

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 9th DAY OF MAY, 2019



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 10740-18

AGENCY DKT. NO. N/A

2019-74

**IN THE MATTER ANTHONY
VILLANUEVA, CITY OF TRENTON.**

**George T. Dougherty, Esq., for appellant Anthony Villanueva (Katz &
Dougherty, LLC, attorneys)**

**Stephen E. Trimboli, Esq., for respondent City of Trenton (Trimboli &
Prusinowksi, attorneys)**

Record Closed: March 4, 2019

Decided: April 5, 2019

BEFORE JEFF S. MASIN, ALJ (Ret., on recall)

Anthony Villanueva, a police officer employed by the City of Trenton, appeals from the appointing authority's decision to remove him from his position. On January 26, 2018, Officer Villanueva was served with a Preliminary Notice of Disciplinary Action (PNDA), charging him with violating N.J.A.C. 4A:2.2-3(a)6: General Causes: Conduct unbecoming a public employee, and N.J.A.C. 40A:1.4-147: Misconduct. Subsequently, on March 23, 2018, he was served with a second PNDA, charging that he had violated a lengthy series of provisions of the Administrative Code, N.J.A.C. 4A:2-2.3 and the Rules and Regulations of the Trenton Police Department, as well as N.J.S.A. 40A:14-147: Incapacity. As noted in the Specifications accompanying the PNDA's, the entire

series of charges related to an incident that occurred in the Detention Unit of the Trenton Police Department on November 28, 2017, when, it is alleged, Officer Villanueva used mechanical force by spraying a detainee, Q.S., with OC (pepper spray) under circumstances where the use of the spray was unwarranted and involved the use of unauthorized force. On June 19, 2018, after the officer had waived a hearing, the appointing authority issued a Final Notice of Disciplinary Action (FNDA), finding that Villanueva was guilty of the several offenses pending against him and removing him from his position, effective as of June 19, 2018. He filed an appeal jointly with the Civil Service Commission and the Office of Administrative Law. The appeal was perfected on July 24, 2018. The parties engaged in discovery and the matter was brought to hearing before this judge on October 23, 24, 29 and 30, 2018. Transcripts were then obtained and briefs filed and the record closed on March 4, 2019. It should be noted that the parties have agreed that as there is a pending federal criminal investigation concerning Villanueva and the incident of November 28, 2017, the provisions of law regarding the restoration of the officer's pay after the 180-day period of unpaid suspension following his removal are inapplicable.

In short, based upon the testimony presented during the hearing, the event of November 28, 2017, began when one Q.S. was arrested by the State Police Task Force on an outstanding warrant and was brought to the first floor of the Trenton Police Department Detention facility. At some point he was taken upstairs to the second floor for processing by Officer Villanueva, then on duty at the facility. On the second floor at the time that Villanueva and Q.S. arrived, there was a police aide, Rodney Haile. It is undisputed that after arriving on the second floor, Q.S. asked to make a phone call, ostensibly to notify his mother that he was under arrest and to arrange for bail. He was permitted to make the call. However, as testified without dispute by Villanueva, the phone call went on for a time exceeding that normally permitted and after "numerous" verbal attempts to have Q.S. end the call, Villanueva cut off the call by hanging up the receiver. As he did so, Q.S. pushed the officer's arm away. Video recorders located in the area of the phone room produced recordings that were admitted in evidence and confirm this episode.

As shown in the video, after this physical action by Q.S., Officer Villanueva, joined by Aide Haile, took physical control of Q.S. and moved him out of the phone room. As described by them, as he was being escorted from the phone room to the detention cell area, Q.S. elbowed Villanueva in the side. At this point, according to his explanation, Villanueva intended to arrest the detainee for assault on a police officer. This arrest, separate from that on the outstanding warrant, would have required that Q.S. be processed again, including being fingerprinted and photographed, as well as the completion of additional paperwork.

At this point it is vital to note that in the entire sequence, or continuum of events, occurring that day between Villanueva and Q.S., the only action the appointing authority claims involved any violation of responsibilities on Villanueva's part is the point when, as he first arrives at Cell 7, Villanueva sprays Q.S. with OC as the detainee is, in the appointing authority's assessment, inside a cell, the door of which is closed and secured. The appointing authority has no problem with the officer's conduct up to that point or, after the detainee shortly thereafter comes out of the cell and moves down the hallway and struggles with the officer and aide and is finally subdued with the assistance of other officers. The parties stipulated that the entire episode from Q.S.'s arrival on the second floor to the moment he was subdued by multiple officers lasted from 5:35:34 until 5:48:26.

After Q.S. was subdued, Officer Villanueva prepared a "Case Supplemental Report." In that report, dated November 28, 2017, and timed at 18:18:59, the officer first related the incident regarding the phone call and the resistance to the officer's command for Q.S. to get off the phone. Once Q.S. had been controlled in the phone room, after he had smacked Villanueva's hand away and cleared his throat as if to spit on the officer, Villanueva

grabbed [Q.S.] by his arm and placed my other hand on his upper back in attempt to walk him into his cell. [Q.S.] began to push and swing his elbow in an attempt to brake [sic] from my grasp. [Q.S.] was able to land an elbow to the right side of my body. I then ordered [Q.S.] to get on the ground numerous times, so I could place him in handcuffs. After a long struggle, I was able to get [Q.S.] into a cell with the assistance of Police

Aide Haile. While in the cell, [Q.S.] began to scream and cause a disturbance, which caused other prisoners to become irate as well. I advised police aide Haile to open the cell door so I can handcuff [Q.S.] behind his back, process him, again on the new charges and move him to another cell to be better monitored. As I approached the cell, I advised [Q.S.] to get on the ground because he was going to be placed into handcuffs. [Q.S.] was advised if he becomes aggressive, he was going to be sprayed with OC spray. [Q.S.] advised me that he was going to do whatever he wants, and I better not get near him. As Police Aid [sic] Haile began to open the cell, [Q.S.] began to clear his throat and spit in my direction. I then grabbed the can of OC spray and attempted to spray [Q.S.] with a (1) two second burst, but was unable to due to [Q.S.] shielding his body with the bed mat. After another attempt, I was able to administer a (1) two second burst of the OC spray in the bridge of [Q.S.'s] nose. [Q.S.] became extremely irate and exited his cell at which time he pushed me and ran toward the main detention hallway. I follow [sic] him into the secured hallway. After a long struggle to get his hands behind his back to place him into handcuffs, I advised Police Aide Haile to call downstairs for additional officers.

The report was reviewed by a supervising officer that very day, at 21:57:51. Villanueva also completed a Use of Force Report, at 17:30 on November 28.

As noted, part of the charges filed against Officer Villanueva involve contentions that his report was false, thus violating several standards applicable to law enforcement officers. In order to judge the accuracy of the report, it is necessary to review the recordings admitted in evidence in detail.

The next event after Q.S. elbowed Villanueva is shown in a recording identified as "1-11 Cell Block." Q.S. appears in the hallway of that cell block at 17:46:55. Q.S. is shown moving along a hallway, on one side of which are a series of detention cells. He passes six cells and comes to Cell 7. As the recording shows, Q.S. walks along the hallway; he does not run, and he may best be described as sort of strolling down past a series of cells. This recording does not show Officer Villanueva in frame. Q.S. arrives at Cell 7 at 17:46:06, turning into the cell. At that point, Villanueva is visible in the hallway, apparently parallel to Cell 2. The can containing OC spray is quite visible in his right hand. At 17:46:08 Q.S. can be seen to be raising his arm in what will be seen in a more direct view of Cell 7 on a separate recording as seemingly a gesture toward the oncoming Villanueva, who is at that point at about Cell 5. At 17:46-10 Villanueva turns

diagonally towards Cell 7, with his right arm raised. At 17:46-11, he is right up to the cell door and his arm is raised towards the cell. From the angle of this recording, it is not really possible to detect if Villanueva sprays OC into the cell at this point, although a different view to be described shortly shows that he did spray the OC. At 17:46-15 he appears to shake the can as he holds it away from the cell and then at 17:46-18, he again points the can into the cell. At 17:46-20, Villanueva heads back down the hallway and is out of sight at 17:46-26, reappearing in the hallway at 17:46-45.

The next recording, labeled as "Cell 7," is shot from directly opposite the cell door. It is important to note here that, as explained during the hearing, the time shown on this recording is not accurate; that is, it shows times that are not commensurate with those shown on the previously described recording. References to times in this description of the recording will be to the times shown on the "Cell 7" recording, but it is understood that the actual time when the events depicted occurred are during the time frame 17:46 as shown on the "1-11 Cell Block" recording. That said, "Cell 7" shows that at 16:57-13, Q.S. appears in the scene, looks back over his shoulder at 16:57-13, and begins entering Cell 7, while at 16:57-18 he gestures towards the direction from which he has come. The cell door is beginning to close at this point. At 16:57-19, Q.S. is in the cell, the door still closing. Officer Villanueva appears at 16:57-19, with his arm up. At 16:57-20-21, Villanueva clearly sprays OC into the cell. By this point the door is closed with Q.S. completely inside the cell. After the first spray, Q.S. picks up the mattress and attempts to shield himself. At 16:57-26-27, Villanueva sprays OC twice in the direction of Q.S., who has the mattress up in front of him, inside the completely closed cell.

