

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 22ND DAY OF MAY, 2019



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 07233-18

AGENCY DKT. NO. 2018-3146

**IN THE MATTER OF
ROBERT G. ZOLL,
BURLINGTON COUNTY JAIL.**

Mark W. Catanzaro, Esq., for appellant Robert G. Zoll (The Law Office of Mark W. Catanzaro, LLC)

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

Primitivo J. Cruz, Esq., On the Brief, for respondent Burlington County Jail (Malamut & Associates, attorneys)

Record Closed: March 29, 2019

Decided: April 18, 2019

BEFORE TAMA B. HUGHES, ALJ:

STATEMENT OF THE CASE

Appellant, Robert G. Zoll ("Zoll" or "appellant") appeals the sixty-day suspension and demotion imposed by the Burlington County Jail ("Jail" or "respondent") as a result of an alleged incident on February 22, 2018 of excessive force by another officer while in

his presence. The respondent alleges, among other things, that the appellant failed to intervene and properly report the incident.

PROCEDURAL HISTORY

On March 14, 2018, appellant was issued a Preliminary Notice of Disciplinary Action (PNDA) charging him with violation of N.J.A.C. 4A:2-2.3(a) (General Causes – (1) Incompetency, inefficiency or failure to perform duties; (3) Inability to perform duties; (6) Conduct unbecoming a public employee; (7) Neglect of duty; and (12) Other sufficient cause - specifically violations of Sections 1006, 1012, 1013, 1018, 1023, 1038, 1044, 1064, 1065, 1150 and 1170 of the Burlington County Department of Corrections Policy and Procedures (Policy).

A Departmental Hearing was held on April 23, 2018, the result of which was the issuance of a Final Notice of Disciplinary Action (FNDA) on May 1, 2018, sustaining the charges of violation of N.J.A.C. 4A:2-2.3(a)(1),(6),(7) and (12) – sections 1021, 1023, 1036, 1038, 1043, 1044, 1064, 1065, 1150 and 1170 of the Policy. The disciplinary action imposed was a sixty-day suspension and demotion to the position of Correction Officer.

Appellant appealed the respondent's determination and the matter was transmitted to the Office of Administrative Law (OAL) where it was filed on May 18, 2018, to be heard as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The hearing in this matter took place on January 31, 2019, and upon receipt of the parties' written summations, the record closed on March 29, 2019.

STATEMENT OF FACTS

T.G. Blango (Captain Blango), an Administrative Captain, testified that he has worked for the respondent for over nineteen years. Prior to his promotion to his current title, he was the Administrative Lieutenant for the jail for approximately a year and a half. In that capacity, among other responsibilities, he ran background checks, conducted investigations, and performed video reviews.

On February 22, 2018, he was serving in the capacity of Administrative Lieutenant when Incident Reports were filed by Mary Knight (Knight), the Center of Family Guidance (CFG) Regional Director, and Mike Teasdale (Teasdale), the CFG Health Services Administrator. (J-4 and J-5.) According to the Incident Reports, Knight and Teasdale reported to the Medical Clinic (clinic) after hearing a medical code. Upon their arrival, they observed Sergeant Morris (Morris) hitting an inmate (N.B.) who was in one of the clinic cells.

Upon receipt of the Incident Reports, he reviewed the clinic surveillance film. Thereafter, he pulled the reports/statements that were submitted by the responding personnel. The reports in question were generated in the ordinary course of business by all of the personnel who respond to a medical code. In this case, he initially reviewed the reports generated by Morris, Zoll, Officer Valerie Henry (Henry), and Nurse Marina Yani (Yani).

In review of Morris' report, he noted that Morris stated that when he arrived at N.B.'s cell, N.B. was unresponsive so he applied a "sternum rub." N.B. immediately awakened and became responsive. Thereafter, N.B. was escorted out of the cell for evaluation. (J-6.) According to Captain Blango, this statement was inconsistent with Knight's and Teasdale's statements.

