



STATE OF NEW JERSEY

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 : **DECISION OF THE**
CIVIL SERVICE COMMISSION

 In the Matter of Gary Bode and Fred
 O'Callaghan, Department of
 Corrections
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 CSC Docket Nos. 2018-1671 &
 2018-1708
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 OAL Docket Nos. CSR 18358-17 &
 CSR 18648-17
 (consolidated)
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ISSUED: September 21, 2018 (EG)

The appeals of Gary Bode and Fred O'Callaghan, Correction Lieutenants¹ with East Jersey State Prison, Department of Corrections (DOC), of their removals effective December 7, 2017 and December 15, 2017, respectively, on charges, were heard by Administrative Law Judge Susana E. Guerrero (ALJ), who rendered her initial decision on August 1, 2018. Exceptions were filed on behalf of the appointing authority and exceptions and a reply to exceptions were filed on behalf of the appellants.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on September 5, 2018, did not adopt the ALJ's recommendation to modify the removals to 180 calendar day suspensions. Rather, the Commission modified the removals to 60 working day suspensions.

DISCUSSION

The appellants were charged with conduct unbecoming a public employee, neglect of duty and other sufficient cause. Specifically, the appointing authority alleged that the appellants entered general population unsuited and without following proper procedure, creating an unsafe environment for medical and custody staff members. Upon the appellants' appeals, the matters were transmitted to the OAL for hearings as contested cases. The matters were consolidated at OAL.

¹ Pursuant to P.L.2017, c.293, the title of Correction Lieutenant has been retitled Correctional Police Lieutenant.

The ALJ set forth in her initial decision that on August 26, 2107, the appellants were the highest-ranking officers at the prison. During the first shift that day there was a physical altercation between two inmates in the big yard. An officer witnessed the altercation and called in a code. O'Callaghan responded by approaching the gates. He was informed by the officer that one inmate had picked up another inmate and slammed him to the ground on his head. O'Callaghan could see the injured inmate convulsing on the ground. O'Callaghan then witnessed the inmate stop convulsing and ordered the gate opened. He also called in a code 53 medical emergency and called for a suited team. O'Callaghan then preceded to enter the yard and was followed by nine officers. These officers were not ordered by O'Callaghan to enter the yard. O'Callaghan and these other officers were not suited with protective gear. The 97 inmates in the yard at the time of the incident were ordered to retreat to the far end of the yard, about half the length of a football field away from the injured inmate. They all complied before O'Callaghan entered the yard. Once O'Callaghan entered the yard, he ran directly to the inmate and checked his pulse. Medical staff arrived within two minutes of O'Callaghan entering the yard. O'Callaghan remained with the medical staff for approximately 10 to 15 minutes, until the inmate was carried away on a stretcher. After the codes were called, Bode also entered the yard without any protective gear.

Correction Sergeant² Vargas responded to the code by arriving at the gates to the yard with 13 officers. He entered the yard and ordered the 97 inmates to lay on the ground, put their hands behind their heads and to cross their legs as a protective measure. The 13 officers then created a barrier between the inmates and the injured inmate, O'Callaghan, the other officers with O'Callaghan, and the medical staff. Vargas claims that Bode denied his request for a second team and that Bode had ordered that his team remain in the yard with the inmates after the injured inmate had been removed from the yard.

The appointing authority's witnesses testified that the appellants violated several provisions of at least three Internal Management Procedures (IMPs), as well as the Law Enforcement Personnel Rules and Regulations. The IMPs provided the procedures to be utilized during emergency situations, and the responsibilities and the requirements for Lieutenants in such situations.

The ALJ found that O'Callaghan entered the yard unsuited and that his entry caused other officers to enter the yard unsuited. The ALJ stated O'Callaghan's actions constituted neglect of duty and conduct unbecoming a public employee as he violated the IMP requiring him to enter suited and with a team of 13 suited officers. Further, O'Callaghan failed to ensure the safety of the officers who accompanied him and the medical staff. Additionally, the ALJ found that Bode's actions in entering the yard without being suited and his ordering of Vargas'

² Pursuant to P.L.2017, c.293, the title of Correction Sergeant has been retitled Correctional Police Sergeant.

team to remain in the yard with the inmates after the injured inmate was taken away constituted neglect of duty and conduct unbecoming a public employee. The ALJ found Bode's actions reckless and unnecessarily jeopardized the safety and security of Vargas' team. Moreover, the ALJ found that the charge of other sufficient cause against the appellants were proven by the appointing authority as both appellants clearly violated IMPs.

With regard to the penalty, the ALJ determined that the errors committed by O'Callaghan in responding to the code in question were insufficiently severe to render O'Callaghan unsuitable to continue in his position. The ALJ indicated that in O'Callaghan's 18 years with DOC, his disciplinary history consisted of a single written reprimand. Therefore, she concluded that a 180 calendar day suspension was a more appropriate penalty. In assessing the proper penalty for Bode, the ALJ indicated that the penalty was excessive for the infractions he committed. The ALJ stated that Bode only had one written reprimand present in his disciplinary record in his 12 years with DOC. Thus, the ALJ determined a 180 calendar day suspension a more appropriate penalty for Bode.

In its exceptions, the appointing authority argues that the ALJ properly found all the charges were proven and sustained against the appellants, but that the ALJ applied irrelevant and immaterial factors in reducing the penalties. Specifically, it argues that the fact that no riot, hostage situation or deaths occurred did not excuse the actions of the appellants. The potential for harm, violation of procedures, and risk of safety to the prison was inexcusable for the highest-ranking officers in the prison at the time of the incidents. In this regard, it contends that the appellants actions were so egregious that removal was warranted.

In their exceptions and reply to exceptions, the appellants argue that the ALJ erred in finding the appellants violated the IMPs. They contend that a plain reading of the IMPs in question indicate that the appellants did not violate any procedures. Additionally, the appellants contend that ALJ improperly found the testimony of Assistant Superintendent Jeffery Crothers credible and did not give enough weight to their testimony. Specifically, they contend that the testimony of Crothers contained many inconsistencies. Finally, the appellants argue that the 180 calendar day suspension was too severe in the instant matter based on their disciplinary histories and the fact that both appellants acted with good intentions and there were no injuries or negative consequences as a result of their actions.

Upon its *de novo* review of the record, the Commission agrees with the ALJ's determination regarding the charges. However, the Commission does not agree with the ALJ's recommendation to modify the removals to 180 calendar day suspensions. Rather, the Commission modifies the removals to 60 working day suspensions. In their exceptions, the appellants argue that the ALJ erred in finding the appellants violated the IMPs as a plain reading of the IMPs in question indicate

that the appellants did not violate any procedures. The Commission does not agree. As the ALJ clearly indicated, both the appellants violated IMPs regarding the proper and safe response to emergency situations. Both appellants entered the yard where inmates were present without the proper safety equipment and without the properly equipped number of other officers in violation of the IMPs. Their failure to follow proper procedures risked escalating the situation and potentially put the lives of other officers and medical personnel in danger.

The appellants also contend that the ALJ did not give enough weight to their testimony and claimed the testimony Crothers was inconsistent with the facts. In this regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 N.J. 108 (1997). “[T]rial courts’ credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record.” *See In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto*, *supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ’s decision if it is not supported by the credible evidence or was otherwise arbitrary. *See N.J.S.A. 52:14B-10(c); Cavalieri v. Public Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004). Nevertheless, upon its review of the entire record, the Commission finds that there is sufficient evidence in the record to support the ALJ’s credibility determinations. The ALJ explicitly indicated that she found Crother’s testimony credible that Bode should not have entered the yard at all and that he should have reported to his appropriate post once the code was called. Further, while the ALJ specifically found the appellants’ testimony that they were never specifically trained on how to respond to a code in the yard nor specifically instructed not to enter the yard while inmates were present, the Commission agrees with the ALJ that they were required to be familiar with and follow the IMPs. The appellants claim that not enough weight was given to this finding in determining the charges is unpersuasive.