Further review of "Cell 7" shows that Villanueva departs Cell 7 at 16:57-29 and Q.S. is dropping the mattress from in front of him at 16:57-31. The prisoner in the next cell can be seen covering his mouth and nose with his shirt, although Q.S. does not show any sign of such action. Villanueva returns to the cell at 16:58-01, gestures as if to spray OC, but does not appear to do so. The cell door is opening at 16:58-08.

The next sequence of events is shown on the recording "1-11 Cell Block" beginning at 17:47:03 when Officer Villanueva comes up the hallway and reaches Cell

7. Again, it is important to note that the appointing authority does not fault Villanueva's conduct from this point on. The recording shows that once the cell door is open, Q.S. comes out of the cell with the mattress between he and Villanueva, who first backs away from the cell as Q.S. comes out of the cell and then follows the detainee back down the hallway in the direction of the phone room. Part way in this traverse, Q.S. drops the mattress to the floor. As other videos depict and as undisputed testimony relates, when Q.S. is again in the area where he would be processed, that is, fingerprinted and photographed, he is physically resistant and after a short time struggling with him, Officer Villanueva and Aide Haile are joined by two other officers summoned from the first floor, who successfully subdue Q.S.

Before discussing the testimony, including that of the experts for each party, it is important to note the documents that they discussed that form the basis for determining whether Officer Villanueva's use of force against Q.S. at Cell 7 was or was not in conformity with accepted standards. The first of these is R-15, the Attorney General's Use of Force Policy, issued in April 1985 and revised in June 2000. Section I "Authorization and Limitations, A. Use of Force" reads: "1. A law enforcement officer may use physical force or mechanical force when the officer reasonably believes it is immediately necessary at the time." In the "Policy" section of the document, it is noted that "[D]eciding whether to utilize force when authorized in the conduct of official responsibilities is among the most critical decisions made by law enforcement officers." Acknowledging that "sound judgment and the appropriate exercise of discretion will always be the foundation of police officer decision-making in the broad range of possible use of force situations" and that "[I]t is not possible to entirely replace judgment and discretion with detailed policy provisions," the document relates that "[L]aw enforcement officers whose actions are consistent with the law and the provisions of this policy will be strongly supported by the law enforcement community in any subsequent review of their conduct regarding use of force."

There follow a series of possible situations where the use of force is permitted, again with the element of "reasonable belief" as a necessary foundation for such use.

- a. To overcome resistance directed at the officer or others; or
- b. To protect the officer, or a third party, from unlawful force; or
- c. To protect property; or
- d. To effect other lawful objectives, such as to make an arrest.

"Mechanical Force" is defined at Section D.

1. involves the use of some device or substance, other than a firearm, to overcome a subject's resistance to the exertion of the law enforcement officer's authority.
2. Examples include the use of . . . chemical or natural agent spraying.

Section F defines "Reasonable Belief."

1. Reasonable belief is an objective assessment based upon an evaluation of how a reasonable law enforcement officer with comparable training and experience would react to, or draw inferences from, the facts and circumstances confronting and known by the law enforcement officer at the scene.

Another set of materials, P-13, identified by witnesses as the training module used by the Mercer County Police Academy to train new recruits in 2014 when Officer Villanueva received his Academy training, is a set of Power Point slides. On page 11, the slide on the top right reads:

Circumstances when OC **should not** be used [bold in the original]

- A. Generally speaking, OC should not be used against, or in the immediate vicinity of . . .
- B. OC should not be used against individuals in custody or in restraining devices **unless** an officer or another person is under attack. [bold in the original]
- C. OC should be used against a person who is operating a motor vehicle, or against a person who is occupying a motor vehicle when there is a danger that the person may attempt to operate it.
- D. OC should not be used whenever the risk of contamination to innocent bystanders or the officer is greater than an alternative use of force.

Finally, witnesses also addressed a Power Point presentation, R-11, entitled "The Attorney General's Policy on Use of Force." At the page identified by numbers at the lower right corner as COT 1A18-0011.169-171, this notes that in regard to "reasonable belief" the "cornerstone for appropriate use of force," officers are "often forced to make split second decisions," "circumstances may be tense, unpredictable, rapidly evolving," there is "no precise prescription for application of force" and that "all of the events transpiring during the officer's interaction with the subject [all bolding in the original] **can be considered** in evaluating reasonable of force used." Additionally, circumstances "**can change.**" At page 175, the presentation notes

Escalation-De-Escalation

- An officer may increase or decrease use of force to accomplish a law enforcement objective
- Not required to desist because suspect resists
- But once suspect **submits**, the officer **must stop using force.**

Factors that an officer should consider when determining whether to use force are detailed at pages 184-187. Among these are the items identified under the heading of "Ability," that is, the "physical capacity" of the subject "to cause physical injury to the officer or another person," whether the subject "is armed with a weapon" and whether the subject "presents an imminent threat to the officer or another." Also, under the heading of "Opportunity," whether the subject has "the opportunity to use his ability to injure or kill the officer or another person," and under "Jeopardy," "does the combination of the subject's ability and opportunity provide the officer with a reasonable objective belief that the officer or another person is in imminent physical danger?"

According to records in evidence, Officer Villanueva received training on these matters in 2014 and received passing grades.

Trenton Police Lieutenant Steven Wilson testified that he was involved in examining the events described. It is standard procedure to examine situations where force has been utilized by an officer. Wilson was not assigned to Internal Affairs when

he collected the videos and reviewed reports filed by Officer Villanueva and Sergeant Acosta. When Wilson compared the recordings to the report filed by Villanueva, Wilson noted that there were "inconsistencies" between the officer's description of what had occurred and what was shown on the recordings. Wilson, an officer for twenty-five years, noted that he had been trained at the Police Academy regarding Use of Force policies and also had to undergo training in the subject twice a year. He explained that even in a situation such as that depicted in "Cell 7," where the mattress might have blocked the attempt to spray the detainee, the episode still involved a use of force. The situation involved the use of mechanical force against Q.S. while he was inside a closed area.

Lieutenant Wilson agreed that while he had reviewed the various recordings of the cell area and hallway, they had no sound component, and this was a missing factor in analyzing the propriety of Officer Villanueva's conduct. Nevertheless, Wilson was confident in his ability to form an opinion as to that question. He observed that recordings showed that the prisoner self-escorted himself to the cell and the door of the cell was almost closed when the OC spray was first applied. Despite any words that the prisoner might have spoken, and the gesture shown in the recording at cell 7, "words don't hurt" and there was no active resistance. R-13, page 11, notes that OC spray "should not be used against individuals in custody unless an officer or another person is under attack." Here there was no apparent "physical attack" and the prisoner was in custody, effectively inside a jail cell. He was not making any attempt to leave the cell. There was no posturing by the prisoner indicative of fighting and no imminent threat. There was no opportunity for the prisoner to use his ability to injure anyone. While Wilson acknowledged that he could not speak to the officer's subjective belief as he approached the cell and made use of the OC spray, given the situation, there was thus no reasonably objective belief that the officer or another person was in imminent physical danger. Thus, the action undertaken by Villanueva did not conform with the training that he had received. And, if the prisoner's actions were such as to "rile up" others in the cell block, they were all inside of locked cells. Also, while the physical resistance displayed by Q.S. in the phone room was important, it appears that as he

went by himself to the cell and entered it and the cell door closed, the situation had de-escalated by the time that Villanueva approached the cell.

On cross-examination, Wilson agreed that the physical resistance in the phone room and the "sharp elbow" Q.S. used to separate himself from the officers were factors to be considered in understanding the total circumstances, the "continuum" of events prior to Villanueva spraying the OC for the first time. As for the fact that once the prisoner used force against officers he was subject to a new arrest on charges stemming from that assault, it is true that he could be ordered to the ground, but Wilson did not know if this occurred. If he refused to obey such an order that would be resistance on his part. A threat by the inmate to spit would also add a factor to the circumstances facing the officer. OC can be used in an anticipatory manner if the relevant factors exist to support its use in such way. But in this case, there was no evidence of an emergent need for its use. While officers do have discretion to determine if force can be used, the decision to do so must be objectively reasonable. The Attorney General's Guidelines specifically note that the determination to use mechanical force must be based on an officer's reasonable belief that it is "immediately necessary at the time." (emphasis reflecting witness' specific reference to underlined words). As for the need to effectuate an arrest, a factor that is listed in the Guidelines that can authorize the use of mechanical force if to do so involves the reasonable belief that the arrest cannot be carried out without the immediate use of such force, Lieutenant Wilson noted that there are several elements involved in an arrest. These include the actual taking of the person into control and the fingerprinting and photographing of the arrestee, as well as the completion of necessary paperwork. However, there is no necessity that each of these items be completed at the same time. Thus here, by the time that Villanueva reached the cell, the person to be arrested was already in a nearly completely closed cell that he could not himself reopen. As such, he was controlled and the other elements could have been carried out later on after Q.S. had calmed down.