Zoll's report was also reviewed. He reported that N.B. appeared to be having a seizure when he arrived and was unresponsive. Morris applied a sternum rub after which N.B. became responsive and was escorted out of the cell. (J-7.)

Yani's report did not mention that a sternum rub had been performed by Morris. (J-10.) Likewise, Henry's report was also reviewed. (J-14.)

Captain Blango also interviewed N.B. on the date of the incident. According to N.B., he suffers from "pseudo seizures." Earlier that day, he had one of those seizures and awakened to find Morris smacking him with an open hand, which was consistent with

what Knight and Teasdale had reported. He believed that Morris hit him four times. Captain Blango testified that he did not see any injuries on N.B. as a result of the incident.

Due to the inconsistencies between Knight's and Teasdale's reports and the other reports, written statements were requested from Nurse Diana Figueroa (Figueroa), Nurse Consulata Mulli (Mulli) and a more detailed statement was requested from Yani. These reports were received on February 23, 2018. (J-8 through J-13.)

In review of Figueroa's statement, she reported that N.B. was awake and oriented but resisting any attempt to sit him up. Mulli's statement and Yani's second statement also reported N.B. to be awake and breathing. This was inconsistent with Morris' and Zoll's reports which stated that N.B. was unresponsive. Captain Blango testified that sternum rubs are not required when the individual is awake and responsive. The purpose of a sternum rub is to check whether an individual is responsive, for instance if there was a drug overdose or withdrawal. If medical personnel are present, particularly in the medical clinic, the medical personnel are the ones who administer medical treatment if needed, not security.

After reviewing the additional reports, it was determined that an incident did occur, and that additional information/statements were needed from Figueroa and Yani. (J-9 and J-12.) In Figueroa's second statement, she reported that N.B. was on the ground in a fetal position but awake, alert, and oriented when she entered. He was resisting getting up and his hands flared up. She also heard Morris' elevated tone. She became concerned for her safety and attempted to leave the cell. In Yani's third statement, she indicated that she was unsure whether N.B. was going to resist or become combative, so she left the cell for her own safety. Neither Morris' or Zoll's reports were consistent with Figueroa's and Yani's reports or any other report that had been submitted.

Taped interviews of N.B., Mulli, Figueroa, Henry, Yanni, and Zoll were also conducted. In Mulli's interview, she stated that N.B. was awake and alert when she went into the cell, which was before Morris and Zoll arrival. (J-16.) She did not see or hear anything else as she exited the cell to attend another patient.

In Figueroa's taped interview, she also stated that N.B. was awake and alert before Zoll and Morris arrived and needed no further medical treatment. (J-17.) She became afraid when she saw N.B.'s hand movement and "blacked out" a little bit due to her fear and wanted to get out of the cell. Figueroa's interview was consistent with her written statements.

In Yani's taped interview, she too reported that N.B. was awake, alert, and oriented before Zoll and Morris arrived. (J-19.) She also stated that N.B. resisted sitting up and that his hand "flared" causing her concern for her safety and the reason she left the cell. Yani did not report seeing Morris give N.B. a sternum rub. If a sternum rub had been required, she would have done it.

In Zoll's interview, he reiterated the statements reflected in his written report, specifically, N.B. was unresponsive upon his arrival and a sternum rub was administered at which point N.B. woke up. (J-20.)

Captain Blango testified that based upon his investigation, it was his recommendation that disciplinary charges be pursued against Zoll. While there were inconsistencies between the various witnesses to the event, three of the statements (N.B., Knight, and Teasdale) were consistent that Morris had assaulted N.B.

The recommended disciplinary charges and basis for each were:¹

- N.J.A.C. 4A:2-2.3(a)(1) (General Causes – Incompetency, inefficiency or failure to perform duties) – failure to report an incident and use of force.
- N.J.A.C. 4A:2-2.3(a)(6) (General Causes – Conduct unbecoming a public employee) – Due to the presence of civilian staff and the inmate, Zoll did not properly report that an incident occurred. Officers are held to a higher standard – while he could not prevent the assault, Zoll should have reported the incident.