In determining the proper penalty, the Commission’s review is *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual’s prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 N.J. 571, 580 (1980). It is settled that the theory of progressive discipline is not a “fixed and immutable rule to be followed without question.” Rather, it is

recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 N.J. 474 (2007). Further, even when a law enforcement officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense may nevertheless warrant the penalty of removal where it is likely to undermine the public trust. *See Henry v. Rahway State Prison, supra*, 81 N.J. at 579-80. In the instant matter, both appellants had only one written reprimand each in their disciplinary histories. O'Callaghan had been employed for 18 years with DOC, while Bode was employed for 12 years. Moreover, given the actual incident in question, the Commission does not find removal to be appropriate under these circumstances. In this regard, while it is clear the appellants both violated IMPs and that the appointing authority proved the charges, as the ALJ indicated, they acted with benevolent intentions to preserve the life of the inmates and did not believe that they put any officers or medical personnel in danger. Further, no officers, medical personnel or inmates sustained any injuries as a result of their actions. However, the Commission acknowledges that the appellants' failure to follow procedures could have resulted in severe consequences. In this regard, the Commission notes that a law enforcement officer is held to a higher standard than a civilian public employee. *See Moorestown v. Armstrong*, 89 N.J. Super. 560 (App. Div. 1965), *cert. denied*, 47 N.J. 80 (1966). *See also, In re Phillips*, 117 N.J. 567 (1990). The Commission is particularly mindful of this standard when disciplinary action is taken against a high ranking law enforcement officer in a correctional facility. Accordingly, the Commission imposes 60 working day suspensions on both appellants, which will serve as an indication that any further infractions committed by the appellants will potentially subject them to removal from employment.

Accordingly, the appellants are entitled to back pay, benefits and seniority for the period after the imposition of the 60 working day suspensions up to their dates of reinstatement. With regard to counsel fees, since the appellants have not prevailed on the primary issues on appeal, they are not entitled to awards of counsel fees. *See N.J.A.C. 4A:2-2.12*. 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, while the penalty was modified, all the charges were upheld and major discipline imposed. Consequently, as the appellants have failed to meet the standard set forth in *N.J.A.C. 4A:2-2.12*, counsel fees must be denied.

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 back pay are finally resolved. In the interim, as the court states in *Phillips, supra*, the appointing authority shall immediately reinstate the appellants to their permanent positions.

ORDER

The Civil Service Commission finds that the appointing authority's actions in removing the appellants were not justified. Therefore, the Commission modifies the removals to 60 working day suspensions. The Commission further orders that the appellants be granted back pay, benefits and seniority for the period after the imposition of the 60 working day suspensions through the dates of their actual reinstatement. 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 and an affidavit of mitigation shall be submitted by or on behalf of the appellants 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. However, under no circumstances should the appellants' reinstatements be delayed pending resolution of any potential back pay dispute.

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
THE 5TH DAY OF SEPTEMBER, 2018



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

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and
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(CONSOLIDATED)

**IN THE MATTER OF GARY BODE,
EAST JERSEY STATE PRISON.**

OAL DKT. NO. CSR 18358-17
2018-1671

**IN THE MATTER OF FRED O'CALLAGHAN,
EAST JERSEY STATE PRISON.**

OAL DKT. NO. CSR 18648-17
2018-1708

Kevin Jarvis, Esq., for appellants Gary Bode and Fred O'Callaghan (O'Brien, Belland & Bushinsky, attorneys)

Jessica Saxon, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: June 19, 2018

Decided: August 1, 2018

BEFORE SUSANA E. GUERRERO, ALJ:

STATEMENT OF THE CASE

Correction lieutenants Gary Bode ("Bode") and Fred O'Callaghan ("O'Callaghan") (collectively appellants) appeal the decisions of the New Jersey Department of Corrections (NJDOC), East Jersey State Prison (EJSP or "respondent"), to remove them from their employment. The removals stemmed from a determination that the appellants failed to properly respond to an incident at EJSP on August 26, 2017, and that this was

detrimental to the orderly operations of the facility and jeopardized the safety and security of EJSP, including its staff.

PROCEDURAL HISTORY

Respondent issued a Preliminary Notice of Disciplinary Action (PNDA) dated October 6, 2017, notifying Bode of the charges made against him concerning his response to an emergency code. (J-3.) An internal disciplinary hearing took place on November 15, 2017, and a Final Notice of Disciplinary Action (FNDA) was issued on December 7, 2017, which sustained all charges in the PNDA. (J-1.)

O'Callaghan was also issued a PNDA dated October 6, 2017, notifying him of the charges made against his response to an emergency code. (J-4.) A departmental hearing was held on November 28, 2017, and an FNDA was issued on December 15, 2017, sustaining the charges listed in the PNDA. (J-2.)

Bode and O'Callaghan each requested a hearing, and the appeals were filed with the Office of Administrative Law (OAL) on December 11, 2017, and December 20, 2017, respectively, to be heard as contested cases pursuant to N.J.S.A. 40A:14-202(d).

In the interest of fairness and efficiency, the undersigned consolidated the appeals on February 5, 2018, pursuant to appellants' request, and without objection from respondent. The matter was heard over the course of four days, April 4, April 5, May 11, and June 18, 2018, and the record closed on June 19, 2018, upon the undersigned's receipt of a copy of an exhibit.

CHARGES

The sustained charges in Bode's December 7, 2017, FNDA and O'Callaghan's December 15, 2017, FNDA are identical. They include the following: conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); neglect of duty, N.J.A.C. 4A:2-2.3(a)(7); other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12); and violations of the following provisions of Human Resources Bulletin 84-17, as amended: serious mistake due to

carelessness but not resulting in danger to persons or property (B.7); conduct unbecoming an employee (C.11); violation of administrative procedures and/or regulations involving safety and security (D.7); and violation of a rule, regulation, policy, procedure, order, or administrative decision (E.1).

The incidents giving rise to these charges are as follows:

On 10-06-2017 Administration received a completed investigative report from S.I.D. based on an incident on 8/26/2017 where you responded to an incident in the General Population big yard, unsuited and without following proper procedures, policies or administrative guidelines. Your actions were detrimental to the orderly running of the facility and jeopardized the safety and security of the institution. In addition your actions jeopardized the safety of medical and custody staff members.

FACTUAL DISCUSSION

Most material facts in this matter are undisputed, and I, therefore, **FIND** the following to be the relevant and credible **FACTS** in this matter:

Bode became employed by the NJDOC in July 2006, and became a lieutenant at EJSP in March 2016. On August 26, 2017, he was the first-shift operations relief lieutenant at EJSP.

O'Callaghan has been employed by the NJDOC since approximately 2000. He was promoted to lieutenant in or around July 2012. On August 26, 2017, O'Callaghan was the first-shift area lieutenant, and his area of responsibility included the Big Yard.

On the morning of Saturday, August 26, 2017, Bode and O'Callaghan, as lieutenants, were the highest ranking officers at EJSP. EJSP staffs fewer officers and supervisors on weekends.

During the first shift on August 26, 2017, there was a physical altercation between two inmates in the EJSP's Big Yard, which is an enclosed large outdoor area,

approximately the size of two football fields, where a sally-port¹ leads into the prison. The fight occurred during a movement (i.e., when a large number of inmates were being moved in groups from the Big Yard back to their cells). There were approximately 190 inmates in the Big Yard prior to the movement.

Upon witnessing the two inmates fight, Officer Bennett, who was assigned to the Big Yard, called a Code 33.² There were approximately ninety-seven inmates in the Big Yard at the time the Code 33 was called, in addition to the two inmates involved in the fight.

When the Code 33 was called, O'Callaghan responded by approaching the gates to the Big Yard. Bennett informed him of the fight he had witnessed, and that one inmate picked up the other and slammed him to the ground, and that the inmate was dropped on his head. From the gate area (at the entrance to the yard), O'Callaghan witnessed the injured inmate (inmate W.) convulsing on the ground.