Finally, on re-cross, Wilson noted that even though the Use of Force Policy allows for discretion and is worded "may" rather than "shall," just because an officer can

use force does not mean that he should, if the circumstances do not reasonably warrant such conduct.

Officer George Leroy Wilson, a Trenton Police Officer for twenty-six and a half years, has been a training officer at the Trenton Police Academy from 1999 to April 2006 and again from 2010. He reviewed the various training materials utilized for the Use of Force training and also Villanueva's training history. He noted that officers are responsible for the custody of training documents. He reviewed the recording of the events at Cell 7 and opined that Villanueva's conduct was not consistent with the training concerning the allowable use of mechanical force. Again, he saw no threats of harm facing the officer and observed that the cell door was closed. The initial use of OC spray appeared to be in retaliation for the earlier resistance demonstrated by Q.S. Any yelling or even verbal threats that may have been voiced would not change his opinion, as there was no opportunity for Q.S. to pose an immediate threat to the officer or others. Agitating other inmates also would not factor, as they were all in locked cells. There was no need for the officer to utilize the spray at that time. Additionally, the prior altercation in the phone room does not change the opinion, nor does the elbowing just before Q.S. walked down the hallway to the cell. While the use of spray would have been justified in the phone room, by the time the men were at the cell the circumstances had changed. By entering the cell, (which also meant being behind a door that was nearly closed by the time Villanueva arrived), Q.S. had effectively submitted to arrest, and as emphasized on R-11 at page 175, "once [the] suspect *submits*, the officer *must stop using force*." (Italics in the original.) The Attorney General's Guidelines for the use of mechanical force are not vague. The use of force here was unjustified. And the need or intent to book the prisoner for the additional charges justified by the resistance in the phone room would not have affected the opinion, as there was no practical reason to pull the man out of the cell. He was already under arrest anyway for the outstanding warrant and contained in a cell, completely under control. It was appropriate to let Q.S. cool down before any such booking was attempted. The officer could have explained the circumstances to his supervisor and, if necessary, extended his tour to allow completion of the full arrest process. In short, one does not use OC spray to effectuate the procedural elements of processing. This command is consistent

with the direction in the Guidelines at R-13, page 11, that, except if the officer or another person is "under attack," OC should not be used against individuals in custody.

John Harbourt, a Trenton Police sergeant and training officer with eighteen years' experience, who trained officers at the department's own training facility and then at the Mercer County Police Academy from 2004 till 2018, and trained officers on Use of Force policy as well as the use of OC spray, reviewed the training module which was utilized when Officer Villanueva was trained at the Academy in 2014. He also reviewed records concerning Villanueva's subsequent in-service training on Use of Force. The witness reviewed the several recordings and presented his analysis. Despite the lack of sound on the videos, he had a sufficient basis for formulating his opinion on the propriety of Villanueva's use of OC spray. He noted that to the extent that Q.S. might have been voicing insults, threats, or verbally announcing resistance to the officer's directions or orders, "words don't hurt." At the time that the spray was used, Q.S. was in a closed or very nearly closed cell (the door closing and nearly shut) and, referencing the training module, R-13, page 11, "B. ,no one, not an officer or any other person, was 'under attack.'" There was no apparent physical resistance occurring. There was no posturing of fighting, and to the extent Q.S. was isolated inside the closed cell, no physical resistance. Referring to page 186 of R-11, there was, at that time, no "opportunity" for Q.S. to "use his ability to injure or kill the officer or another person." Indeed, such "ability" did not exist, as he was in a locked cell. There was no "imminent threat." While Harbourt could not speak to what the officer believed at the time, in his opinion, there was "no reasonably objective belief" that supported the use of OC spray against Q.S. at the time that Villanueva chose to use it. No person was in jeopardy at that time. To the extent that any of the events prior to the use of the spray might have "riled up" other detainees, all those on the cell block were isolated inside of closed cells. While the altercation in the phone room was an "important" element in the entire progression of events that night, in that it showed that Q.S. was "willing to make physical contact with a sworn law officer," a fact that Harbourt noted he would never take "lightly," nevertheless, after the prisoner self-escorted to the cell and it was nearly closed and he stood inside the cell, "it appears like it de-escalated."

On cross-examination, Sergeant Harbourt, who had not read Villanueva's report (which has been noted to be not entirely accurate; a fact that will be examined further below), acknowledged that the words and volume that Q.S. used towards Officer Villanueva would be "a contributing factor," presumably in his understanding of the entire picture presented to Villanueva as he approached the cell and utilized the OC spray. He saw no evidence of "passive resistance" on the recordings. If there were any, such as during the time that Villanueva and Haile were attempting to escort Q.S. out of the phone room, such would also matter in his assessment. Again, how it was that Q.S. became disengaged from these escorting officers would "matter." And the slapping in the phone room would be grounds for new charges, which would have authorized Villanueva to tell the detainee, as he broke away from his escorts, to "stop there and get on the ground." Failure to comply with such a command would constitute resistance. Resistance is a factor that goes into the picture of what constitutes, as the questioner, put it, "just cause" to use OC spray. As for the "Cell 7" recording, Harbourt agreed that it appeared to show that Villanueva was trying to get through the cell door as it closed on him. This would appear to be a pursuit of the "arrestee."

Counsel for Officer Villanueva sought to present Sergeant Harbourt with a hypothetical, which included the slapping, elbowing, Q.S.'s disengagement from the escorting officers, the unheard (due to the lack of sound) order to get on the ground, Q.S.'s unescorted movement down the hallway to the cell, the again unheard threats and/or verbal resistance, the entry into the cell and Villanueva's pursuit to the cell, and an intent to take Q.S. from that cell to another cell. He asked Harbourt whether this scenario "embodies what is described in 175," referring to page 175 of R-11, which is captioned "Escalation-De-escalation." Harbourt agreed that the video, with the assumption of the verbal elements not capable of detection from the non-sound recording, would, if shown to officers who were being trained, display "different types of resistance." If Villanueva believed that he had been assaulted and intended to effectuate an arrest of the already arrested Q.S. for assault, he had the authority to do so. And at the cell, it would have been within the officer's authority to command Q.S. to get on the floor and prepare to be cuffed. If he failed to do so, that would constitute passive resistance. And if at that time, Q.S. made comments about not touching him or

he would spit at the officer, that is another addition to the picture. Given all these factors in the hypothetical, it would be within the officer's authority to order that the cell door be opened so that he could complete the arrest.

The witness was then asked whether after such refusal to get on the ground and such verbalizations as are included in the hypothetical, whether officers were instructed that "you have to open the door and wait to see if he's going to do something before you can use spray, or can you anticipate he's going to use spray and you don't want to be face-to face with this man, especially if he's bigger than you?" In his answer, Harbourt noted that there was nothing in the AG Guidelines "that prohibits the use of OC spray in a confined space or a cell area. The use of force doesn't state anywhere in the policy that the officer has to meet the same level of force that he or she's being met with. We're allowed to go one level above."

However, as the record will show, the recording does not show that the door to the cell was opened immediately, but rather some forty seconds later. Counsel asked Harbourt if, given all the facts in the hypothetical, an officer faced with those facts would exercise reasonable judgment in understanding that it was permissible to use "mace?" Harbourt answered, "No." He noted that there was no "emergent issue." He agreed that the training guide, R-11, at 175, does not use the word, "emergent." However, Harbourt noted that, while the slide at page 175 does not refer, "in so many words," to emergent circumstances, at page 159, entitled "Foundation of Police Decision Making," the slide refers to "sound judgment" and "appropriate exercise of discretion."

The final element of Harbourt's testimony on cross-examination was a question posed by counsel and clarified by the judge. It started with the hypothetical facts as given, including commands from outside the cell and Q.S.'s non-compliance with the order to get on the ground inside that cell and his comments about not being touched or he would spit in Villanueva's face. When Harbourt asked for a restatement of the last part of Mr. Dougherty's question, the judge stated

He wants to arrest the gentleman for this assault. The gentleman goes - - into the cell. He's ordered to get down on the ground. He doesn't get

down on the ground. He stands there. He verbalizes some threat that he's going to spit at the officer. And your question [posed to Dougherty] now is, whether given those facts - -

By Mr. Dougherty:

Q. The officer had a reasonable belief that it would be okay to use mace and not be in trouble for it as a protection against what would happen when they were face-to-face in the cell?