¹ As part of the joint exhibits, the parties entered into evidence the Policy, Sections 102-1074; 1150 and 1170 and Zoll's acknowledgement and receipt of the Policy. (J-21 - J-24.)

- N.J.A.C. 4A:2-2.3(a)(7) (General Causes – Neglect of duty) – Neglect to properly report an incident that occurred – specifically the use of force.
- N.J.A.C. 4A:2-2.3(a)(12) (General Causes – Other sufficient cause) – specifically:
 - Charge 1021 – Zoll's conduct was unprofessional. He is held to a higher standard and he should have reported the incident.
 - Charge 1023 – Zoll was required to follow all rules and regulations of the facility and enforce the rules.
 - Charge 1036 – By not removing Morris for his verbal and physical abuse of N.B., he in essence condoned the behavior. Additionally, he did not report the incident.
 - Charge 1038 – Zoll discredited himself by falsely reporting the same thing that Morris report – specifically, that a sternum rub had been performed.
 - Charge 1043 – While Zoll could not have prevented the assault, he should have reported it.
 - Charge 1044 – Inmates need to be treated with respect. Zoll should have reported the incident – by not reporting it, he concealed the incident.
 - Charge 1064 – While Zoll wrote a report, he did not write what is believed to have actually occurred.
 - Charge 1065 – The report filed by Zoll was false.
 - Charge 1150 – Zoll failed to report that an improper use of force had occurred.
 - Charge 1170 – Zoll had a duty and responsibility to truthfully and accurately report the incident that occurred.

On cross examination, Captain Blango admitted that he was unaware that Knight and Teasdale had met with Captain Leith prior to writing their reports. He acknowledged that when an investigation is underway, no conclusions should be drawn until the investigation is complete. When questioned why Morris was removed from the facility the same day of the incident—prior to his (Captain Blango) receipt of the follow-up statements

and conducting the taped interviews—he stated that the statements of Knight and Teasdale and interview of N.B. were sufficient cause for his removal.

In questioning Captain Blango about the discrepancies in reporting regarding what occurred inside the cell, he agreed that the people in the room would have had a better vantage point than the people standing outside of the cell. He also acknowledged that both Yani and Figueroa, who were in the cell, stated that they did not witness any use of force. Additionally, Yani and Figueroa both stated that they were threatened with the loss of their job if they did not write corroborating supplemental reports, the directive coming from Captain Leith. He further acknowledged that Mulli, who was right outside of the cell door, stated that she did not hear anything and that he did not interview any other inmates that were present. Regarding a sternum rub, Captain Blango testified that it is a medical treatment that the officers had been trained on two weeks prior to the incident.

Captain Blango was also questioned about the size of the clinic and configuration of the cell. In describing the size of the outer room and cell where N.B. was located, he estimated each room to be approximately eight by ten feet. The door to the cell swung out counterclockwise; the door hinges located on the right side of the door. The door was approximately eight feet tall and had a window that was approximately three or four feet high and a foot and a half wide. Inside of the cell on the other side of the wall was a toilet and a bunk. Only one fixed bunk was located in the room and a second bed (boat) is placed in the room if the room houses two inmates. When a boat is placed in a cell, the aisle between the boat and the bunk is approximately one and a half to two feet. Captain Blango estimated the distance between the door and the boat in the cell to be approximately two to three feet.

Michael Teasdale (Teasdale), a registered nurse, testified that he is employed by CFG and currently works as the House Services Administrator at the jail. In that capacity, he oversees the medical care at the facility which includes mental health, dental, and medical.

He was at the jail on the morning of February 22, 2018 attending a meeting with Knight and the Warden on the administrative side of the facility. When the meeting was over, as he and Knight were walking back to the jail side of the facility, a medical code was called in the clinic. After hearing the medical code, they went to the clinic to see if their assistance was needed.

