STATE OF NEW JERSEY

In the Matter of Darius Collins Northern State Prison	FINAL ADMINISTRATION ACTION OF THE CIVIL SERVICE COMMISSION
CSC DKT. NO. 2019-3353 OAL DKT. NO. CSR 7720-19	

ISSUED: MARCH 13, 2020 (SLK)

The appeal of Darius Collins, Senior Correctional Police Officer, Northern State Prison, Department of Corrections, removal effective May 8, 2019, on charges, was heard by Administrative Law Judge Ernest M. Bongiovanni (ALJ), who rendered his initial decision on January 17, 2020. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and reply, the Civil Service Commission (Commission), at its meeting on February 26, 2020, did not adopt the ALJ's recommendation to modify the removal to a 120 working day suspension. Rather, the Commission ordered that the removal of the appellant be upheld.

DISCUSSION

The appellant was removed on May 8, 2019 on charges of conduct unbecoming a public employee, neglect of duty and other sufficient cause. Specifically, the appointing authority alleged that the appellant intentionally misstated material facts regarding his involvement in actions during an incident regarding a cell search, and that he left a gate unsecured in violation of policy. Upon the appellant's appeal to the Commission, the matter was transmitted to the Office of the Administrative Law (OAL) for a hearing as a contested case.

In his initial decision, the ALJ found that the appellant was the patrolling supervisor of the Administrative Close Supervision Unit, on the Second Wing, at Northern State Prison. Three eyewitness inmates accused the appellant of refusing to authorize showers for two other inmates, which caused these inmates to take unauthorized showers and, thereafter, refuse to reenter their cells afterwards since the property in their cells was damaged, trash the tier hallways and stairwells with garbage debris, and flood the stairwell with water while resisting a team of 10 officers performing a "two tier extraction" to get the two inmates under control. While resisting, the two inmates were severely injured. Regarding the charge that the appellant left a gate open, the appellant admitted during the investigation that he left the gate open. Based on the evidence presented, the ALJ did not sustain the charges of conduct unbecoming a public employee against the appellant as he did not find that there was credible evidence that the appellant's actions ignited the cell incident, nor did he find that the appellant made any misstatement of fact about the incident or his conduct during it. However, the ALJ sustained the charge of neglect of duty against the appellant as he admitted that it was his duty to see that the gate that blocked access between the tiers was secured and he failed to do so. Additionally, the appellant's inaction caused a team of 10 men to be used for the "double tier extraction" to control the inmates and the area of conflict was more likely to result in harm to the guards and prisoners because they were engaged on stairs in addition to the level floors. Moreover, the appellant offered no excuse for his negligence. Concerning the penalty, the ALJ indicated, given the heightened security at that part of the prison, the appellant's infraction in leaving the gate open warranted a heavy penalty. However, the ALJ modified the penalty from removal to a 120 working day suspension based on the appellant not having any prior major disciplines in the less than three years that he worked at Northern State Prison.

In the appointing authority's exceptions, it asserts that the ALJ's factual findings were incorrect as its investigation determined that it was the appellant who destroyed the two inmates' property in their cells, which caused them to be enraged and triggered the series of events that unfolded. Further, the ALJ incorrectly disregarded the appellant's failure to testify or present any witnesses which should have caused an adverse inference to be made against him. Moreover, the ALJ incorrectly considered an unsworn statement of a witness on behalf of the appellant who was available to testify and whom the appellant declined to call. Additionally, the ALJ incorrectly faulted the appointing authority for not presenting the criminal histories of the eyewitness inmates as this information was irrelevant as to whether the investigation was reliable, and the investigators' testimonies were credible. Also, the ALJ faulted the appointing authority for not presenting evidence that the appellant had the character for such an offense as it asserts that such evidence was inadmissible and irrelevant as the investigators testified at length to their findings. Finally, the appointing authority argues that

the appellant's actions were so egregious that the only appropriate penalty is removal regardless of his lack of prior disciplinary history.

In the appellant's reply to exceptions, he presents that there is no definitive proof that he committed any improper acts other than leaving the gate open. The investigator admitted during cross examination that his information came from the testimony of select inmates. This investigator admitted during cross examination that convicted felons are less likely to be truthful when questioned, and have been known to cause problems, fight and destroy property to get relocated to a different facility. Further, while the appellant was not the only officer working in the unit during the time of the incident, no other officer testified to witnessing the appellant performing the alleged acts nor was any other officer charged with giving a false statement. Additionally, the Local Control Point Officer, who was the only person who could give the appellant access to any cell in this unit, was not questioned. Moreover, the appellant argues that he had no obligation to testify on his own behalf, and there was no need, as it was the appointing authority's obligation to prove the allegations that the appellant committed improper acts other than leaving the gate open, which it failed to do. Finally, although he asserts that the 120 working day suspension for leaving the gate open is extreme, especially since he does not have any other prior discipline, he accepts the ALJ's recommendation.