A. Based upon how you worded the question, yes.

On redirect, Harbourt explained that if the door to the cell was closed, it would not be, in Mr. Trimboli's word in his question to Harbourt, "appropriate" if he used OC when the door was closed. As for the discussion about "emergent," at page 185 of R-11, the "Ability" slide, the text notes, "does the subject present an imminent threat to officer or another?" Even in the context of Mr. Dougherty's hypothetical, Sergeant Harbourt saw no "imminent threat." Additionally, the actual AG Guidelines, R-15, at page 000140, addressing "Authorizations and Limitations A. Use of Force," states, "A law enforcement officer may use physical force or mechanical force when the officer reasonably believes it is immediately necessary at the time." In this case, while Q.S. could be re-arrested for the assault, at the time he entered into a cell the automatically-controlled door of which immediately moved to a nearly shut position by the time Villanueva arrived, he was already in custody. And there was then no requirement that the booking related to that re-arrest take place at that time, as the officer had the ability to wait for the subject to calm down in the cell. There was no emergent need at the time to book him. On redirect, Sergeant Harbourt emphasized that his issue with Villanueva's conduct was with the "immediacy" of it.

My issue is the immediacy of it. I know we are talking about whether his legal authority is, okay, to go in to pursue a suspect or an arrestee who was—he was going to be charged with aggravated assault. Yes, his authority is there absolutely 100 percent. Okay? But like we try to tell the recruits and the young officers, just because you can doesn't mean you should. All right? In my opinion, he was secured in a holding cell. He was secured on the second floor of the police department. Okay? He was searched and patted for weapons. I'm not saying that weapons don't get through, all right? But he was secured in a cell.

Officer Villanueva offered Dr. James Williams as an expert witness. Dr. Williams has an extensive record of service in local, state and federal law enforcement and is the retired chief of the Organized Crime Task Force for the United States Department of Justice. He has served as a municipal police chief in Burlington Township, New Jersey and Chief of International Police Training for the DOJ. He also served as Director of Team Operations for the New York Yankees and is currently on staff at Rowan University, teaching many facets of police policy, practice and procedure. He graduated from the New Jersey State Police Academy and was involved in developing training and policy operations in conjunction with the NJ Police Training Commission and served as a chief police training officer at a regional police training academy in South Jersey from 1965-1973, where he taught Use of Force policy. He is a certified police trainer and is familiar with the Attorney General's Guidelines. Queried as the currency of his experience with that policy given the passage of time, he offered that it was largely the same today as when it came out in 1985, except that the wording has changed to include "reasonable belief," a change he described as "minor." He was involved in this re-write. Dr. Williams was accepted as an expert in police training regarding use of force policy.

Dr. Williams explained that Officer Villanueva's role in the Detention Unit in the Trenton Police Department on the day in question was to process Q.S. after he was brought in by the State Police on an outstanding warrant. This would involve fingerprinting, photographing and escorting him to an assigned cell. Q.S. resisted all efforts to process him, starting once his approved use of the phone lasted too long and he was directed to end the call, which he did not voluntarily do. Q.S. struck the officer's hand away from the phone. Then, he struck the officer in the side with his elbow as they were walking down the hallway. This allowed him to break the officer's grasp on him and "run away." Indeed, Williams characterized Q.S.'s actions, which should have involved merely submitting to the officer's directions, as instead involving an attempt to escape from Villanueva. He then proceeded down the hallway to the cell. Once Q.S. reached and entered a cell, he continued verbal agitation, which had a disruptive effect on other prisoners. Villanueva directed Q.S. to stop his disruptive behavior, but he did not desist. In his report, Dr. Williams wrote that it was at this point in time, when the

“verbal attempts to quiet down and settle the movements of Q.S.,” that Villanueva “elected to use the chemical spray . . . as an alternative to physical force to bring [Q.S.] under control.” The officer decided not to use physical force in a confrontation with Q.S., but instead elected to use OC spray. According to Dr. Williams, none of the officer's actions at the cell constituted violations of the Attorney General's Guidelines.

According to Dr. Williams, Officer Villanueva had provided clear direction to Q.S. that he was to stop and get on the ground. He was under arrest for assault and when he did not comply with the understandable and, Williams was sure, loud voice directions which Dr. Williams concluded had been provided by Villanueva, the officer was not required to desist from pursuing Q.S. in order to effectuate the arrest. His job was to process Q.S. He had a duty to take him under control for the arrest. In the circumstances, nothing mandated that Villanueva stop merely because the arrestee was in a cell, indeed a cell that Williams understood from Villanueva Q.S. had not been assigned to occupy, although whether he had been assigned to that cell or not would not affect his opinion concerning Villanueva's conduct. It was still his duty to perform and he could go into the cell in order to get Q.S. out of the cell. No policy prevented his using OC spray in this circumstance. Officers are trained to use discretion when performing their duties and here, the continuum of circumstances presented to Villanueva allowed him to properly exercise that discretion and utilize the spray as a necessary element to effectuate the arrest. Indeed, the use of spray was a lesser use of force, used in lieu of the physical force that might be employed if the officer entered the cell without having first sprayed Q.S. It was used to calm down an unruly detainee. In Williams' opinion, the initial assault occurred in the phone room, and then Q.S. continually resisted lawful commands of the officer in order to evade arrest. This resistance included the entry into the cell. Villanueva's responsibilities did not end merely because the arrestee was in a cell. And his responsibility to process Q.S. would not end merely because his shift came to an end. He had a responsibility to complete his assignment.

On cross-examination, Dr. Williams explained that in his report he did not refer to effectuating an arrest as a goal at the time that Villanueva elected to use the OC spray,

as "it doesn't need to be in there for anything." His knowledge of the supposed verbal disruption that Q.S. was causing was not drawn from the recordings, which had no sound, but from what Villanueva told him and from his

observation from this tape you have provided me to look at shows him talking and making—I'm not a lip reader so I can't read his lips, but it has been my empirical experience in situations like this that the language being used is not something that I would want to use and it's not something that I do use.¹

Asked to consider R-13B, Dr. Williams advised that he did not consider this a restriction on the use of mechanical forces if the individual was in custody. However, Dr. Williams agreed that when Q.S. was inside the cell, he was restrained. However, he was not under control. Although he was not attacking anyone at that time nor was he damaging any property, nevertheless, under the circumstances with which he was presented, Officer Villanueva could reasonably have believed the use of OC spray to be appropriate.

In closing his answers on re-direct, Dr. Williams noted that "police run the jail, not prisoners." His professional opinion was that he was "very certain" that there was no violation of the use of force policies.

Rodney Haile, the police aide on duty in the detention unit, testified that either he or another officer would determine which cell a detainee would be placed in. He did not have any recollection that he had made a specific assignment for Q.S. prior to his entering Cell 7. Shown a "Prisoner Intake Form-Medical and Search" which he agreed contains his handwriting with the designation of Cell 7, he could not recall when he completed the form. Although he explained that it is "usually" all filled out at once, he added that sometimes the cell designation can be filled in later in time. Haile did not

¹ In his report, Williams listed as fact number "6" that "[Q.S.] once inside the cell continued to loudly scream and cause an in-cell disturbance which caused other inmates from other cells to react and join the disturbance." As for his "empirical experience" that led him to the conclusion that Q.S. was screaming loudly, was yelling, this was "based on my empirical experience at the Bordentown Reformatory and the Burlington County Jail."

specifically notice the "tussle" occurring between the officer and the detainee just before Q.S. went up the hallway to Cell 7 because he was paying attention to the control panel. It was Haile who activated the cell door to close. He recalled that there was a very loud discussion between the two which could be heard in the entire cell block area. Other arrestees became "a bit rowdy." However, he did not actually observe Q.S. as he proceeded down the hallway to the cell. Haile closed the cell door on his own when he saw that Q.S. had entered the cell and was "all the way in." He recalled that when the cell door was closing there was a lot of yelling directed toward the officer. He described the noise level as "intense." It was Villanueva who instructed him to re-open the cell, a request which the witness said was not unusual, although it does not happen every day. However, Haile did not recall that Villanueva had moved away from the cell prior to his requesting that the door be opened.

Joseph Constance, a former police officer and currently a licensed private investigator, testified as an expert witness for the appellant. Mr. Constance formally worked in the Trenton Police Department and was the deputy chief of police and chief of detectives. He received training in the use of force, including classroom training on the Attorney General's Guidelines. He described this document as involving generalities and noted that all circumstances faced by police officers are "different." Mr. Constance is a certified training officer and has taught at the police academy and provided in-service training. He also served as the president of the Principal Officers' Association and during that service he came across this issue of use of force quite often. He described use of force as occurring within the "fog of war."

Mr. Constance is not certified as a training officer with regard to the use of OC spray. He was never assigned to internal affairs and retired from the police department in 2000. He trained others in the use of force during the late 1980s and 1990s. He never previously testified as an expert concerning the Use of Force Guidelines. In preparation for the testimony in this case he reviewed the videos, Villanueva and Acosta's reports and the Internal Affairs interview.