The inmate who injured inmate W., inmate M., obeyed orders to approach the gate to be taken out of the yard. He was handcuffed and escorted out of the Big Yard without incident. This occurred before O'Callaghan entered the yard. O'Callaghan then saw that the injured inmate had stopped convulsing and was motionless, and he ordered Bennett to open the sally-port gate to the Big Yard so that he could enter the yard and assess the injured inmate. O'Callaghan called a Code 53 at that time.³ He also yelled over the radio for a suited team.⁴

O'Callaghan was followed into the yard by approximately nine officers. He did not order them to follow him into the yard. O'Callaghan and these other officers entered the yard unsuited, not wearing any protective gear.

¹ A sally-port consists of a holding area with two gates that controls movement going into and out of the prison from the yard.

² A Code 33 is an emergency code, for an inmate fight or disturbance.

³ A Code 53 is a medical emergency.

⁴ "Suited" refers to wearing protective gear, including a helmet and a protective vest, and carrying a baton. Some officers are also required to carry shields as part of a suited team, and the supervisor would have an MK46 spray (a type of mace used for crowd control, also referred to as an MK9).

While inmate M. was being taken out of the yard, and before O'Callaghan entered, the ninety-seven inmates were ordered to retreat to the far end of the Big Yard (the distance being about half of a football field), away from the injured inmate. They all complied with the directive to walk to the end of the yard and face the fence.

Sgt. Anthony Vargas, the operations sergeant, responded to the Code 33 by arriving at the gates of the Big Yard with his team of thirteen officers.

Once the inmates were at the other end of the Big Yard, O'Callaghan entered the yard and ran directly to the injured inmate. O'Callaghan checked the pulse of inmate W., and medical staff arrived within a minute or two of O'Callaghan approaching the injured inmate. O'Callaghan remained with the injured inmate and the medical staff in the yard for approximately ten to fifteen minutes, until the inmate was carried away on a stretcher.

Vargas entered the Big Yard with his team, and they ordered the ninety-seven inmates to lay on the ground, put their hands behind their heads, and cross their legs, as a protective measure. He and his team created a barrier between the ninety-seven inmates and inmate W., O'Callaghan and the other officers accompanying him, and medical staff. Vargas ordered the unsuited officers to leave the yard. Vargas and his team were all suited.

After the codes were called, Bode also responded to the Big Yard without wearing any protective gear.

Vargas radioed Stephen Linardos, the Star sergeant, requesting a second response team and MK46. Vargas maintains that Bode denied his request for a second team and MK46, which prompted him to then call Center Control⁵ to make a subsequent request for a second team and mace. The mace was delivered to Vargas in the yard, and a second team was never sent.

⁵ Center Control is the unit that coordinates the security and communication functions in the facility.

Once the injured inmate was taken out of the yard, accompanied by O'Callaghan and medical staff, Vargas instructed his team to exit the yard. However, Bode stopped Vargas and instructed him to remain in the yard with his team, and Bode left the yard to speak with Linardos on a landline about moving the inmates out of the yard. Once Bode left the yard, Vargas, contrary to Bode's order, directed his team to exit the yard. As they were exiting the yard, O'Callaghan radioed Vargas with instructions to exit the yard. Vargas and his team later moved the ninety-seven inmates back into the building without incident.

O'Callaghan prepared an Unusual Incident Report in response to the incident. Bode wrote a report of the incident after he was instructed to do so two days after the incident. These reports do not mention that any officers entered the yard unsuited on August 26, 2017.

Respondent asserts that Bode and O'Callaghan violated several provisions of at least three EJSP Internal Management Procedures (IMPs), as well as the Law Enforcement Personnel Rules and Regulations. These are listed below:

IMP for Emergency Response

EJSP's IMP for Emergency Response (J-6) states: "Custody Staff members are reminded to assess the risk to themselves and other staff members and act appropriately. Common sense and sound judgement as well as a sense of duty shall guide staff in their decision making process."

When responding to an emergency, the IMP specifically states the following with regard to an Initial Response Team:

One (1) Supervisor and five (5) Officers will be dispatched from the Star for all disturbance codes that occur on housing units, shops, and other areas with the exception of the Mess Hall, Yards and Drill Hall or other self contained secured area with no staff or visitors present. The designated Supervisor will be issued the emergency Response Belt. Designated Response Officers are issued batons (marked with red tape)

and handcuffs at the beginning of their respective Shift. **The Initial Response Team for the Mess Hall, Yards and Drill Hall (or other self contained secured area) will consist of one (1) Supervisor and thirteen (13) Officers suited in protective gear.**

[Emphasis added.]

With respect to the Secondary Response Team, the IMP states:

One (1) Supervisor and ten (10) Officers suited in protective gear will be dispatched from the Star for all disturbance codes that occur on housing units, shops, and other areas with the exception of the Mess Hall, Yards and Drill Hall or other self contained secured area with no staff or visitors present. **The Secondary Response Team for the Mess Hall, Yards and Drill Hall (or other self contained secured area) will consist of one (1) Supervisor and thirteen (13) Officers suited in protective gear.**

[Emphasis added.]

The IMP for Emergency Response states that when a Code 33 is called,

the Star Sergeant will clear the immediate area of all inmates and seal the barrier doors to the unaffected areas. The Star Sergeant will give out the Emergency Response Belt (handcuffs, leg irons, MK-9 spray and keys as needed) to the Initial Response Supervisor (affected Area Sergeant or first available supervisor). . . . **The Initial Response Supervisor will be in charge of the scene and must use sound judgement and take control of the situation. . . .**

If a major disturbance occurs in the Mess Hall, Yard Area, Drill Hall or other self contained secured area with no staff or visitors present, the Initial Response Team will consist of 13 officers and one supervisor equipped with helmet, vest and baton from the Pass Office ready Room. Five members of this team will be assigned protective shields. The supervisor will also have the MK-9 OC spray. Once the team is suited they shall proceed to the area of the emergency as one unit. The highest ranking staff member present shall assess and determine whether the Response Team will enter the affected area to control the disturbance based on safety and security concerns and

the totality of the circumstances. A Secondary Response Team shall be assembled in the Rotunda consisting of 13 officers and supervisor suited with the same equipment as the first team. The first team will not enter the affected area until the secondary team is assembled. If the secondary response team is advanced to the affected area, a third team will be assembled in the Rotunda with the necessary equipment, utilizing equipment from the Arsenal if necessary.

[Emphasis added.]

With respect to responding to a Code 33 in the yards, the IMP states in part:

All unit and area activities will be terminated, all movement will be suspended and all compounds will be secured. Civilian traffic within the confines of the institution will be controlled accordingly. These areas cannot be entered until an assessment of the situation can be made. If the involved inmates comply with all staff directives and report to a sally-port for removal then only the necessary officers and supervisors will be dispatched with any necessary equipment. If the situation involves non-compliant inmate(s) and entry may be required then the Initial Response Team (13 Officers) will suit up with protective gear and respond to the area. This team may enter via any entry point as deemed appropriate by the on-scene supervisor or Shift Commander. A Secondary Response Team (13 Officers) will suit up with protective gear and stand-by for assignment.

Note #1: The first team may only enter the area when the second team is prepared. Any additional staff and/or equipment will be sent to the area upon request of the on-scene supervisor or as directed by the Shift Commander

IMP for Operations Lieutenants

EJSP's IMP for Operations Lieutenants (J-7) states, in part:

Whenever an emergency code is called by Center and/or the "Whooper" alarm is activated, the Operations Supervisor on duty will secure the outermost entrance door to the Operations Unit and report to the Star for emergency response assignment until the emergency is cleared by the Center.

Nothing in this document shall preclude an Officer or Supervisor from responding to the aid of another staff member. Custody Staff members are reminded to assess the risk to themselves and other staff members and act appropriately. Common sense and good judgment as well as sense of duty shall guide staff in their decision making process

IMP for Area Lieutenants

The IMP for Area Lieutenants (J-8) addressing responding to a Code 33 states, in part:

All inmates in the affected area are to be secured in their assigned cells/dormitory or an unaffected area. In unaffected areas officers are to ensure that all inmate movement into and out of the unit/area ceases until the Shift Commander clears the emergency code.