Upon arrival, they witnessed Morris strike N.B. three times, once towards the head and twice towards the torso. While there were people moving around in the clinic, and the cell door was opened and closed a couple of times, he had a clear view into the cell either directly or through the window on the door. He also heard Morris yelling at N.B. asking him if he was done faking and if he was done "F'ing" with him. Thereafter, N.B. was brought out of the cell and evaluated by the medical staff. After giving the staff instructions, he and Knight left and immediately went to his office to document the incident. (J-5.) According to Teasdale, there was no medical reason for Morris' actions.

Subsequent to the incident, he asked that the nurses that were present (Figueroa and Yani) to write a report. Due to the fact that their first reports were not sufficiently detailed, he requested that they both submit a more detailed report of the incident. At no time did he threaten Figueroa and Yani with termination if they did not submit a second report; tell them what to put in their reports; or discipline them.

On cross examination, Teasdale testified that the medical staff (Knight, Yani, Figueroa, Mulli) are all employed by CFG. He acknowledged that on February 21, 2018, the day before the incident, a medical code had been called in for N.B. and he administered Narcan to him. Teasdale did not recall the EMTs who responded to the code or Morris laughing at him for administering Narcan to a person having a seizure. He denied being angry at Morris.

When questioned who was present in the cell on February 22, 2018, Teasdale stated that N.B., Zoll, Morris, and Figueroa were in the cell. He saw Yani outside of the cell in the clinic area moving around.

In describing the cell and everyone's location, Teasdale noted that the cell contained a boat, sink, toilet, and a bunk. There was a few feet of space between the bunk and the boat. When he arrived in the clinic, N.B. was laying down in the boat which was located in the top left-hand side of the cell, mostly on his back. Morris was located in the aisle between the boat and the bunk, closer to the top of the boat. His body was slightly turned towards the cell door; his right shoulder closer to the boat. Figueroa was located near the door. Zoll was in the back of the cell—behind Morris—near the top of the boat.

In detailing Morris' actions, he stated that it was his belief that Morris used his left hand to hold N.B. down and used his right hand to strike N.B. three times. One strike was to the side of N.B.'s head, the other strikes were to N.B.'s chest or torso area. As he was striking N.B., Morris was yelling at him, asking if he was done faking it and "are you done F'ing with me." The whole incident occurred in just a few seconds and the door was open as this was occurring. Figueroa was in the cell near the door when this happened. He could not tell if she was trying to exit or get out of the way during the incident. When questioned whether he threatened to "walk" Figueroa and Yani if they did not rewrite their reports, Teasdale reiterated that he had not.

Teasdale was also questioned what a postictal state was. He agreed that it was an altered state of consciousness characterized by, among other things, drowsiness, confusion, and other disorienting symptoms that can last up to five to ten minutes.

On redirect, Teasdale was questioned whether an individual in a postictal state would be alert, oriented times three. He said no. When questioned about whether he could see into the cell when the door was closed, Teasdale stated that he could because the cell door had a window. He could also hear what was happening in the cell when the door was closed.

Mary Knight (Knight), a registered nurse, testified that she is the Operations Director for CFG. In that capacity she is responsible for the operations of the facilities that CFG manages in New Jersey, one of which is the jail. She was at the jail on February

22, 2018 for a site visit. As she and Teasdale were leaving their meeting, a medical code came across. She wanted to see how the staff responded to codes so they went to the clinic to observe.

Upon walking into the clinic, they saw Zoll, Morris, and Figueroa in N.B.'s cell. Figueroa looked as though she was trying to get out of the room. According to Knight, she had no idea what was happening in the cell, but she saw Morris strike N.B. three times, simultaneously yelling at him. She could not recall whether Morris hit N.B. with an open or closed fist and she only saw one of the actual strikes connect with N.B. Initially, the door was partially closed but then it opened because Figueroa came out; however, she could see into the cell through the window. Immediately after the incident, she and Teasdale went to his office and wrote a report. (J-4.) Upon completion, they took the report to Captain Leith's office.

After dropping the report off, she and Teasdale returned to his office where she instructed him to obtain reports from the nursing staff that was present. After reviewing the reports, the nurses were asked to submit more detailed reports. They were not told what to write, just that the reports needed to be more detailed. At no time were the nurses threatened that they would lose their job if they did not submit a supplemental report, nor were they disciplined.