Upon its *de novo* review of the record, the Commission agrees with the ALJ regarding the charges. In this regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See also, In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004).

In this matter, the ALJ correctly did not sustain the charge of conduct unbecoming as he did not find the evidence proffered regarding the eyewitness inmates credible. In this regard, the appointing authority did not present the inmates to testify nor did it have any of their statements entered into evidence. No reason was given for the appointing authority's failure to produce any witness inmate testimony either in person or via some other media. Further, the ALJ found that the inmate witnesses were most likely told the story of the events by the

offending inmates and, at least with this possibility, the appointing authority should have produced full-video recorded statements of the witnesses. Additionally, while in administrative and civil proceedings, it is permissible for the trier of fact to draw adverse inferences from a party's plea of self-incrimination, the inference may be drawn only if there is other evidence supporting the adverse finding. *See State Department of Law and Public Safety v. Merlino*, 216 *N.J. Super.* 579 (App. Div. 1987), *aff'd*, 109 *N.J.* 134 (1988). Further, the appointing authority made no effort to compel the appellant to testify or even produce his video-recorded interview. Therefore, it was appropriate for the ALJ not to draw an adverse inference against the appellant as there was no other credible evidence supporting the adverse finding. Moreover, under these circumstances, the record does not support a finding that the ALJ's findings were arbitrary or not supported by the record. Concerning the neglect of duty charge, as the appellant acknowledged that it was his duty to secure the gates and he failed to do so, the ALJ correctly sustained this charge.

Regarding the penalty, the Commission disagrees with the ALJ's reduction. In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In assessing the penalty in relationship to the employee's conduct, it is important to emphasize that the nature of the offense must be balanced against mitigating circumstances, including any prior disciplinary history. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). Moreover, even when a Senior Correctional Police Officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense occurring in the environment of a correctional facility may, nevertheless warrant the penalty of removal where it compromises the safety and security of the institution, or has the potential to subvert prison order and discipline. *See Henry v. Rahway State Prison, supra*, 81 *N.J.* at 579-80. In this regard, the Commission emphasizes that a Senior Correctional Police Officer is a law enforcement officer who, by the very nature of his job duties, is held to a higher standard of conduct than other public employees. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied,* 47 *N.J.* 80 (1966). *See also, In re Phillips,* 117 *N.J.* 567 (1990). Moreover, the Commission is also mindful that the appraisal of the seriousness of an offense and degree which such offenses subvert discipline are matters peculiarly within the expertise of the corrections officials. The appraisal is subject to *de novo* review by the Commission, but that appraisal should be given significant weight. *Bowden v.*

Bayside State Prison, 268 *N.J. Super.* 301, 306 (App. Div. 1993), *cert. denied*, 135 *N.J.* 469 (1994).

In this case, leaving a gate open is, essentially, failing to perform the fundamental duty of a Senior Correctional Police Officer and the appellant's failure to perform such duty demonstrates egregious neglect. Such an infraction compromised the safety and security of the facility and all of the employees and inmates therein. Additionally, the appellant neglected this duty in the Administrative Close Supervision Unit which makes it even more serious. Further, the appellant provided no explanation regarding this egregious lapse of duty. Finally, while the appellant did not have prior discipline, based on the egregious nature of the misconduct and the fact that appellant was a short-term employee as he had been employed less than three years at the time of the incident, removal from employment is warranted.

ORDER

The Civil Service Commission finds that the action of the appointing authority in imposing a removal was justified. Therefore, the Commission affirms that action and dismisses the appeal of Darius Collins.

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 26th DAY OF FEBRUARY, 2020

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT NO. CSR 07720-19

IN THE MATTER OF DARIUS COLLINS,
NORTHERN STATE PRISON.

Carlton Easton, 2nd Vice President, PBA Local #105, appearing for appellant Darius Collins pursuant to N.J.A.C. 1:1-5.4(a)(6)

Jana R. DiCosmo, Deputy Attorney General, for respondent, Northern State Prison (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: December 3, 2019 Decided: January 17, 2020

BEFORE **ERNEST M. BONGIOVANNI**, ALJ:

STATEMENT OF THE CASE

Darius Collins (appellant/Collins) brings this appeal from his termination as a Senior Correction Police Officer (SCPO) at Northern State Prison, New Jersey Department of Corrections (DOC). Collins was charged with intentionally misstating material facts concerning his involvement in, and his actions during, the January 6, 2019, search of a cell, leaving gates unsecured, which caused damage to inmates' property.

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 to the Office of Administrative Law, where it was filed on May 30, 2019. The hearing was held on October 16, 2019, and the record left open until November 18, 2019, for the parties to obtain a hearing transcript and submit written summations. This date was extended to December 3, 2019, to permit the complete video interview of the appellant, as the exhibit entered at the hearing was intended to be the entire interview but mistakenly the copy provided only contained half of the interview.