It later states:

Nothing in this document shall preclude an Officer or Supervisor from responding to the aid of another staff member. Custody Staff members are reminded to assess the risk to themselves and other staff members and act appropriately. Common sense and good judgment as well as sense of duty shall guide staff in their decision making process.

The EJSP IMP for Operations Lieutenants and the IMP for Area Lieutenants both require those lieutenants to be knowledgeable of all posts and written decrees within their areas of responsibility and ensure staff compliance with all post orders, rules, regulations, policies, procedures, and administrative decisions. (J-7; J-8.)

NJDOC's Law Enforcement Personnel Rules and Regulations

Article II, Section 3, of the NJDOC's Law Enforcement Personnel Rules and Regulations reads: "Officers shall devote their full attention to their assignments to ensure

that all duties are performed in accordance with current rules and regulations. Lack of diligence on the part of officers will not be tolerated.” (J-5.)

Testimony

For Respondent

Assistant superintendent Jeffrey John Crothers (“Crothers”) was promoted to assistant superintendent at the NJDOC in August 2017, and has more than seventeen years of experience with the Department. He testified as an expert for respondent, particularly with respect to EJSP’s policies and procedures concerning emergency response.

Crothers began his employment at EJSP in August 2017, but was on vacation on August 26. On August 28, he participated in an administrative review of the events that occurred on August 26, which consisted of reviewing video surveillance⁶ and reports issued of the incident. The team conducting the review then referred the matter to the NJDOC’s Special Investigations Division (SID) for an investigation. Those involved in the SID investigation determined that Bode and O’Callaghan should be disciplined, and the administrator and the Office of Employee Relations called for their removal.

Crothers testified that it was a violation of EJSP policy for O’Callaghan and Bode to enter the yard unsuited, and that there is a general rule that officers do not go into the Big Yard. He believes that there were another nine officers, approximately, who also entered the yard unsuited, and that they did so because they were following their leader, O’Callaghan.

Crothers also noted that O’Callaghan omitted things in his report, and that Bode did not even write a report until ordered to do so days later. Their reports improperly failed to indicate that they, or other officers, entered the yard unsuited.

⁶ The incident was recorded on multiple video cameras, and footage of the August 26, 2017, incident was viewed at the hearing.

Crothers testified that when the Code 33 was called, policy required that the Tie-To⁷ be cleared first (by Linardos and his General Assignment officers). O'Callaghan and his response team should have gone to the Ready Room to get suited. A second team also should have gone to the Ready Room to suit up, and, once suited, both teams should have gone to the Star⁸ together. Bode should have suited up that second team, which would have been led by a sergeant, in this case, Vargas. The first team, led by O'Callaghan, would have entered the yard to assess the situation, make the calls, and bring the aggressor through the sally-port. Bode would have remained at the Star, and the second team would have stayed in the prison and only have gone into the yard if necessary. This, according to Crothers, is consistent with the IMP for a Code 33 occurring in a mass-movement area, such as the Big Yard, and should have occurred here. Crothers considered O'Callaghan to be the initial-response supervisor, and, pursuant to the IMP for Emergency Response, he was also required to report to the Star and take charge of all subsequent operations and response teams, and ensure that his compound is secure and under control. This did not occur.

Crothers testified that the response to the Code 33 was initially chaotic and that the central hub of the jail was not being controlled. For example, some inmates who had moved out of the Big Yard to go back to their cells and were passing through the Tie-To at the time the Code 33 was called, walked around, instead of through, the metal detector. Crothers did agree, however, that it was the duty of the Star sergeant to secure the Tie-To, lock down the area, and stop any and all movement, and that this did not appear to have been done.

Crothers describes O'Callaghan's (and his accompanying officers') response on August 26 as one that would have been proper had the code been called in a housing unit, a hallway, or a shop. However, since the code occurred in the Big Yard, the IMP requires that there be, at a minimum, twenty-six suited officers (thirteen as part of the

⁷ The Tie-To is an area in the jail that contains metal detectors and leads to several areas in the jail, including the Big Yard.

⁸ The Star is a central location in the prison that houses the Star sergeant, who controls movement inside the jail.

Initial Response Team and thirteen as part of a Secondary Response Team) and two suited supervisors.

Crothers agreed that O'Callaghan properly called the Code 53. Crothers testified that the two nurses should have arrived with an officer and two inmate porters, but they arrived without them due to the urgency with which O'Callaghan called the code.

With respect to Bode, Crothers testified that Bode should have come out of operations and should have taken control of the floor when the Code 33 was called. He should not have been in the yard at all. Crothers criticized Bode for denying Vargas's request for an MK46 and a second team. Crothers described Bode's order to Vargas to remain in the yard as "reckless" and "unreasonable," but not unlawful, and he agreed that Vargas disobeyed Bode's orders to remain in the yard and pat down the ninety-seven inmates in the yard. Crothers believes Bode abandoned Vargas and his team, and that the situation in the yard was not safe. Crothers agreed that O'Callaghan made the right decision by having Vargas leave the yard. Once the aggressor and victim were removed from the yard, the staff should have exited.

While Crothers recognized that errors were committed by other officers in responding to the code, only the lieutenants were disciplined.

Crothers testified that he believed that there were inmates in the sally-port who were being moved into the prison from the yard at the time the Code 33 was called. He testified that when an emergency code is called and recreation is in progress, recreation officers are to immediately lock both sally-port gates and lock down the yard. According to Crothers, however, Bennett led the twenty-five inmates into the sally-port, did not lock it down or let them go out, and when O'Callaghan ordered the gate opened, there were fifty inmates, instead of just the twenty-five, moving into the prison at once. Crothers, however, concedes that this is not documented in any report and is based on his reasonable belief. Bennett's report only mentions that he was ordered to open the gate so that O'Callaghan could enter the yard.

Crothers testified that familiarity with the IMPs is part of lieutenant training. There is a ten-day mandatory course prior to becoming a lieutenant, and one course addresses how to be a competent leader. He taught emergency response, which Bode attended. O'Callaghan also received emergency-response training at the academy.

Following this incident, EJSP majors, lieutenants, sergeants, and officers were retrained on emergency response, and changes to policy were made. Now, for example, custody staff must receive administrative approval from the shift commander prior to entering the yard during a code when the yard is occupied by inmates.

Sgt. Stephen Linardos ("Linardos") has been employed by the NJDOC for eighteen years and has held the position of sergeant at the EJSP for five and a half years. He has been the Star sergeant at EJSP for approximately two years, and served as Star sergeant on August 26, 2017.⁹

Linardos was at the Star when Bennett called the Code 33. When the code was called, all the custody staff that was in the Tie-To responded to the Big Yard, and Linardos testified that they should have gone to the Star before exiting. When the code was called, inmates were left in the Tie-To area that had to be secured, and Linardos tried to get them back into their wings, and temporarily secured them in a holding cage.

Linardos recalled that O'Callaghan called a Code 53, and said "Call 911" and "I need that suited team now" over the radio, at which point Vargas's suited team was dispatched.

Linardos recounted that Bode called from the yard and stated that they would start sending inmates back inside the prison. Linardos told him not to do so because most of the custody staff was in the yard.

Sgt. Anthony Vargas ("Vargas") has been employed by the NJDOC for fifteen years, and has been a sergeant at EJSP since July 2011.

⁹ As a Star sergeant, Linardos handles scheduling, calls out mass movements, and sets up emergency-response teams in the event there is an emergency.

Vargas was the operations sergeant on August 26, 2017. When Bennet called the Code 33, Vargas proceeded to the Star. Linardos told him that the Initial Response Team went out to the yard, and that he needed to suit up in the Pass Office with the other officers. Vargas was in charge of suiting up, and he put on his gear and counted his thirteen officers. He then heard O'Callaghan's radio transmission that he needed a suited team to the yard ASAP. According to Vargas, O'Callaghan was yelling on the radio, and Vargas's initial thought was that an officer was down.