On cross examination, Knight was questioned about Morris' actions, specifically the raising of his voice and arm. In response she stated that it was "a little before and during." She recalled Morris striking N.B. with his left hand three times; it all happened very quickly. While this was happening, Zoll was standing slightly behind Morris and to his right. She felt that he was closer to the door than Morris. Morris was standing in the aisle between the boat and the bunk. N.B. was lying on his back in the boat and Morris was standing over him near N.B.'s torso area. While Figueroa was in the room, her back was turned as she was trying to leave the room when the strikes were occurring. It appeared that she was having difficulty getting out of the room. Upon further questioning regarding the door, Morris stated that the door was never completely closed; there was

always a crack. She could see in through the window when the incident occurred and Morris was loud.

Knight did not recall a telephone call on speakerphone with Teasdale and the nurses regarding their reports or threatening to walk them out, per Captain Leith, if they did not write the supplemental reports.

On redirect, Knight reiterated that no nurse was disciplined as a result of the incident. While she recalled speaking to Captain Leith regarding the lack of detail in the reports, and recalled speaking to Figueroa about the same, she could not recall whether she was the one or Teasdale to request the additional reports from the nurses.

Pyaegebaye Blango (Ltd. Blango) testified that he has worked for the respondent for almost nineteen years and was promoted to the rank of Lieutenant in October 2015. He was working on February 21, 2018 and present in the medical clinic when N.B. had a seizure. Also present were Teasdale, Yani, and Morris. According to Ltd. Blango, Teasdale used Narcan on N.B. twice within a three- to four-minute time frame. Narcan is used when an inmate overdoses on a narcotic to bring the individual back to life.

Ltd. Blango went on to state that when the EMTs and paramedics arrived, they were surprised that Teasdale had given N.B. Narcan for a seizure and were ridiculing him for his actions. Morris was present and participating in the exchange. Teasdale attempted to explain his actions and appeared angry.

On cross examination, Ltd. Blango stated that he told Morris to "knock it off" and censured him on his conduct.

Robert Zoll (Zoll) testified on his own behalf. In February 2018, he was a Sergeant for the respondent and was on duty on February 22, 2018 when a medical code was called in. Upon his arrival at the medical clinic, he and two nurses (Yani and Figueroa) entered N.B.'s cell. He was unfamiliar with N.B. prior to that date. N.B. was laying on the floor between the bunk and the boat and the nurses were unsuccessfully

attempting to get N.B. up into either a seated or standing position. Morris arrived at that point and entered the cell.

Upon Morris' arrival, N.B. was rolled into the boat onto his left side, N.B.'s head facing the back wall. He was standing by N.B.'s feet with his back to the door which was about six inches away. Figueroa was to his right. Morris was in the aisle between the bunk and the boat near N.B.'s head and his back was to him.

According to Zoll, Morris got down on his right knee and performed a sternum rub on N.B. who did not appear to be alert. This is done to bring someone back to consciousness. It was a procedure that the officers had been taught the month prior by Teasdale. They were never told that officers should not perform this procedure if medical staff was present. As Morris was performing the sternum rub on N.B., he was speaking loudly to him, saying his name and things like "come up, come – come." At no time did he hear Morris say anything about "faking" it or use any profanity, nor did he see Morris strike N.B. As Morris was performing the sternum rub, N.B. opened his eyes and they were able to sit him up and eventually pull him up and remove him from the cell. Zoll could not remember whether Figueroa was in or out of the cell at this point.

On cross examination, Zoll was questioned whether Figueroa was mistaken in her report that N.B. was awake, alert, and oriented. In response, he stated that he could not explain what she saw but he disagreed with her report. He also disagreed with Yani's and Mulli's report which noted that N.B.'s eyes were open and he was awake. According to Zoll, he only reported what he saw. Additionally, he was not aware of any reason why Yani or Figueroa would have had any reason to fear for their safety.

