was the only reason why the cell door was opened in order to safely handcuff the inmate. The appellant cites the video to highlight the officer who wrote the report indicating the incident was unsafe dangerously placed his arms deep inside the inmate's cell with the handcuffs where the inmate could have easily taken the cuffs and used them as a weapon toward custody staff as had been done in a prior incident. Initially, the custody staff believed that the SCO was going to open the cell door and remain safe behind the door while the escort staff escorted the inmate and it was only after it was realized that the SCO was attempting to assist that the appellant ordered his removal. The appellant emphasized that the case law provides that an officer's conduct needs to be based on the reasonableness in the moment and without the benefit of 20/20 hindsight.

In further response, the appointing authority indicates that the appellant was the Area Sergeant, and by virtue of her job assignment, she was responsible, and the presence of other Sergeants was not relevant as all officers with the rank of Sergeant and below would ultimately defer to her. The appointing authority presents there is no evidence that the officer who submitted the incident report deeming the situation unsafe has filed a State Policy complaint against the appellant. Notwithstanding, the appointing authority emphasizes that the

¹ The Division of Equal Employment Opportunity and Affirmative Action does not have any record that the appellant has filed a discrimination complaint.

appellant allowed the SCO to open the cell doors and come in contact with the inmate who just threatened him, which placed that SCO's life at risk.

In further reply, the appellant presents that contrary to the appointing authority's statements, it is common that supervisors and officers work together. Further, under the administrative code, any staff member who fails to stop the flow of events can be held accountable and she is the one who removed the SCO from the dangerous situation. The appellant highlights that the internal policy that the appointing authority presents regarding the removal of a threatened officer was put in place after the incident. Regardless, even if this policy was in place, the appellant asserts that nowhere does it state that only the Area Supervisor can be held accountable as officers and supervisors routinely work together. She states that it is inaccurate that the Area Supervisor would automatically be the ranking supervisor and the appointing authority does not point to any policy to support this claim. Instead, to the contrary, she as the supervisor with the least seniority, would defer to the more senior supervisors. The appellant cites testimony where the officer who filed the report claiming that the matter was unsafe stated that he filed a State Policy complaint against her and she has received correspondence in that matter. She provides examples of possible scenarios that could have happened during the incident to support her claim that this incident cannot be looked at in hindsight and must be reviewed based on the information that she knew at the time of her actions.

CONCLUSION

N.J.A.C. 4A:2-3.7(a) provides that minor discipline may be appealed to the Commission. The rule further provides:

1. The Civil Service Commission shall review the appeal upon a written record or such other proceeding as the Commission directs and determine if the appeal presents issues of general applicability in the interpretation of law, rule or policy. If such issues or evidence are not fully presented, the appeal may be dismissed and the Commission's decision will be a final administrative decision.
2. Where such issues or evidence under (a)1 above are presented, the Commission will render a final administrative decision upon a written record or such other proceeding as the Commission directs.

This standard is in keeping with the established grievance and minor disciplinary procedure policy that such actions should terminate at the departmental level.

In the instant matter, the Commission finds that the appellant's appeal presents issues of general applicability in the interpretation of a policy.

Specifically, the appellant challenges the reasonableness of the appointing authority's policy of using "negative contact" as grounds for disciplining her. The appellant claims that the concept of "negative contact" is not defined and argues that one cannot be charged for wrong doing when there is no departmental definition or understanding as to what the wrong doing is. Additionally, the appellant asserts that at the time of incident, the term "negative contact" was only listed under the Emergency Response Code Policy and this was a routine escort and not an emergency. Further, the appellant claims that she was arbitrarily singled out for discipline as there were other officers at the incident and she was not the most senior supervisor; yet she was the only one who was disciplined.

The record established that on September 19, 2016, an inmate verbally threatened a SCO by stating "I'm gonna fuck you up." The SCO then called for his Area Supervisor, the appellant. The appellant arrived on the scene with two Escort Officers and another Correction Sergeant appeared later to assist. The appellant did not remove the threatened SCO from the immediate area and permitted him to open the cell door of the inmate who had just threatened him. Shortly thereafter, the SCO moved towards the inmate who had just threatened him to assist with escorting. When the appellant realized that the SCO was attempting to assist, the appellant had the SCO removed from the immediate area. Additionally, the record establishes that the appellant acknowledged receiving a Letter of Instruction for a prior incident where an officer's clothing was grabbed by an inmate and verbally engaged in conversation with the officer. The Letter of Instruction advised that the appellant, as the supervisor, should have had the officer removed as the incident could have escalated to a level of unnecessary force being used.

In other words, the appellant, as a supervisor, had previously been instructed that when an officer has been threatened, that officer should have been immediately removed from the situation and not involved in the escorting of the inmate. Otherwise, that officer's involvement in the escort could have escalated the incident to a level of unnecessary force being used. In this matter, the appellant, the Area Supervisor, knew that a SCO was threatened by an inmate. Based on the Letter of Instruction that the appellant had received, the appellant should have immediately removed the SCO from the situation and not allowed the SCO to be the one to open the cell. A reasonable supervisor in that situation should have known that any continued involvement by the SCO could have led to an emergency situation. The mere fact that the inmate appeared compliant does not mean that the potential for an emergency was not there as the inmate could have attacked the SCO at a moment's notice before the appellant ordered his removal. Further, as the potential for an emergency was known to the appellant based on her instruction from the prior incident, it was appropriate for the policy of "negative contact" to be applied to the situation. The appellant's emphasis that other supervisors with more seniority were also present does not relieve her, the one who was assigned as the

Area Supervisor at the time of the incident, of her responsibility, especially after receiving her prior Letter of Instruction.

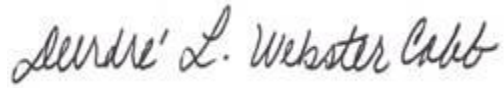
After consideration of documents and testimony, the hearing officer found that on September 19, 2016, an inmate had verbally threatened a SCO. Then, this SCO called his Area Supervisor, the appellant. The appellant arrived on the scene along with two Escort Officers and another Sergeant appeared later to assist. The appellant did not remove the SCO from the immediate area and permitted him to open the cell door who had just threatened him. The hearing officer determined that this was a violation of policy. The hearing officer indicated that although there was no physical confrontation, as this inmate was compliant throughout his interaction with custody staff, per testimony by all parties, his verbal threat could have been acted out towards the SCO once his cell door was open and breached by the SCO, since the inmate had not been mechanically restrained at that time. Therefore, the hearing officer found that there was a clear violation of the Emergency Response policy's negative contact rule which states that any staff member assaulted or threatened by an inmate will not be assigned to escort or otherwise have any further contact with that inmate. However, the hearing officer found that the appellant's behavior did not rise to the level of a 10 working day suspension and therefore she modified the sanction to a five working day suspension. The Commission will not disturb a hearing officer's credibility judgments in minor discipline proceedings unless there is substantial credible evidence that such judgments and conclusions were motivated by invidious discrimination considerations such as age, race or gender bias or were in violation of Civil Service rules. *See e.g., In the Matter of Lillian D. Childs* (CSC, decided April 28, 2010); *In the Matter of Oveston Cox* (CSC, decided February 24, 2010). A review of the record evidences no showing that either factor is present in this case. Rather, the appointing authority's application of its "negative contact" policy was reasonable. Therefore, the appellant has not established an abuse by the appointing authority of its discretion in this disciplinary case. Accordingly, the Commission finds that the charge against the appellant has been sustained and the penalty of a five working day suspension is appropriate under the circumstances.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23rd DAY OF MAY, 2018



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