Vargas did not know what Bode was doing in the yard. Vargas radioed the Star and asked for cans of mace and for the second team to come to the gate. Vargas testified that Bode went on the radio and said that Vargas did not need the additional mace or team, and Vargas then radioed the shift commander requesting the same.

Vargas ordered his team to leave the yard once the injured inmate exited the yard with the medical staff because he believed it was unsafe to stay in the yard. He testified that Bode had ordered him to keep his team in the yard, and that Bode wanted them to pat down the inmates, ten at a time, in the yard before sending them inside. Vargas explained to Bode why it would be unsafe to pat down prisoners in the Big Yard. Bode radioed Linardos to tell him that he was going to send the yard in, but Linardos radioed Bode back asking Bode to call him on the landline. Bode then left the yard to call Linardos, and Vargas made the decision to have his team exit the yard despite Bode's order to stay in the yard.

Vargas drafted two reports in response to the incident. The first, a Preliminary Incident Report, was written less than two hours after the August 26 incident. (R-8.) Vargas then prepared a Special Custody Report on August 28, 2017. (R-9.)

After this incident, Linardos did a "debriefing" for the officers about being suited in the yard, and Vargas also verbally counselled the officers that they should never go into the yard, mess hall, or drill hall unsuited during an emergency.

Senior correction officer Larry Clouse ("Clouse") has been a senior correction officer since 1997, and has worked at EJSP since 2004. Currently, he is a General Assignment officer at EJSP.

Clouse was part of Vargas's response team on August 26, 2017. While in the Ready Room, Clouse heard O'Callaghan calling that he needed a team "now," screaming and hollering and indicating that he needed a suited team. O'Callaghan's panicked tone caused Clouse to think that they had possibly lost a cop.

Clouse was concerned in the yard because the officers were significantly outnumbered by the inmates, and that it could have turned into a hostage situation. He recalled Vargas telling Bode that the inmate was removed from the yard and that he wanted the team out of the yard, but that Bode denied this request and instead contacted Center by radio to ask if they were ready for the yard to return. The radio transmission asked Bode to call back immediately.

Clouse wrote a Special Custody Report four days after the incident because he was asked to do so. (R-10.)

Senior correction officer James Vincent Colacci ("Colacci") became employed by the NJDOC in 2017 as a correction officer recruit. On August 26, 2017, he was working in the Tie-To. He responded to the Code 33 with officer Eddie Parin and another officer. They ran over to the inmate that was on the ground and stood by him. He ran in unsuited because he did not want to let O'Callaghan run in alone, but he was aware that he was required to be suited in the yard. He later left the yard when Vargas ordered him to do so. He drafted a Special Custody Report on August 26, 2017. (R-11.)

Patrick Nogan ("Nogan") is an administrator with the NJDOC, where he serves as chief executive of EJSP. He has served in this position for approximately four years, and has twenty years of experience with the NJDOC.

Nogan became aware of the August 26 incident when he received an email from the shift commander advising him of the Code 33 yard incident. Approximately two days

later, he received a written complaint from the PBA vice president and an executive board member of the sergeants unit alleging that what was reported concerning the events was not accurate, and that what occurred jeopardized security and put the officers in danger. He scheduled an emergency meeting with several majors, the assistant superintendent, and the associate administrator. They reviewed the reports and the video of the incident to determine whether there was any validity to the union's complaint. He was shocked and dismayed, and stated that he had never seen anything that egregious, reckless, and dangerous in a correctional facility. These actions put not only the officers' lives at risk, but also those of the inmates, and jeopardized public confidence and trust. Nogan testified that the slightest miscalculation could have resulted in total loss of custody control of the facility. He referenced that the sally-port gates were open and inmates could have rushed the Tie-To, where there was not enough staff to handle it.

After consultation with the management team, it was determined that only the leaders (i.e., lieutenants) of this reckless and dangerous situation should be disciplined. The "reckless leadership," retreating to safety and leaving the staff in danger, and ordering the staff to stay in a very dangerous situation, constituted a "deliberate" violation of policy. Nogan testified that while he is familiar with the policies, he is not an expert.

Nogan criticized Bode's and O'Callaghan's failure to properly report the incident. Bode purposefully failed to write a report, which he should have written since he was involved in the incident, and had to be ordered to do so days after the incident. According to Nogan, O'Callaghan made purposeful omissions in his report.

After the incident, there was a "refamiliarization," not a "retraining," with the security major and supervisors to go over emergency-response procedures. A written order was also put out prohibiting a lieutenant from ordering entry into any yard or mess hall without first consulting the on-call.

For Appellants

Senior correction officer Edward Parin ("Parin") was employed by the NJDOC, at the EJSP facility, for the past seven years. He is a General Assignment officer.

When the Code 33 was called, Parin was standing in the Tie-To scanning the movement. Parin responded to the sally-port at the moment inmate W. was making his way to the sally-port. Parin cuffed and escorted him to the infirmary with other officers.

Parin recalled Vargas asking for mace over the radio at least twice, and that it sounded urgent. Parin went to Linardos at the Star, who already had the mace ready, and Parin took it into the yard. Parin was not suited when he entered the yard. Vargas ordered Parin to leave the yard as soon as he brought in the mace. He could not remember the other officers, aside from Bode and O'Callaghan, who were not suited in the yard. He prepared a Special Custody Report for the incident. (A-2.)

Within two to three weeks of the incident, Parin was verbally counseled by Vargas about "being more mindful."

Senior correction officer Edwin Cordova ("Cordova") has been employed by the NJDOC for eighteen years. He is a senior correction officer, and has been assigned to EJSP since 2002. On August 26, 2017, he was a General Assignment officer assisting Bennett in the Big Yard. He was at the sally-port gate when the inmates were being moved from the yard back into the building. Cordova was asked to open the sally-port gate when the Code 33 was called. He testified that there were no inmates in the sally-port at the time the code was called. Cordova entered the yard with O'Callaghan and other officers. He was unsuited. Cordova then went back to the sally-port and assisted with returning the inmates back into the building. Cordova authored a report on August 26, 2017, concerning this incident. (A-3.)

Fred O'Callaghan has been employed by the NJDOC since approximately 2000, and was promoted to lieutenant in approximately July 2012.

While O'Callaghan did receive lieutenants training, and other training at EJSP, he testified that he never received training for responding to an emergency in the EJSP yard. He also testified that he was never instructed not to enter the yard unsuited while inmates were present.

O'Callaghan could not remember exactly where he was when the Code 33 was called, but it was somewhere near the Tie-To or Star. He responded to the code as the area lieutenant, and his job was to respond to the area and assess the situation. As area lieutenant, he would never go to the Star and suit up as part of a team. O'Callaghan testified that he acted consistently with the IMP for Area Lieutenants.

When O'Callaghan heard the code and approached the yard, there were officers in the sally-port, including Officers Parin and Schuler. O'Callaghan also entered the sally-port, and there he asked Bennett about what had happened in the yard. O'Callaghan then ordered inmate M. to the gate, and ordered the other inmates to move to the other side of the yard, about half a football field away. They all complied with the orders. When inmate M. approached the gate, the gate was cracked open about a foot and a half, and then immediately shut. Inmate M. was handcuffed and escorted out. When inmate M. was at the gate, O'Callaghan called for a suited team to escort the inmate out. Vargas was in the sally-port with O'Callaghan before they entered the yard.

When O'Callaghan ordered inmate M. to the yard gate, he saw inmate W. going into convulsions and shaking violently on the ground. When the inmate stopped moving, O'Callaghan thought that he may have stopped breathing or had a broken neck. He then ordered Bennett to open the gate so he could enter to check the inmate's vitals. O'Callaghan testified that custody has an obligation to perform CPR when medical staff is not available. When he entered the yard, the inmates were on the far side of the yard, laying on the ground in compliance with the orders given.

O'Callaghan testified that he never ordered any officer to go into the yard with him, and he never believed that ordering the gate opened, and entering unsuited, placed anyone in danger.