When questioned about the reports that were filed as part of the investigation, Zoll stated that he disagreed with Knight's, Teasdale's and N.B.'s reports that Morris had stood over N.B. and slapped him. If he had seen that, he would have reported it. When questioned why if two nurses were present at the time of the event did security perform a medical procedure, he proclaimed that he did not see anything wrong with it at the time.

FINDINGS OF FACT

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

In this case, I **FIND** the testimony of Knight and Teasdale to be extremely credible that they witnessed Morris strike N.B. in the cell. I further **FIND** Captain Blango's testimony was equally as credible. I further **FIND** that the video speaks volumes in and of itself and further corroborates the testimony of Knight and Teasdale. In review of the video, it is clear that upon Knight's and Teasdale's arrival at the medical clinic, something was taking place in N.B.'s cell. Teasdale and Knight are seen fixated on N.B.'s cell into which they had a clear view, either directly or through the window as the door was being opened and partially closed. I further **FIND** that Henry continuously held the door open until Teasdale and Knight arrived at the clinic. Upon their arrival, Henry immediately and repeatedly attempted to close the door. I further **FIND** that Henry's actions appeared as though she was intentionally trying to prohibit Teasdale and Knight from seeing what was occurring inside the cell.

I **FIND** consistency in the reports and taped interviews of Yani, Figueroa, and Mulli that N.B. was conscious, awake, and oriented when Zoll and Morris arrived. I further

FIND that a sternum rub is not applied to an individual who is conscious. I **FIND** consistency in their reports that at no time was a sternum rub performed by anyone much less by Morris. I further **FIND** given the evidence presented in this case that Zoll's testimony was not credible that N.B. was unconscious upon his and Morris' arrival in the cell, and that in the presence of two trained medical professionals, Morris performed a sternum rub to which N.B. immediately responded.

I **FIND** the testimony of Knight and Teasdale credible that Morris was yelling profanity at N.B. and that given their proximity, they could clearly hear what was being said. I further **FIND** that for different motivations, the content of Figueroa's and Yani's statements were inconsistent with Knight and Teasdale as well as Zoll's and Morris'. However, the statements of Zoll, Morris, Henry, and Figueroa corroborate Knight's and Teasdale's report that Morris significantly raised his voice at N.B.

I **FIND** that the statements of Zoll and Morris appear consistent with each other yet inconsistent in material respects with all of the other reports, specifically as it relates to the level of consciousness of N.B. and the application of a sternum rub.

CONCLUSIONS OF LAW

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his duties. N.J.S.A. 11A:1-2(a). Such a civil service employee may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a).

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

Here, the respondent charged appellant with violations of: N.J.A.C. 4A:2-2.3(a)(1) (Incompetency, inefficiency or failure to perform duties); N.J.A.C. 4A:2-2.3(a)(6) (Conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7) (Neglect of duty); and N.J.A.C. 4A:2-2.3(a)(12), (Other sufficient cause - specifically a violation of the Policy, Section(s) 1021, 1023, 1036, 1038, 1043, 1044, 1064, 1065, 1150 and 1170).

In his defense, the appellant asserts that from its inception, the investigation was biased. In support of this argument, appellant cites to among other things: Knight and Teasdale were not required to submit to a taped interview; Yani and Figueroa were allegedly threatened with the loss of their job if they did not write corroborating reports; Morris was removed from the building on the date of the incident and before the investigation was complete; and he (appellant) was the victim of collateral damage for an incident that had occurred the day before between Morris and Teasdale.

This argument lacks merit for several reasons. It is undisputed that Knight and Teasdale responded unexpectedly to the medical clinic upon hearing the medical code. The surveillance film clearly reflects that upon arrival, both Knight and Teasdale were riveted on N.B.'s cell door which Henry continuously attempted to close when she spotted them coming into the clinic. The cell door, which contained a large window, was within feet of where Knight and Teasdale were standing. Both Knight and Teasdale witnessed Morris strike N.B. three times and heard him yelling profanities at N.B. Within minutes of the incident, they left the clinic and wrote separate Incident Reports. Within hours of the

event, Captain Blango interviewed N.B. who corroborated the fact that Morris had struck him multiple times. While the investigation was not yet complete, the evidence was sufficient at that time to remove Morris from the building.