In reviewing the events that he considered while forming his opinion, Mr. Constance noted that the detainee had been permitted to make a phone call, had extended his stay on the phone beyond that permitted by Villanueva, had struck Villanueva's hand away from the phone, had struck him with his elbow and then went down the hallway. Villanueva had ordered Q.S. to the ground. And the detainee had responded by telling the officer to not touch him and that he would spit in his face. The incident was intensifying, and Villanueva went for the OC spray. Q.S. went down to the cell and entered it as the door was closing, barely getting inside. Villanueva was quite close behind him and sprayed him. The door closed. Villanueva hollered to Police Aide Haile.

Mr. Constance described Officer Villanueva's purpose at the time that he arrived at the cell as a pursuit to place Q.S. under control. The detainee was belligerent, threatening to spit, and trying to hide behind a mattress. He was trying to escape being arrested and was a barricaded suspect. Villanueva had to get him out of the cell by himself.

Referring to R-11, page 175, Mr. Constance noted that the middle bullet point, "not required to desist because suspect resists," has not changed over time. This concept is current and has always been so. The use of OC spray would soften the detainee up so that he could be put on the ground and handcuffed. Officer Villanueva had a duty to complete an arrest.

Considering R-13, page 11, bottom left corner slide, "B.," Constance claimed that this section did not prevent Villanueva from acting as he had. He had to use good common sense. He had to assume that Q.S. was still violent. and this would tell him that Q.S.'s attack upon him could have continued. He used the OC spray to soften him up. Had he not effectuated the arrest his sergeant "would have been all over him." As for the possibility that he could have left the photographing, fingerprinting and paperwork for the next shift, it is not appropriate to leave one's "dirty laundry" for others. Villanueva knew what had occurred and he had the duty to complete his report.

Nevertheless, Constance agreed that it would have been permissible for Villanueva to remain on overtime to complete the processing.

Mr. Constance analogized the situation of Q.S. barricading himself in the cell with the mattress to one who was in a car or home with the door locked. That the door was closed for thirty to forty seconds did not make a difference in his opinion as to the propriety of Villanueva's actions at the cell. He also argued that the comment on R-13, page 5, bottom left, "B.1a." regarding a justification for the use of OC spray when an "officer is dealing with a combative person who has physically resisted or has threatened to physically resist or has ignored the officer's verbal commands" applied to the situation that Villanueva faced. Also, he noted that R-13, page 11, left bottom "B.," does not say "shall not," but instead, "should not," again emphasizing the discretion that an officer has when applying the Guidelines to actual situations. He also noted that it would be expected that the officer would provide a warning that he was going to use OC spray, which he said Villanueva did on two or three occasions.

Anthony Villanueva testified that he received training at the Mercer County Police Academy in 2014. He passed all of the tests, including the Use of Force element. He became a Trenton police officer in February 2015, serving a one-year probationary period.

Officer Villanueva noted that on November 28, 2017, he was near the end of his tour at approximately 5:30 p.m. when he was told to come to the first floor to get Q.S., who had been arrested by the State Police on an outstanding warrant. He was to process Q.S., who he took upstairs and told Q.S. that he needed to be searched. The search occurred without any problems arising. Q.S. requested to make a phone call and was allowed to do so in the phone room. He contacted his mother. He was told that he had five minutes for the call. The first part of the call was about bail, but the call then went on, and as the five minutes were about to expire, Villanueva told Q.S. to end the call. He did not, despite being told "numerous times" to do so. After about eight minutes, the officer reached over to hang up the receiver. Q.S. "smacked" his hand away, saying "You hung up my call." The officer tried to grab Q.S. to escort him out of

the phone room. Along with Police Aide Haile, he managed to move the prisoner toward the control panel, gripping him with his left hand and with his right arm over Q.S.'s back. Q.S. still was speaking about his call time not being up. He told the officer to "get the fuck off me, get off me." He then proceeded to push his elbow into the right side of the officer's body. Villanueva told Q.S. that he had earned another charge and instructed him to "get on the ground, get on the ground," but this direction was ignored. Villanueva went to obtain the OC spray, which was located near the fingerprint area. He got it and could see that Q.S. was talking to prisoners as he moved up in the hallway. This was causing the prisoners to become rowdy. As he went up the hallway towards Q.S., they were screaming at the officer to "leave him alone, leave him alone." As Villanueva approached Cell 7, he ordered Q.S. to "get on the ground," before Q.S. entered the cell, a cell that Q.S. had never been told to enter. Q.S. said that if Villanueva touched him, he would spit. As the gap between he and Q.S. closed, Q.S. entered the cell and the door began closing. Villanueva had not directed Haile to close the door. Villanueva explained that he was attempting to handcuff the prisoner, but the door closed. He stepped back and instructed Haile to open the door. Again, he ordered Q.S. to get on the ground. The other inmates were loud and banging. Villanueva administered OC spray, but was "unsuccessful." He tried again, but Q.S. blocked himself off with the mattress. Villanueva told Haile to open the door, but Haile did not do so immediately. Villanueva went to get latex gloves and the detention area's own pink handcuffs² and told Haile to open the door. In the appellant's view, he needed to complete the arrest of Q.S. for the new charges.

Shown R-13, page 11, which addresses situations in which OC spray should not be used, Villanueva explained that he did not believe that "B" applied, in this situation, because Q.S. was resisting and had entered Cell 7 contrary to the instructions that Villanueva had given him, thus displaying a "form of resistance." He understood that the middle bullet point for R-11, page 175, applied to this situation and thus, he was not required to desist from effectuating the arrest due to Q.S.'s resistance. His objective was to remove Q.S. from the cell and have him comply with his orders to get on the

² So as not to have to use his own handcuffs, which he might have some difficulty retrieving after his shift ended.

ground. When the cell door opened he tried to enter it, but Q.S. rushed at him with the mattress. Q.S. was considerably bigger than the officer, who described himself as approximately 5'5" and 145 pounds, as opposed to Q.S., who he estimated was 5'9," 190 to 200 pounds. However, this difference in size was not a deterrent to the officer in trying to arrest Q.S.

According to Officer Villanueva, the cell number was usually not placed on the Prisoner Intake Form until the prisoner was already in the cell, because it was necessary to first exam the condition of a cell before determining whether a prisoner would be placed in that specific cell.

Villanueva explained that he wrote his report concerning the incident that same evening as per the standard operating procedure. It was necessary to turn the report in and have it approved by a superior. His tour ran from 0600 to 1800 hours. Sergeant Acosta, who was his shift sergeant, was present in the building and had a brief conversation with Villanueva prior to Acosta leaving for the day. Villanueva gave the sergeant a brief account of what had occurred and of his use of OC spray. Acosta, who apologized for having Villanueva process Q.S. without another officer present despite the fact that it was usual to have two officers present per prisoner and a superior officer also present, did not criticize Villanueva's actions and asked that Villanueva write a brief description of what occurred. Acosta then gave the report to Sergeant Harris, his relief, who reviewed it and had her electronic signature affixed to it. She also had no comments about the report.

The appellant explained that he wanted to complete the arrest procedure, knowing that his shift was ending soon and that he could not just leave this task over to the next shift. "No other officer wants to deal with the prior shift's issues."

When Sergeant Acosta returned for his next tour of duty on December 1, he advised that he had seen the recordings of the activities that occurred and wanted to review them with the appellant. Officer Smith assisted Acosta. Villanueva told the sergeant that he was aware that there were a few things in his report that were not

consistent with the recorded material. While his report said that he and Haile had escorted Q.S. to the cell after the prisoner struck Villanueva with his elbow, the recording showed that Q.S. walked by himself to Cell 7. Despite the differences between his report and the recorded events, Villanueva insisted that he had “no intent to mislead.” He was certainly aware of the presence of surveillance cameras in the hallway. He knew that if he deliberately misrepresented he would be subject to punishment. He did not purposely do so. He told Acosta that he had rushed through his report. When he was preparing his report, he had been on duty for sixteen hours and was tired and prepared to go home. He had no assistance from any recordings as he wrote the report. Sergeant Acosta said that he understood. Villanueva was not told to issue a corrected report. He did not know if he could do so on his own; he thought that he needed permission to correct a report already turned in.

On cross-examination, Officer Villanueva agreed that he had stayed until 10:00 p.m. to finish his report. He had not “rushed” through his report.

Q. And in that period of time, the four hours that you remained beyond your shift, you rushed to complete your report. I believe you—you testified that you hurried to complete it?

A. I'm not sure if I said that, sir.

Q. All right. Well, let me ask you. Did you rush to complete your report?

A. No, sir.

Q. All right. So you had ample time to complete it.

A. I believe so, yes. But I also stated it was the end of my tour.

Q. Now when you say, “end of tour.” Are you referring about the 6 p.m. or the additional four hours?

A. The 6 p.m.

Q. Right.

The Court: And you'd been on since when?