O'Callaghan called the Code 53 after inmate M. was removed from the yard. He was not panicked when he called the Code 53, but did call with a sense of urgency. He never had concerns regarding the medical team's safety. In the yard, while tending to the

injured inmate, O'Callaghan heard Vargas urgently call for more mace. O'Callaghan estimates that he was in the yard for a total of approximately ten to fifteen minutes.

When O'Callaghan left the yard with the injured inmate, medical staff, and another officer, he met with Linardos at the Star. They still had approximately forty to fifty inmates in the Tie-To holding cage. He testified that they were going to move the inmates held in the holding cage out first, to get them back to their housing units, and then begin to slowly remove the inmates from the yard, ten at a time. After speaking with Linardos, O'Callaghan went back to the yard area, where he informed Vargas that they would empty the holding cage before letting inmates out of the yard.

O'Callaghan prepared an Unusual Incident Report and emailed it to the facility major and his secretary.¹⁰ He denied intentionally leaving anything out of his report, as he did not feel that it was pertinent to mention in the report that he entered the yard unsuited. Moreover, he never denied that he went in unsuited.

Gary Bode began his employment with the NJDOC in July 2006, and became a lieutenant at EJSP in March 2016.

Bode received two weeks of training when he became a lieutenant, but he did not receive any training on how to respond to a code in EJSP's Big Yard. He agreed that he was ill-prepared by the NJDOC to handle an emergency response. To prepare for any emergency response, he read the IMPs.

Bode asserts that this matter was initiated against him because members of the administration and Vargas had an issue with him. In January 2017, a major issued a letter of instruction alleging that Bode violated the chain of command with respect to his handling of inquiries concerning the calculation of overtime. Vargas then filed an Equal Employment Division (EED) complaint against Bode in December 2016 that was determined to be unfounded in December 2017. Vargas filed another EED complaint against Bode in November 2017, which was found to be administrative in nature.

¹⁰ The Unusual Incident Report is not in evidence.

When the Code 33 was called, Bode was on the second floor; he went downstairs, started walking towards the Star, and then he heard the Code 53. Linardos mentioned that he was putting teams together, and Bode wanted to see what was happening in the yard. In his experience, the lieutenant does not suit up with the team. When he arrived at the gate to the yard, he saw all the inmates lying on the floor, and he saw the injured inmate having a seizure. Bode then went back inside to see if Linardos needed anything.

Since O'Callaghan was handling the one injured inmate, Bode went into the yard to provide an overall assessment of the incident. Bode testified that in the yard, Vargas was getting jumpy, was loud and in a panic, and Bode kept telling him to calm down. Vargas then started calling out for a second team and for an MK9, which he should have had with him. However, Bode testified that he never denied Vargas's requests for an MK9 and a second team.

Bode saw O'Callaghan and the injured inmate exit the yard, so he radioed Linardos at the Star to ask him to let him know when the area was clear to start bringing the inmates into the building. Linardos asked Bode to call him on the landline, and during that time Vargas is saying "we are not supposed to be in here" loud enough for other officers and inmates to hear him. Bode told Vargas to relax, and that he was going to make a phone call and would be right back. He went to speak with Linardos about clearing out the yard. Bode left to make the call to Linardos, and Vargas disobeyed his direction and left the yard. On the phone, Linardos told Bode that there were no officers in the Tie-To.

Bode later told Vargas that he was insubordinate for not following his order. Vargas told Bode that he did not have to be in the yard since nobody was in danger.

Bode asserts that no IMP or other policy explicitly prohibits one from entering the yard unsuited. According to the Post orders for operations lieutenant, he was required to go to the Star in an emergency, which he did. Bode conceded that according to the IMPs, he was supposed to report to the Star and remain there until the code had cleared. (J-7 at 13.)

Bode did not write a report on the day of the incident because, according to him, he had no impact on the code, and he has never had to write a report in response to a Code 33 or Code 53. His major asked him to write a report days later. The only thing he left out of his report was his argument with Vargas that day because he felt that he had already dealt with it. His report did not mention unsuited officers, because he was unaware of anyone in the yard who was unsuited, and there was no purpose to document that or the fact that he was unsuited. He believes that he and other officers in the yard were not required to be suited, and that they would only have to be suited if there was a noncompliant inmate. He never felt that they were in danger in the yard, because the inmates were compliant.

Robert D. LaPenta ("La Penta") has been employed for twenty-six and a half years with the NJDOC. He became a lieutenant in 2005, and worked at EJSP from 1996 until approximately June 2018, at which time he transferred to the correctional staff training facility in Sea Girt. He was a training lieutenant at the time of this incident (and since 2013), and testified that he only trained custody staff on emergency response in this facility after the August 26, 2017, incident.

LaPenta testified that the IMPs cannot cover every situation. One main objective of officers is the preservation of human life and the security of the institution, and he mentioned the importance of using good judgment and common sense when a policy does not apply to a specific situation.

In his thirteen years of experience as a lieutenant, he has never seen a lieutenant as part of a suited team, and he, himself, was never part of a suited team as a lieutenant.

ADDITIONAL FINDINGS OF FACTS

When assessing credibility, inferences may be drawn concerning the witness's expression, tone of voice, and demeanor. MacDonald v. Hudson Bus Transp. Co., 100 N.J. Super. 103 (App. Div. 1968). Additionally, the witness's interest in the outcome, motive, or bias should be considered. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which

it “hangs together” with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

After reviewing the exhibits and documentary evidence presented and after having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to be the additional relevant and credible **FACTS** in this matter:

When O’Callaghan presented to the gate to the Big Yard, he was responding to the Code 33. Crothers testified convincingly that O’Callaghan presented as the initial-response supervisor and, as such, the IMPs for responding to a Code 33 in the yard required that, prior to entering the yard, O’Callaghan present to the Ready Room to get suited with the required protective gear and thirteen officers, and that this initial suited response team not enter the yard until the second response team is assembled. While Vargas and his suited team were present when O’Callaghan entered the yard with several unsuited officers, O’Callaghan did not have the required number of officers with him to constitute a complete team, and O’Callaghan and his team failed to suit up as required by the IMPs. This, in turn, jeopardized the safety and security of the medical staff, the other unsuited officers, and O’Callaghan himself. O’Callaghan’s running into the yard unsuited also created a disruption to the orderly running of the facility, in that it caused the officers in the Tie-To to abandon their posts to follow O’Callaghan, their leader, into the yard while inmates passing through the Tie-To avoided the metal detectors before being shepherded into a holding cage. O’Callaghan’s running into the yard unsuited also created a disruption to the orderly running of the facility because it caused other officers to follow O’Callaghan into the yard without being suited, jeopardizing the safety of all those involved in the response to the code.

Despite assertions made by Crothers and Nogan that the sally-port gates were left open by O’Callaghan (leaving the jail vulnerable because the inmates in the yard could

have rushed the Tie-To), and that O'Callaghan ordered the gate opened while there were twenty-five inmates held there (resulting in a disruption in the movement and an influx of twenty-five additional inmates into the jail during the lock-down), no reliable evidence presented substantiated these allegations.

Crothers testified credibly that Bode should not have entered the yard at all and that the IRP for Operations Lieutenant required that he respond to the Star once the code was called and remain there until the emergency was cleared. While Bode may have initially responded to the Star, he did not remain there until the emergency was cleared. This constitutes a violation of EJSP's IMP for Operations Lieutenants. Moreover, while Bode argues that no IMP specifically requires all custody staff to be suited when entering the yard, as Crothers testified, the IMPs addressing emergency responses in the yard expressly require all those responding to the code to be suited in protective gear. Bode's entering the yard unsuited during the code ran contrary to EJSP procedures, showed poor judgment, and jeopardized, at a minimum, his own safety.

Finally, Bode concedes that he instructed Vargas and his team to remain in the yard with the ninety-seven inmates despite Vargas's attempts to leave the yard once the injured inmate and all those attending to him were no longer in yard. While Bode maintains that his order was reasonable and that there was no danger to Vargas or his team because the inmates were compliant, Vargas, Clouse, and Crothers testified credibly that it was unsafe to stay in the yard, in part because they were significantly outnumbered by the inmates. Bode did not offer any convincing justification for prohibiting Vargas and his team from leaving the yard once the injured inmate had been removed, and his order to Vargas showed poor judgment and was reckless. The fact that O'Callaghan later ordered Vargas to exit the yard (after Bode had directed Vargas to stay) only highlights the unreasonableness of Bode's order.