Added to the above are the contradictory statements of appellant and Morris as opposed to every other witness to the incident. The appellant and Morris claim that N.B. was unconscious upon their arrival. All of the individuals present at the time reported that N.B. was awake, alert, and oriented. The appellant testified that Morris performed a sternum rub. No eyewitness, all of whom were certified medical professionals, saw Morris perform a sternum rub.

Last, regarding the assertion that he is the victim of collateral damage—assuming arguendo that Teasdale had a vendetta against Morris for a perceived slight—where would Knight's motivation be in fabricating such a story? Not only was there no evidence presented for such complicity, it defies logic that as the Operations Director, Knight, within minutes of responding to an unexpected, unanticipated medical code, hatched a scheme with Teasdale to set up Morris, file an incident report – for a “pay back” on Morris. If anything, the more plausible reaction on her part would be to sanction Teasdale for his actions the day prior if they had in fact been medically improper. As such, appellant's argument that he is the victim of collateral damage stretches the imagination.

In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980). Here, while appellant may not have been able to prevent Morris from hitting N.B. due to the rapidity of events, as a Sergeant he had the duty to take action and accurately report what he had seen. Instead, he wrote a report that misrepresented what had actually occurred and provided a taped statement perpetuating the fabrication.

For the foregoing reasons, I **CONCLUDE** that the respondent has met its burden as it relates to violation N.J.A.C. 4A:2-2.3(a)(1).

"Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 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)).

As noted above, while the appellant may not have been able to prevent Morris' assault on N.B., he had an obligation and duty to report the same. This is particularly so under these circumstances where an inmate, who was having a medical emergency, was physically assaulted and cursed at, all in the presence of civilian employees. To compound the matter, appellant and Morris fabricated a story which was utterly unsupported by the evidence. A sergeant's failure to report an officer who commits excessive use of force is conduct that has a tendency to affect the morale or efficiency of a governmental unit.

For the foregoing reasons, I **CONCLUDE** that the respondent has met its burden as it relates to violation N.J.A.C. 4A:2-2.3(a)(6).

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, 2009 N.J. AGEN LEXIS 112, OAL Docket No. CSV 5072-07. 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.

Here, the appellant not only failed to report Morris' use of force, he was complicit in covering Morris' actions up. For the reasons cited herein and above, I **CONCLUDE** that the respondent has met its burden as it relates to violation N.J.A.C. 4A:2-2.3(a)(7).

The appellant was also charged with violation of N.J.A.C. 4A:2-2.3(a)(12) – "Other Sufficient Cause" – specifically violation of Policy Sections: 1021, 1023, 1036, 1038, 1043, 1044, 1064, 1065, 1150, 1170.

It is undisputed that not only did the appellant fail to report the use of force by Morris, he also covered it up by falsely reporting that Morris had performed a sternum rub on N.B. Such conduct is violative of the Policy sections cited above, particularly Sections 1021, 1023, 1038, 1044, 1150, and 1170.

For all of the reasons previously cited above, I **CONCLUDE** that the respondent has met its burden as it relates to violation of N.J.A.C. 4A:2-2.3(a)(12).

PENALTY

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

v. Bock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990).

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

The respondent suspended the appellant for sixty days and demoted him to the position of Correction Officer. As a command officer, he sets an example for the other officers in the facility and is responsible for carrying out the goals and ideals of the administration. See Marino v. County of Union, 2001 N.J. Agen Lexis 1531 (2001). His failure to report the use of excessive force on an inmate experiencing a medical emergency is unacceptable. In and of itself, this would warrant disciplinary action. The fact that the appellant worked in concert with Morris to cover-up the incident is not only reprehensible, it is conduct that warrants significant disciplinary action.