The witness: And I have been on since 6 in the morning.

The processing for Q.S.'s re-arrest was accomplished by another officer at Acosta's direction while Villanueva reported to Acosta on the first floor. Villanueva knew that the report would be part of the criminal record for the new charges and thus had to be accurate, accuracy being a part of his duty as a police officer. Yet his report did not mention that the OC spray was used when the cell door was closed, a fact he agreed

was significant and should have been in his report. He was fatigued, and this was a mistake. Additionally, he said the struggle that occurred near the control panel seemed to be a long one.

While Villanueva did not tell Q.S. to go to Cell 7, he acknowledged that Q.S. might have been told this by the aide or instead have gone to that cell on his own. While he believes that Q.S. was aware that Villanueva was coming up the hall after him when the detainee was passing Cell 1 or 2, he agreed that the recording showed that Q.S. did not speed up as he travelled toward Cell 7, but advanced at "a steady pace." He agreed that the recording did not show any evidence that anything was thrown out of the cells.³ He believes that he at least advised Q.S. that he would be sprayed by the time that Villanueva was by Cells 5 or 6, but he is not sure of this. He also agreed that the noise level was "extremely loud" and he is not sure if Q.S. heard him. However, he voiced "numerous commands" prior to reaching Cell 7, including verbal commands made even before reaching the hallway. As he reached the cell, Q.S. was still voicing threats and telling Villanueva to stay away from him.

Villanueva agreed that he used the spray "immediately" as he arrived at the cell, with the door closing as he did so. While he felt that there was a threat during the entire incident, he agreed that at the time he sprayed Q.S., the detainee was not a physical threat to him, nor was he destroying property.

Officer Villanueva denied that his spraying the OC at Q.S. in the cell as Villanueva reached it was an act of retaliation. He was really acting to effectuate the arrest process prior to the end of his tour of duty.

³In his answers to interrogatories, Villanueva said that hamburgers and water were thrown into the hallway from the cells along the hallway. He did not have the videos to view as he wrote his report, and agreed that his statement about tossed items in the report was "probably not true" adding that he cannot recall.

Discussion

In a civil service disciplinary hearing the burden to prove that the charged public employee violated specific provisions of the disciplinary code falls upon the employer, which must adduce a preponderance of the credible evidence to support its claims. Henry v. Rahway State Prison, 81 N.J. 571 (1990). Here, Officer Villanueva is charged with misconduct by a public employee, which entails conduct that has the ability to undermine the public's trust in government and its employees and bring discredit to the institution, Karins v. Atlantic City, 152 N.J. 532, 557 (1998). In addition, he is charged with incapacity, which entails an inability to undertake the requirements of one's position in a proper and acceptable manner. Finally, he is charged with violating the Rule and Regulations of the Trenton Police Department.

Police officers are held to a higher standard of conduct than most civil servants. Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965). This must especially be true in connection with the use of force, although here it is the case that deadly force was not involved. However, given the risks, legal consequences and impact of such use on the officers, recipients and the perceptions of the public, strict adherence to the policies must be required. Indeed, the ability of law enforcement to utilize force, whether physical, mechanical or deadly, is the most relevant reason for the insistence that they meet such a higher level of conduct.

An incident occurred on the second floor of the Trenton Police headquarters on November 28, 2017. Fortunately, the significant events related to the interaction between Officer Villanueva and detainee Q.S. were largely recorded. Thus, while Officer Villanueva wrote a report just after he had used OC spray on Q.S. while the detainee was inside of Cell 7 and Q.S. was then brought under control by several officers in the area of the processing room, we do not have to rely upon Villanueva's report to determine what actually occurred. This is indeed fortunate, for as even Villanueva has admitted, his report was at least incorrect, inconsistent, incomplete and, in the City's view, simply false. Once again, here is the pertinent portion of that report,

beginning just after Q.S. elbowed Villanueva and up to the point where Q.S. has been moved to the processing area where he is physically subdued.

I then ordered [Q.S.] to get on the ground numerous times, so I could place him in handcuffs. After a long struggle, I was able to get [Q.S.] into a cell with the assistance of Police Aide Haile. While in the cell, [Q.S.] began to scream and cause a disturbance, which caused other prisoners to become irate as well. I advised Police Aide Haile to open the cell door so I can handcuff [Q.S.] behind his back, process him, again on the new charges and move him to another cell to be better monitored. As I approached the cell, I advised [Q.S.] to get on the ground because he was going to be placed into handcuffs. [Q.S.] was advised if he becomes aggressive, he was going to be sprayed with OC spray. [Q.S.] advised me that he was going to do whatever he wants, and I better not get near him. As Police Aid Haile began to open the cell, [Q.S.] began to clear his throat and spit in my direction. I then grabbed the can of OC spray and attempted to spray [Q.S.] with a (1) two second burst, but was unable to due to [Q.S.] shielding his body with the bed mat. After another attempt, I was able to administer a (1) two second burst of the OC spray in the bridge of [Q.S.'s] nose. [Q.S.] became extremely irate and exited his cell at which time he pushed me and ran toward the main detention hallway. I follow [sic] him into the secured hallway.

Clearly this report does not reflect the reality of the incident. If indeed Villanueva did tell Q.S. "numerous times" that he had to get on the ground, either telling him that he would be handcuffed or without stating the exact purpose for the command, the report entirely leaves out any reference to the reality concerning Q.S.'s movement to cell 7. All Villanueva mentions is "a long struggle" which enabled him to "get Q.S. into a cell with" the assistance of Police Aide Haile. But as the recordings show, the officer had nothing physically to do with Q.S.'s movement to and entrance into Cell 7. Q.S. moved up the hallway himself, unescorted. According to the report, once Q.S. had been put in a cell by Villanueva and Haile, supposedly "after the long struggle" that we know did not take place, Villanueva advised Haile to open the cell, where the detainee was irate and screaming. After warning Q.S. to get on the ground and hearing Q.S. effectively refuse ("I'll do what I want"), and warning him that he would be sprayed, and as Haile was opening the cell door and Q.S. was about to spit in his direction, Villanueva grabbed the can of OC spray and attempted to spray him. However, that hardly reflects what the recording shows to have actually happened. First, of course, despite any suggestion that once Q.S. elbowed Villanueva, he ran down the hallway, the recording "1-11 Cell

Block" undeniably shows that he did not run, but instead walked, rather leisurely it might be said, along the hallway until he got to Cell 7, from 17:45:55 to 17:46:06. And, despite any suggestion that as he proceeded along the way to that cell other detainees were throwing anything at all, there is no evidence of any such activity.

As for the "long struggle" described in Villanueva's report, the recording does not show it. While it is likely that there was some degree of physical encounter at the time of the elbowing, the actual episode was hardly long.

Q. Okay. Now, in your report, R-3, you say that after you—that after [Q.S.] was able to land an elbow on you, you engaged—you ordered him to get on the ground numerous times. And then engaged in a long struggle, after which you were able to get him into the cell. Do we see any vid—recording on these videos of you and [Q.S.] and Haile engaging in a long struggle after he—after the alleged elbow?

A. Well, you wouldn't be able to see a video of me and [Q.S.] struggling after the elbow because we were in the hallway where there's no surveillance cameras.

Q. And that would have occurred in the nine seconds between the time we saw you—the three of you turn into the hallway and the time we see Mr. Villanueva – [Q.S.] walking here.

The Court: What's the --

The witness: Yeah.

The Court: Oh, 17:45. Okay, yes.

The witness: Yes.

Mr. Trimboli: All right.

The witness: Yes, we were struggling --

Mr. Trimboli: Okay.

The witness: -- in that moment. Because if we were not struggling, I would still be walking down the hallway with [Q.S.]