Finally, while Bode and O'Callaghan were required to be familiar with IMPs, rules and regulations that apply to them as lieutenants at EJSP, and while they received general emergency-response training as part of their lieutenants training, both O'Callaghan and Bode testified credibly that they were never specifically trained on how to respond to a code in the EJSP Big Yard, and they were never specifically instructed

not to enter the yard unsuited while inmates were present. In carrying out their duties, however, both lieutenants were required to use sound judgment and common sense, and to follow the applicable IMPs.

LEGAL ANALYSIS AND CONCLUSION

Under the Civil Service Act, a public employee may be subject to major discipline for various employment-related offenses, N.J.S.A. 11A:2-6. In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

Neglect of Duty

O'Callaghan and Bode are both charged with "neglect of duty," N.J.A.C. 4A:2-2.3(a)(7). "Neglect of duty" has been interpreted to mean that "an employee . . . neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009) (citation omitted), adopted, Civil Service Commission (March 27, 2009), <http://njlaw.rutgers.edu/collections/oal/>. The term "neglect" means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" means conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job.

O'Callaghan

In the within matter, O'Callaghan entered the Big Yard unsuited, and this predictably caused other officers to follow him into the yard, also unsuited. Entering the yard unsuited, and without a team of thirteen suited officers, constitutes neglect of duty not only because O'Callaghan's response to the Code 33 runs counter to the IMP for Emergency Response, but because he failed to ensure the safety of the officers who accompanied him and the medical staff. This clearly constituted a breach of the duty owed by O'Callaghan to the performance of his job as a lieutenant in a State prison.

Based upon the foregoing, I **CONCLUDE** that the appointing authority has proven by a preponderance of the credible evidence that the charge of neglect of duty, N.J.A.C. 4A:2-2.3(a)(7), should be sustained as to Fred O'Callaghan.

Bode

With respect to Bode, the IMP for Operations Lieutenants required that he report to the Star and remain there until the emergency had cleared. Instead, he entered the yard and did so without any protective gear, risking his safety. Bode also unreasonably ordered Vargas and his team to remain in the yard, and in a potentially dangerous situation, when their presence there was no longer necessary. Bode's order to Vargas was reckless and unnecessarily jeopardized the safety and security of Vargas and his response team.

Based upon the foregoing, I **CONCLUDE** that the appointing authority has proven by a preponderance of the credible evidence that the charge of neglect of duty, N.J.A.C. 4A:2-2.3(a)(7), should be sustained as to Gary Bode.

Conduct Unbecoming a Public Employee

O'Callaghan and Bode are also charged with "conduct unbecoming a public employee," N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an

elastic phrase that 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 Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances “be such as to offend publicly accepted standards of decency.” Karins, 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)).

Appellants’ status as lieutenants in a prison setting subjects them 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.” Twp. 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).

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).]

O'Callaghan

The charge of conduct unbecoming, with respect to O'Callaghan, is supported by his mishandling of the code, which constituted a violation of the IMP for Emergency Response, and specifically his failure to respond to the yard suited and with a team of thirteen suited officers. This put at risk the safety of the medical staff and the officers in the yard, and could have resulted in a serious threat to the prison had the inmates in the yard not been as cooperative as they were that morning.

I **CONCLUDE** that O'Callaghan's response to the emergency in the Big Yard supports the charge of conduct unbecoming, N.J.A.C. 4A:2-2.3(a)(6).

Bode

With respect to Bode, the charge of conduct unbecoming is supported by his failure to follow the IMP for Operations Lieutenants, that required him to report to the Star for emergency-response assignment until the emergency was cleared, and by presenting to the yard unsuited and directing Vargas and his response team to remain in the yard when their presence there was unwarranted and only further exposed them to the potential danger of an inmate attack.

Therefore, I **CONCLUDE** that Bode's actions in response to the code amounts to conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6).

Other Sufficient Cause

Appellants have further been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "other sufficient cause." Specifically, both O'Callaghan and Bode are charged with violating NJDOC Human Resources Bulletin (HRB) 84-17, as amended, including: B.7, serious mistake due to carelessness but not resulting in danger to persons or property; C.11, conduct unbecoming an employee; D.7, violation of administrative procedures and/or regulations involving safety and security; and E.1, violation of a rule, regulation, policy, procedure, order, or administrative decision. (J-1; J-2.) 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.

O'Callaghan

O'Callaghan's conduct in response to the code in the Big Yard was such that he violated this standard of good behavior. Specifically, O'Callaghan's failure to suit up before entering the yard in response to the code, his failure to ensure that the officers accompanying him were also suited, and his failure to assemble a suited team of thirteen officers, and only enter the yard when the second team was at the gate, constituted a serious mistake due to O'Callaghan's carelessness, in violation of HRB 84-17, B.7. As indicated above, under "Conduct Unbecoming a Public Employee," O'Callaghan's actions constituted conduct unbecoming, as well as a violation of administrative procedures and policies involving safety and security, specifically the IMP for Emergency Response, which provides procedures for responding to an emergency code in a safe, secure, and expected manner.

As such, I **CONCLUDE** that respondent has proven by a preponderance of the credible evidence that O'Callaghan violated N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, as well as HRB 84-17, as amended: serious mistake due to carelessness but not resulting in danger to persons or property (B.7); conduct unbecoming an employee (C.11); violation of administrative procedures and/or regulations involving safety and security (D.7); and violation of a rule, regulation, policy, procedure, order, or administrative decision (E.1).

Bode

Bode's conduct on August 26, 2017, was such that he violated this standard of good behavior. Specifically, Bode's failure to remain at the Star when the code was called and until the emergency cleared violated the IMP for Operations Lieutenants, and his decision to enter the yard, and enter the yard unsuited, during the emergency code was inconsistent with emergency-response procedures set forth in the IMP for Emergency

Response. As these failures compromised the orderly operations of a code, and jeopardized the safety of officers in the yard, Bode's actions constituted a careless error in violation of HRB 84-17, B.7. As explained above, Bode's response to the code when he entered the yard unsuited constitutes conduct unbecoming a public employee, which is also a violation of HRB 84-17, C.11. Bode's violation of the IMPs for Operations Lieutenants and Emergency Response, as explained above, also constitutes a violation of HRB 84-17, D.7 and E.1, as these IMPs contain administrative procedures/policies affecting the safety and security of those in the prison.

As explained above, Bode's order to the operations sergeant and his team to remain in the yard with ninety-seven inmates when their presence there was no longer needed and after the sergeant had voiced his justifiable concerns about remaining in the yard, also constituted unbecoming conduct in violation of HRB 84-17, C.11.

Therefore, I **CONCLUDE** that respondent has proven by a preponderance of the credible evidence that Bode violated N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, as well as HRB 84-17, as amended: serious mistake due to carelessness but not resulting in danger to persons or property (B.7); conduct unbecoming an employee (C.11); violation of administrative procedures and/or regulations involving safety and security (D.7); and violation of a rule, regulation, policy, procedure, order, or administrative decision (E.1).

PENALTY

In attempting to determine if a penalty is reasonable, the employee's past record may be reviewed for guidance in determining the appropriate penalty for the current specific offense. The concept of progressive disciplinary action is described in West New York v. Bock, 38 N.J. at 519. A civil service employee who commits a wrongful act related to his duties 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). Depending upon the incident complained of and the employee's past record, major discipline may include suspension, removal, etc. Bock, 38 N.J. at 522-24. Termination of employment is the penalty of last resort reserved for the most severe infractions or habitual negative conduct unresponsive to intervention. Rotundi v. Dep't of Health & Human Servs., CSV 385-88, Initial Decision (Sept. 29, 1988).