DISCUSSION

Respondent's Evidence

Two investigator witnesses were presented, Senior Investigator Richard DeMartino, and Major Davin Borg. DeMartino based his evidence mostly on interviews of other officers on the scene on the day of the search and photographic evidence of the destruction that ensued thereafter. According to the information and evidence he gathered on January 6, 2019, two inmates, W.V. and A.F. from cell #323 housed in the Administrative Close Supervision Unit (ACSU), to which Collins was assigned, took unauthorized showers. According to information later gathered, Collins who was directly supervising these inmates, had previously denied them their permitted three showers a week and this set off a chain of events including the said inmates creating havoc by refusing to return to their cells followed by their throwing garbage and filling hallways and stairwells with water and culminating in a forced "two tier" extraction to get the inmates under control.

In his testimony, the investigator's restated all the information he had gathered and summarized in his eight-page typed report dated February 14, 2019. (R-13.) On the date in question, according to respondent, and based on statements given to DeMartino, while W.V. and A.F. were taking the unauthorized showers, or soon thereafter, Collins entered their cell, threw all their belongings on the ground and poured bleach all over their property. (R-12, color photos.) Collins had also negligently

left a gate in the ACSU open, allowing the prisoners access to unauthorized areas, primarily to the stairwell permitting them to go from tier to tier. When the two inmates returned to their cells, they became enraged by the damage to their property, and refused to be "locked in." To control the inmates a "double-tier extraction," led by two five-person teams, was employed. During the extraction, the two inmates were seriously injured, A.F. receiving the worst, a broken leg, a badly bloodied nose, and a deep laceration over his eye, while fighting the armed-and-shielded team members. Witnesses also saw the two inmates throwing garbage and filling garbage cans with water, then dumping them on the floors and flooding the stairwell. The garbage in the halls was confirmed by DeMartino's photos.

After the incident, DeMartino inspected the ACSU, took photographs of the inmates' cell, the damaged property, and the blood splatter left owing to the injuries. DeMartino also interviewed Collins, and found him to be evasive, and "lying" about the destruction to the inmates' property. He found Collins's interview to be inconsistent with Collins's "Special Custody Report" (Special). He interviewed two inmate witnesses, R.W., one from adjoining cell #324, and another, S.T., in cell 325 They both stated they saw Collins enter a supply closet and carry a bottle of bleach and go into cell #323 while it was unoccupied. R.W. couldn't see into cell#323 but distinctly heard Collins wrecking it. DeMartino testified that he personally went into cell #324 and had a clear view of the stairwell where supposedly inmate R.W. observed Collins with the bottle of bleach while heading to cell #323. R.W. also told DeMartino how he also saw the two inmates resisting the extraction teams. throwing garbage and filling garbage cans with water, then dumping them on the floors and flooding the stairwell. The garbage in the halls and the blood resulting from the struggle was confirmed by DeMartino's photos. S.T. also added that Collins had released W.V. and A.F. for recreation but they reported for showers instead. He added that he was aware that this was the second time since December Collins had denied the two inmates showers.

On January 7, 2019, DeMartino tried to interview A.F., who was recuperating at Rutgers University Hospital in Newark, but owing to his injuries and narcotics being used to treat him, no statement could be taken. However, the next day DeMartino

returned, and along with another investigator, took a recorded statement from A.F. However, A.F. could remember nothing about the incident except waking up in a wheelchair covered in blood. On January 10, 2019, DeMartino interviewed inmate W.V.. He told DeMartino that on the incident date, he and his cellmate had been "skipped over" for showers and took it upon themselves to take unauthorized ones. W.V. said while they were taking their showers, their cell had been "searched." "Inmate [W.V.] noted that after completing the shower he had seen what his cell looked like and refused to lock in." (R-14, Report of DiMartino, page 3 of 8.) W.V. remembered nothing else about the incident.

On January 9, 2019, another inmate whose initials are also R.W. from cell #318 (R.W.318) volunteered to DeMartino a one-page written statement, which DeMartino found as "mirroring" the recorded statements taken of S.T. and R.W.

On February 5, 2019, DeMartino interviewed Collins, whom, he noted, first demanded his union representative be with him pursuant to his Weingarten rights. As with the other witnesses he previously interviewed, DeMartino simply rehashed his summary report which contained about 250 words on twenty-three lines. Although a video of this complete recording was made, neither respondent nor Collins proffered it. DeMartino also interviewed Collins and found him to be evasive and "lying" about the destruction to the inmates' property. He found Collins's interview to be inconsistent with Collins's "Special Custody Report."