Interestingly, despite the claim about the "struggle," the recording shows that Q.S. did not feel the need to rush down the hallway, away from the person he had supposedly struggled with for a "long" time. Clearly, there was no "long struggle." Villanueva explained on cross-examination that to him it seemed long when he wrote his report. But it was not long, and I doubt that he really did not know that. As for then getting him into this cell after that struggle, the recording demonstrates that characterization of the event is absolutely incorrect. Further, in the report Villanueva describes his approach to the cell, his demands and warnings to Q.S., including that he

would be sprayed if he did not obey, and Q.S.'s verbal resistance and manifest intent to spit at him, and states that only then did he "grab the can of OC" and attempt to spray Q.S. However, the recordings tell a different story. The "1-11 Cell Block" recording shows that as Villanueva transits the hallway on his way to where Q.S. has entered Cell 7, by the time that the officer has reached to about Cell 2, he already quite visibly has the OC spray in hand. At 17:46:08 Q.S. gestures at Villanueva, who is now at about Cell 5. Then, the officer, at 17:46-10, turns diagonally towards Cell 7, raising his right arm as he does so, and immediately comes to the cell door with the can pointed into the cell. The best view of what then occurs is on the "Cell 7" recording, and it shows that as soon as he turns to the cell, Villanueva points the can into the cell and without doubt sprays the OC. There is absolutely no indication that once he reached the cell he took any time whatsoever to warn Q.S., to take any steps to verbally calm him down, or to do anything other than to immediately spray OC at him. Any statement in the report that was intended to describe anything other than Villanueva's immediate resort to OC spray is at best misleading. Any suggestion that he was not already preparing to use the spray when he was not yet even up to the cell is also at best misleading, as he had it in his hand when he was approximately five cells away from Cell 7. And the spraying did not first occur only after Haile was opening the door. Instead, it occurred as the door was closing, in fact just before it was entirely closed. The report also fails to note that after this initial encounter at the cell, the officer departed down the hallway before returning about half a minute later, after, as shown on the recording labeled, "B/A Looking from the Elevator," obtaining another can of spray. The report would suggest the detainee's departure from the cell occurred almost immediately after the officer first used the spray, but the reality is there was a period of over half a minute when the officer was completely away from the cell and when he returned, the detainee raised the mattress and as the door opened, Villanueva can be seen to grab the corner of the mattress, at which time Q.S. exits the cell, thereby forcing Villanueva to move back, which action Villanueva recorded as a push by Q.S., perhaps an overstatement but not itself significant. As for the description of Q.S. then running toward the main detention hallway, it is, I think, a bit much to characterize Q.S.'s movement, recorded on 1-11 Cell Block", as "running."

While acknowledging that not every single variation between the report and the recordings constitutes a material departure from the truth of what occurred, in major elements Villanueva's report did not accurately reflect what had occurred only shortly before he wrote the report. And the tenor of the description he gave entirely hides the fact that his immediate reaction to the situation presented by Q.S.'s elbowing him, moving to Cell 7 and entering it was to pull out the spray and to use it at the very second that he arrived at the cell door.

According to Villanueva, the "inconsistencies" in his report were the result of fatigue and an inability to review the recordings at the time that he wrote the report. With all due respect, this explanation is simply not worthy of belief. While Villanueva was about to end his shift when the events involving Q.S. occurred, I cannot accept that he was so tired that he was unable to recall with reasonable detail the circumstances that had just occurred. It is much more reasonable to understand that Officer Villanueva was quite upset that Q.S. had defied him, had slapped and elbowed him and had continued to defy him by refusing the direction to get on the ground after he elbowed the officer. He went to the cell armed with the spray can, which was, as he proceeded, not simply at his side on whatever secures it to his body in the normal course of business, but with the can in hand, ready for immediate use. When he wrote his report, he knew what had happened, and he did not want to tell his superiors that he had utilized the mechanical force as an almost instantaneous reaction to the conduct of the by then contained detainee. Thus, I **FIND** that his inaccurate and misleading report was not simply a product of fatigue, but was a document written with the intention to cover up the facts about his initial use of OC spray, which he no doubt realized might appear to have been an inappropriate use of force in the circumstance. I **FIND** that the written report tendered by Villanueva following shortly upon the incident was deliberately false. And to the extent that Sergeant Acosta was presented with this report, and/or a verbal summary consistent with this written version of events, then Acosta did not obtain a true picture at the time of what had actually occurred. But was the spraying of OC at Q.S. at Cell 7 and what is recorded on "Cell 7" at 17:46:10 a violation of the Attorney General's Guidelines?

The parties have each produced experienced experts. They differed as to the propriety of Villanueva's conduct. Lieutenant Wilson held the conduct to violate the Guidelines; Dr. Williams and Joseph Constance found it proper. As for Sergeant John Harbourt, who testified as an expert witness for the City, counsel for Officer Villanueva argues strenuously that by the time Harbourt had finished his cross-examination, he had changed his opinion and actually deemed Villanueva's conduct as within the Guidelines. But as the detailed review of Harbourt's testimony above shows, that is not actually the case. On direct, Harbourt noted that at the point in time when Villanueva came up to Cell 7, with Q.S. inside and the door practically closed, the detainee posed no threat to anyone, no threat to property, had no opportunity to attack anyone, and no ability to do so. He was isolated, and at that point offering no physical resistance to Villanueva. While he might have spoken words of defiance and appeared to be ready to spit at the officer, as Harbourt noted, words do not hurt, certainly in a physical sense, and while Harbourt may not have stated it and I do not deem it very important, it is certain that a police officer in a detention unit cannot be unfamiliar with what would generally be seen as wholly inappropriate and even threatening verbalizations.⁴ While noting that it was important to consider the altercation in the phone room and the willingness of the detainee to have physical contact with the officer, nevertheless, Harbourt found that in entering the cell, something that it must be noted Q.S. did on his own, he had effectively de-escalated. In his opinion, he did not find that the circumstances were such as to support the use of force as a reasonable action on Villanueva's part.

On cross-examination, counsel for the officer, obviously alluding to the continuum of events, asked Harbourt if the events such as the elbowing, the breakaway from Villanueva and Haile, the verbalized resistance and threat to spit, the refusal to get on the ground in the hallway, were all factors to consider in assessing the officer's conduct. Harbourt agreed that they were. And he agreed that an arrest on new charges was appropriate. Further, he agreed that as he saw the recording, it appeared that as Villanueva approached Cell 7, he was attempting to get into the cell. And he agreed

⁴ Villanueva had been assigned to the detention unit for two weeks at the time of this incident. Possibly he heard no foul language or threats in that time. But, as noted, whether he had or not is not very important in this analysis.

with counsel that Villanueva had a right to enter the cell to effectuate that arrest. As for the Guidelines, he agreed that the language did not specifically prohibit the use of OC spray in a confined space or a cell.

Counsel makes much of what he understands to have been Harbourt's concession that the Attorney General's Use of Force Policy as presented in the Mercer County Law Enforcement Academy Use/Force Training materials does not require the presence of "emergent circumstances" for an officer to use force to overcome resistance by a subject. Thus, counsel argues that Harbourt actually agreed with the defense experts that the use of force by Villanueva was justified. He points to the witness's answer to counsel's last hypothetical question. With the preface that the officer wants to arrest Q.S. for the assault and Q.S. has refused to get on the ground, stands in the cell, and verbalizes the threat to spit, counsel asked if the officer "had a reasonable belief that it would be okay to use mace and not be in trouble for it as a protection against what would happen when they were face-to-face in the cell?" To that hypothetical, Harbourt answered "yes," meaning that in the circumstance posed, the officer's use was founded on a reasonable belief. However, that hypothetical seems to have posed the idea that Villanueva was intending to immediately enter the cell, where he would indeed be face-to-face with the resisting detainee, without the cell bars in between them. Or perhaps it might be that the idea was that he would have been able to get into the cell before the door closed. But as Harbourt noted on re-direct, with the cell door closed, use of the OC spray was "inappropriate." No imminent threat, no emergent circumstances, existed.

Given this answer, what is the significance of emergent circumstances or immediate threats in assessing the actions vis-a-vis the Guidelines? Harbourt agreed that the term "emergent circumstances" does not appear in the Guidelines or training materials.

The cornerstone of the Guidelines is that an officer's use of force, whether physical or mechanical, must be grounded on "reasonable belief" that the circumstances facing the officer require such use. If the circumstances do not support the existence of

such "reasonable belief" then the action is not consistent with the Guidelines. And the promise made to law enforcement officers that they will be "strongly supported by the law enforcement community in any subsequent review of their conduct, a promise repeatedly invoked by counsel for Officer Villanueva in his briefs," is entirely premised upon the officer's action being grounded in that same "reasonable belief." Absent such belief, the officer's use of force becomes "inconsistent" with the Guidelines and the promised support is unwarranted.

"Reasonable Belief" is formed by an assessment of the "facts and circumstances confronting and known by the law enforcement officer at the scene." The very next section of the Guidelines defines "Imminent Danger." Thus, clearly one element of the assessment an officer must make in determining if the use of force is reasonable is the existence of facts and circumstances that show that there is a prospect of danger that that is reasonably likely to occur. That danger, read in context with the rest of the Guidelines, could be to persons, the officer and/or others, to property, or to the potential recipient of force to him or herself if there is a reasonable threat of self-harm. The use of force is then limited to circumstances where the officer has the reasonable belief that the use of force "is immediately necessary at the time." Given all this, it is clear that while the term "emergent" or "emergent circumstances" is not in the Guidelines, the need for reasonable belief, the need for the use to be "immediately necessary, and the statement in the "Policy" statement on the very first page of the Guidelines that "[L]aw enforcement officers should exhaust all other reasonable means before resorting to the use of force," all point to the fact that an officer faced with a situation where the use of force might be contemplated must determine if that use is "immediately" needed due to such compelling, indeed, such "emergent circumstances" or whether the circumstances are such that reasonable alternatives to the use of force exist that should first be attempted before resorting the use of force.