Here, respondent argues that the appellants' misconduct was so severe that it falls outside of progressive discipline, and that removal is the only appropriate remedy because the appellants both compromised the safety and security of EJSP, its staff, and the inmates. I do not agree.

O'Callaghan

O'Callaghan's decision to enter the Big Yard unsuited during an emergency was inappropriate and jeopardized not only his own safety and security, but that of the officers who followed him into the yard and the medical staff who responded to the code. I do believe, however, that O'Callaghan entered the yard with the benevolent intention of preserving the life of an inmate who he believed was seriously injured, and that at the time, O'Callaghan did not feel that any medical or custody staff in the yard was in any real danger—the inmates were complying with all orders and Vargas's team had formed a protective barrier between the inmates and those tending to the injured inmate. Also, while O'Callaghan's mishandling of the code is not inconsequential, no staff or inmate was injured, and it is also worth noting that several other officers also made errors in responding to this code but were never disciplined, only counseled or re-trained. Therefore, I **CONCLUDE** that the errors committed by O'Callaghan in responding to the code on August 26, 2017, were insufficiently severe to render O'Callaghan unsuitable to continue in his position, and I further **CONCLUDE** that the penalty of removal is excessive, and that progressive discipline should apply.

It is undisputed that in his eighteen years at the NJDOC, and six years as a lieutenant, O'Callaghan's disciplinary history consisted of only one written reprimand, in approximately 2004, for arriving thirty minutes late to work. Nevertheless, the sustained charges against O'Callaghan are serious in nature and major disciplinary action is warranted. I, therefore, **CONCLUDE** that a 180-day suspension is more appropriate and proportionate to the offense.

Bode

While Bode's order to Vargas was misguided and reckless, ultimately the response team did not remain in the yard with the inmates for any significant period of time following Bode's order. Vargas and his team began to retreat from the yard almost immediately after Bode left the yard to call Linardos about moving the inmates back into the prison. Vargas and his team were already retreating from the yard when O'Callaghan ordered their removal from the yard, and they were back inside the prison before Bode returned to the yard. As stated above, all inmates fully complied with orders during the code, and nobody was injured. Accordingly, I **CONCLUDE** that removal is an excessive discipline here, and that progressive discipline should apply.

In his twelve years at the NJDOC, Bode has only been written up once, for allegedly violating the chain of command. As with O'Callaghan, however, the sustained charges against Bode are serious and major disciplinary action is warranted. I, therefore, **CONCLUDE** that a 180-day suspension is the more appropriate and proportionate discipline.

ORDER

O'Callaghan

Respondent has proven by a preponderance of the credible evidence the following charges against O'Callaghan: 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; N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause; and the following violations of NJDOC Human Resource Bulletin (HRB) 84-17, as amended: (B.7), serious mistake due to carelessness but not resulting in danger to persons or property; (C.11), conduct unbecoming an employee; (D.7), violation of administrative procedures and/or regulations involving safety and security; and (E.1), violation of a rule, regulation, policy, procedure, order, or administrative decision. Accordingly, I **ORDER** that the charges against O'Callaghan be and are hereby **SUSTAINED**. Furthermore, I **ORDER** that O'Callaghan be suspended for 180 days.

I further **ORDER** that O'Callaghan be reinstated to his position as a lieutenant, and that any applicable back pay and other benefits be issued to O'Callaghan.

Bode

Respondent has proven by a preponderance of the credible evidence the following charges against Bode: 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; N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause; and the following violations of NJDOC Human Resource Bulletin (HRB) 84-17, as amended: (B.7), serious mistake due to carelessness but not resulting in danger to persons or property; (C.11), conduct unbecoming an employee; (D.7), violation of administrative procedures and/or regulations involving safety and security; and (E.1), violation of a rule, regulation, policy, procedure, order, or administrative decision. Accordingly, I **ORDER** that the charges against Bode be and are hereby **SUSTAINED**. Furthermore, I **ORDER** that Bode be suspended for 180 days.

I further **ORDER** that Bode be reinstated to his position as a lieutenant, and that any applicable back pay and other benefits be issued to him.


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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked

"Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 1, 2018
DATE


SUSANA E. GUERRERO, ALJ

Date Received at Agency:

August 1, 2018

Date Mailed to Parties:

August 1, 2018

jb

APPENDIX

WITNESSES

For Appellants:

Edward Parin
Edwin Cordova
Fred O'Callaghan
Gary Bode
Robert D. LaPenta

For Respondent:

Jeffrey John Crothers
Stephen Linardos
Anthony Vargas
Larry Clouse
James Colacci
William Sullivan
Kirt Rocco
Patrick Nogan

EXHIBITS

Joint:

- J-1 Final Notice of Disciplinary Action to Gary Bode dated December 7, 2017
- J-2 Final Notice of Disciplinary Action to Fred O'Callaghan dated December 15, 2017
- J-3 Preliminary Notice of Disciplinary Action to Gary Bode dated October 6, 2017
- J-4 Preliminary Notice of Disciplinary Action to Fred O'Callaghan dated October 6, 2017
- J-5 Law Enforcement Personnel Rules and Regulations
- J-6 East Jersey State Prison Level III Emergency Response, effective date March 1, 2009

- J-7 East Jersey State Prison Level III Operations Lieutenant, effective August 25, 2012, revised March 11, 2017
- J-8 East Jersey State Prison Level III Area Lieutenant, effective September 30, 2011, revised August 25, 2016
- J-9 Work History for Gary Bode from January 1, 1985, to December 13, 2017
- J-10 Work History for Fred O'Callaghan from January 1, 1985, to December 7, 2017
- J-11 Amended Table of Offenses and Penalties
- J-12 East Jersey State Prison Level III Recreation Officers, effective April 26, 2010, revised August 25, 2016

For Appellants:

- A-1 Memorandums to Fred O'Callaghan from Patrick Nogan dated February 10, 2014; from James Jones dated March 20, 2017, and September 1, 2017; from Michael Pascal dated August 30, 2017; and Notice of Informal Pretermination Hearing dated October 6, 2017
- A-2 Special Custody Report by E. Parin dated August 31, 2017
- A-3 Special Custody Report by E. Cordova dated August 31, 2017
- A-4 E-mails, Gary Bode and Richard Service
- A-5 East Jersey State Prison schedule, December 31, 2016, through January 16, 2017
- A-6 Letter from Leila Lawrence, Esq., to Anthony Vargas dated December 5, 2017
- A-7 E-mails, Gary Bode and Ronald Marczak
- A-8 Memorandum from James Jones to Gary Bode dated January 5, 2017
- A-9 Letter from Leila Lawrence, Esq., to Gary Bode dated December 11, 2017
- A-10 Letter from Leila Lawrence, Esq., to Gary Bode dated December 14, 2017

For Respondent:

- R-1 Department of Corrections New-Hire Processing Checklist for Gary Bode, effective hire date July 6, 2006
- R-2 Workplace Policy Acknowledgement of Receipt of Fred O'Callaghan dated May 8, 2012, and December 1, 2013, with various documents
- R-3 East Jersey State Prison Policy and Post Order Receipt Form dated March 21, 2016
- R-4 CD Statement and Surveillance dated August 26, 2017

- R-5 Picture of White Board
- R-6 Training Summary Report for Gary Bode dated February 13, 2018
- R-7 Training Summary Report for Fred O'Callaghan dated February 13, 2018
- R-8 Preliminary Incident Report from Anthony Vargas regarding Fred O'Callaghan dated August 26, 2017
- R-9 Special Custody Report by Anthony Vargas dated August 28, 2017
- R-10 Special Custody Report by L. Clouse dated August 30, 2017
- R-11 Special Custody Report by COR Colacci dated September 1, 2017
- R-12 Special Custody Report by W. Sullivan dated August 28, 2017
- R-13 Special Investigations Report by Michael Kubik for Gary Bode and Fred O'Callaghan dated October 5, 2017
- R-14 CD Interview of Fred O'Callaghan
- R-15 CD Interview of Gary Bode
- R-16 Special Custody Report by Gary Bode dated August 30, 2017