In West New York v. Bock, 38 N.J. 500, 523 (1962), the New Jersey Supreme Court stated that a public employee's prior disciplinary record may be referred to, where appropriate, in assessing the reasonableness of a penalty for a current offense. However, exceptions to the application of "progressive discipline" have been made where certain acts are "so egregious in nature and/or so detrimental to the public welfare that immediate termination is warranted, notwithstanding a good disciplinary history." Curtiss v. East Jersey State Prison, CSV 12007-96, Initial Decision (Dec. 17, 1997), aff'd., Merit System Bd. (Jan. 27, 1998) <http://njlaw.rutgers.edu/collections/oal/>. In addition, law enforcement officers are held to a higher standard than a civilian public employee. See Moorestown v. Armstrong, 89 N.J. Super. 560 (App. Div. 1965), certif. denied 47 N.J. 80 (1966).

With the above in mind, appellant's prior disciplinary history consists of three instances in 2007 where he was charged with neglect, two of which resulted in multi-day suspensions (15 days and 7 days, respectively), the third event resulting in a letter of

reprimand/counselling. In addition to this, he has incurred multiple timeclock violations for which he received a "Letter", and two Letters of Counselling for other infractions.²

For the reasons previously stated above and given the seriousness of the appellant's actions, I **CONCLUDE** that a sixty-day suspension and demotion to the position of Correction Officer is appropriate.

ORDER

I hereby **ORDER** that the charges in the Final Notice of Disciplinary Action against Robert Zoll be **AFFIRMED**.

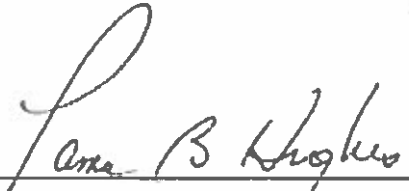
I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

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

² At the time of the hearing, the appellant's disciplinary history was entered into evidence as a joint exhibit. (J-27.) It was agreed at that time that it would not be reviewed by the Tribunal unless and until a determination had been made that the appellant had violated N.J.A.C. 4A:2-2.3. This agreement was honored.

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.

April 18, 2019
DATE



TAMA B. HUGHES, ALJ

Date Received at Agency:

April 18, 2019

Date Mailed to Parties:

April 18, 2019

cmo

APPENDIX
WITNESSES

For Appellant:

Robert Zoll
Pyaegbaye Blango

For Respondent:

T.G. Blango
Michael Teasdale
Mary Knight

EXHIBITS

Joint:

- J-1 Preliminary Notice of Disciplinary Action dated March 14, 2018
- J-2 Final Notice of Disciplinary Action dated May 1, 2018
- J-3 March 14, 2018 Memorandum by Lt. T. Blango
- J-4 Incident Report of CFG Operations Director Mary C. Knight
- J-5 Incident Report of CFG House Services Director Michael Teasdale
- J-6 Incident Report of P. Morris
- J-7 Incident Report by R. Zoll
- J-8 First Incident Report by D. Figueroa
- J-9 Second Incident Report by D. Figueroa
- J-10 First Incident Report by M. Yani
- J-11 Second Incident Report by M. Yani
- J-12 Third Incident Report by M. Yani
- J-13 Incident Report by C. Mulli
- J-14 Incident Report by V. Henry

- J-15 Transcript of Interview of N.B.
- J-16 Transcript of Interview of C. Mulli
- J-17 Transcript of Interview of D. Figueroa
- J-18 Transcript of Interview of V. Henry
- J-19 Transcript of Interview with M. Yani
- J-20 Transcript of Interview with R. Zoll
- J-21 Burlington County Detention Center Policies and Procedures Sections
1012-1074
- J-22 Burlington County Detention Center Policies and Procedures Section 1150
- J-23 Burlington County Detention Center Policies and Procedures Section 1170
- J-24 Burlington County Detention Center Policies and Procedures
Acknowledgement by Robert Zoll
- J-25 Burlington County Detention Center Inmate Profile for N.B.
- J-27 Employee Disciplinary History of Robert Zoll
- J-28 Burlington County Detention Center Video Surveillance