Based upon the evidence, including the recordings, reports, expert testimony, testimony of other witnesses and Officer Villanueva himself, I **FIND** that after Q.S. elbowed Villanueva in the hallway and separated himself from Villanueva and Haile, he walked to Cell 7. While the evidence from Haile and Villanueva leaves it unclear if Q.S.

was told that this was to be his cell or not, he went to that cell. The cell door was closing as he entered it. The cell door was operated by the police aide and Q.S. had no part in its closing. Haile did not refrain from closing it and thereby locking Q.S. into that cell. Officer Villanueva proceeded up the hallway, taking his can of OC spray into his right hand at about Cell 2. As he reached Cell 7, the door was nearly closed, and it is extremely unlikely that he could have squeezed into the cell at that moment. As he turned toward the cell, he raised his arm and sprayed OC in Q.S.'s direction. While there is no audio, it seems from the timing of the events that Villanueva, as he approached the cell, had every intent to spray the detainee. He might have verbalized a command to get down on the cell floor and that he was going to handcuff Q.S., but if he did, it had to be at essentially the same moment he sprayed into the cell. By entering the cell without any physical assistance or inducement, and with the door closing, Q.S. isolated himself from the other already confined detainees and from the officer, at least as the bars were between the men. At that point in time, Q.S. posed no threat of harm to any other detainee, and realistically none to Villanueva. He had effectively de-escalated. That does not mean he had become compliant to commands, or that he might not at some point become a threat to others or property, but at the time that OC spray was first used, the only incident in question here, he was no danger.

Of course, much of the rationale for Villanueva's defense of his conduct is that he had to effectuate an arrest for the assault upon himself perpetrated by Q.S. in the phone room and hallway. And, as witnesses agreed, I **FIND** that an arrest, or as it was termed, a re-arrest, was warranted. But the fact that Q.S. was subject to arrest does not, contrary to Villanueva's position, excuse his use of force on the contained individual. An arrest involves a number of steps. Assuming the existence of legal grounds for the arrest, a person subject to arrest must generally be taken into custody. This can occur by the voluntary surrender to custody and control by the person, with the use of handcuffs or possibly without. However, it may be necessary to take control of the subject by physical means and without the subject's consent. Then, physical or mechanical force may be necessary to control the subject and assure that he or she poses no threat of harm to the arresting officer(s), other persons and/or property. Also, of course, such force may be necessary to assure that the subject does not flee from

the arrest. Here, -Q.S. had already been taken into custody on an outstanding warrant by the State Police. He was on the second floor of the detention center. After the altercation in the phone room and hallway that formed the legal basis for his re-arrest, he might be said to have fled the officer who intended to arrest him and who says that he told Q.S. to get on the ground in the hallway. But where did he flee? To the street? To a car or to his home? To a different part of the building, perhaps an unsecured area? He "fled" to a cell, in the very same narrow hallway and within the sight of the officer and the aide. He did not then stand defiant at the end of the hallway, or even outside of the cell. Instead, in full view of the officer, he entered the cell. He entered into a confined jail space, which, by the time Villanueva arrived at that cell, was for all intents and purposes, a closed, locked "restraining device," one that completely isolated him from any outside persons or things. The custodial, confining, control aspect of the re-arrest had thus been accomplished.⁵ All that remained was paperwork, fingerprints and photography. I **FIND** the idea that the need to complete these aspects of the arrest procedure provided a reasonable belief that mechanical force could be used in these specific circumstances is simply unreasonable. And, it might be added, that the relatively limited physical impact of receiving a spray of OC does not mitigate the improper nature of its use.

Of course, if Officer Villanueva had tried to take physical custody of Q.S. in the hallway after they were separated and before Q.S. entered the cell, it might well have been necessary to use spray if it seemed that that effort would be resisted by force. And if Villanueva had waited and tried to enter the cell after a time, allowing for the possibility that Q.S. would calm down, entering either himself or with support, it might have been proper to use OC spray if resistance occurred. But under the circumstances present at the moment he sprayed into the cell, the use was unnecessary and unreasonable. Further, I **FIND** that at the moment he reached the cell, indeed when he took out the can even before reaching it, the officer had other intentions than merely taking Q.S. to be printed and photographed. He intended to retaliate against Q.S. for his physical defiance and assault. That motive was, I **FIND**, the most significant

⁵ References by defense experts to situations where someone is inside a car or a house and must be arrested hardly fit the scenario here.

rationale for Q.S.'s decision to use OC spray. The claim of wanting to complete the arrest procedure was not his primary thought at the time, although it may have served as a convenient excuse later on.

Based upon the above discussion, I **FIND** that Officer Villanueva utilized OC spray on November 28, 2017, on a detainee, Q.S., while the latter was inside of an almost completely closed cell, the door nearly having completed its closure as initiated by Police Aide Haile. At the time, there was no ability of Q.S. to cause harm to Officer Villanueva, other detainees, employees of the facility, or any reason to believe that he posed a danger to himself, or to property. I **FIND** that Officer Villanueva sprayed into an effectively closed cell, in which the detainee was confined and effectively restrained. There was, at that time, and with consideration of Q.S.'s obviously irate manner, no immediate or pressing need to effectuate the processing steps to complete his re-arrest. These could have been completed after allowing some limited time for Q.S. to calm down. If he did not, or after the allotted time he again became resistant and physically uncooperative or belligerent, then, if other non-force methods were unavailing or deemed unsafe, spray might well have been the appropriate response to his conduct. However, at the time Villanueva came to the cell and instantaneously sprayed at Q.S., there was no immediate need, no emergent circumstance, no reasonable justification for the use of OC spray. Therefore, I **CONCLUDE** that his use of force violated the Attorney General's Use of Force Guidelines and his training.

Sanction

The appointing authority has agreed that Officer Villanueva has no prior disciplinary record. He has received a commendation, A-11D, for his actions in an incident in October 2015.

The inappropriate and unauthorized use of force by a law enforcement officer is misconduct and conduct that is likely to undermine the public's trust in government and its employees and bring discredit to the institution, Karins v. Atlantic City, 152 N.J. 532, 557 (1998). In addition, such conduct involving the unsanctioned use of force is of a

seriousness so as to indicate the inability of the officer to properly perform his police function. This is the case even recognizing the limited effect of OC spray, even if fully delivered to the recipient, which it was not in the case of this unauthorized use.

In addition, the fact, as previously found, that Officer Villanueva purposely did not file an honest and complete report following the incident leads both to the conclusion that here too he engaged in misconduct and conduct unbecoming a law enforcement officer, and that his removal from the force is warranted. Unauthorized use of mechanical force is itself a very serious offense against the standards to which a police officer is held, but even if here the offense might possibly call for some less serious, but still substantial sanction just short of removal, the effect of Villanueva's failure to honestly account for what he had done, even if he thought he had been authorized to do it, compounds the offense and, I **CONCLUDE**, necessitates his removal. Above all, police officers must be honest and must honestly account for their actions, rather than seek to obscure and cover up. In regard to incidents involving the use of force, this need for honesty is perhaps, if possible, even more necessary.

ORDER

It IS **HEREBY ORDERED** that Officer Villanueva shall be removed from his position as a Trenton police officer.

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.



April 5, 2019
DATE

JEFF S. MASIN, ALJ t/a

Date Received at Agency:

4-5-19

Date Mailed to Parties:

4-5-19

mph

APPENDIX

LIST OF WITNESSES:

For appellant:

Anthony Villanueva
Dr. James Williams
Joseph Constance
Police Aide Rodney Haile

For respondent:

Sergeant Miguel Acosta
Sergeant John Harbourt
Lieutenant George Wilson

LIST OF EXHIBITS:

For appellant:

A-11A-D Awards and Certificates
A-14 Curriculum Vitae, Joseph Constance
A-15 Curriculum Vitae, J.A. Williams

For respondent:

R-1 PNDA, dated March 23, 2018
R-2 FNDA, dated June 19, 2018
R-3 Villanueva Supplemental Report, November 28, 2017
R-4 Use of Force Report, November 28, 2017
R-5 Video recordings, November 28, 2017
R-6 Hector Gonzalez Report, November 28, 2017
R-7 Miguel Acosta Report, January 22, 2018
R-8 Steve Wilson Report, January 22, 2018
R-9 For identification only

- R-10 For identification only
- R-11 Trenton Police Department Training Presentation Regarding Use of Force
- R-12 Villanueva Training History
- R-13 Chemical Agents Training Materials, Mercer County Academy
- R-14 Academy Training Roster, December 1, 2014
- R-15 Attorney General Use of Force Policy
- R-16 For identification only
- R-17 For identification only
- R-18 Special Order Memorandum 2007-087
- R-19 For identification only
- R-20 Index to Video Evidence
- R-21 For identification only
- R-22 Prisoner Intake Sheet