In the summary of the interview, Collins noted the showers that day started with the inmates in the low numbers and ended with the high numbers, meaning it started around cell #201 and ended at #326. (R-10, Shower Log.) Collins said after A.F. and W.V. showered they went to their cells but just stood outside them and refused to enter. Collins contacted his area supervisor, Sergeant Adamson. Adamson went to the cell and when the inmates again refused his order, he ordered them to the holding area near the officers' area where the two were held (in the cages that were described by SCPO Roberto Villareal). After a while, Adamson after talking to the two prisoners brought them back to their cell, yet again, they refused to enter it. Adamson then

advised his supervising lieutenant and the extraction teams were formed. Because DeMartino and his other investigators had been told that A.F. and W.V. had been able to walk from the second to first floor unescorted, they asked Collins if the tier stairwell gates were locked and he answered "No." When questioned whose responsibility it was to secure the gates he answered "mine."

DeMartino showed Collins pictures of cell #323 from that day and was asked if he searched the cell and Collins responded "No." When asked if he had any idea why the cell would be in that condition, he "could not offer any explanation." When asked why he thought the two inmates refused to lock in, Collins again had no answer. He found Collins's interview to be inconsistent (although he used the description "inaccurate" when testifying) with Collins's "Special Custody Report" in that the Special never mentioned Sergeant Adamson escorting the two inmates to the holding area.

On February 7, 2019, DeMartino interviewed Sergeant Adamson. Adamson talked about how he came to contact his lieutenant to order the formation of the double-tier extraction. He also said that he tried talking to the two inmates after learning they were destroying the tier. He said nothing about going to the cell #323 after Collins reported they refused to lock. When asked if the two inmates had been brought to the holding area, Adamson said "No."

Another witness, Regional Major Davin Borg, who among other jobs, works as a policy witness for the DOC, testified. He has worked for the DOC for twenty-four years. According to Borg, Collins conduct on the incident date violated a great number of the DOC's Rules and Regulations for Law Enforcement Personnel. (P-14.) Beginning with Article I, Section 1, "No officer shall violate the laws of the United States . . . or of any state." According to Borg it is axiomatic that the willful destruction of property in cell #323 if committed by Collins means he violated this rule. Similarly, in Section 2 of the same Article, because of destroying the inmate's property Collins also created an impression among the public that [he] might be engaged in public violating the public's trust. Similarly, he stated Article 5 Section 3 was violated because Collins "willfully carelessly or negligently" lost destroyed spoiled or damaged property belong to the

department or an inmate. Collins also "failed to maintain a high degree of self-control at all times" by going into the two inmates' cell and destroying their property (Article 2, Section 4).

Further, under Northern State Prison's Internal Management Procedures (IMP) (R-15) the following violations occurred. Under Level 3 Tiered Provisions, 6, b. Personal Hygiene and Housekeeping, 1) Showers, "Each inmate housed in the [ACSU] shall be permitted to shower at least three times a week." Under IMP Institutional Search Plan the purposes of and the details on the properly conducting a search are meticulously set forth. (R-16.) Major Borg was shown the pictures of what the cell looked like on January 6 and simply commented that inmates in the ACSU are not ever allowed to have their cells in that kind of state. (R-11.) Further, under "Searches of Inmates and Correctional Facilities" of the Internal Management Procedures, the sergeant on duty must approve all searches. (R-17.) Here no such approval was given. As alleged by respondent, Collins entered the cell and upended all its contents. Finally, under IMP, Restrictive Housing Movements Congregate Interaction is to occur between inmates in one-hour blocks. (R-19.) However, the double-tier extraction caused the congregate interaction to be condensed to five minutes. Finally, Collins was shown to have completed all his required training as of the date of the incident. (R-20 and R-21), and thus should have known these Management procedures.

When asked if Collins's actions warranted his removal, Major Borg focused on Collins's admitted negligence in leaving a gate to a stairwell left unlocked and open.

> One of the most important things about working in our field is making sure the security and the safety of the institution as well as your fellow staff, are met. According to the investigation, the actions that were done created a scenario in which two inmates had full reign of an ad-seg unit. And an extraction was ordered. The fact that you have an extraction ordered is itself a cause for people to be injured. The fact that you have two people running unrestrained throughout the entire ad-seg unit due to the stairwell gates being left open means that they have a greater opportunity to cause more problems or damage to property.

Q: In your opinion, as one familiar with the policies and procedures on extractions, did the open gate compromise the officers' ability to perform the double-tier extraction?

A: It compromised their ability and made it a much more dangerous scenario, had the inmates removed themselves to a stairwell as opposed to being on a flat area.

Q: And explain to me why that is?

A: Because you are doing a forced extraction on a . . level surface, obviously the amount-or the distance that somebody can fall, or somebody can be grabbed and taken to the ground is limited by the height and weight of the individual. But when a stairwell's involved, now you're limiting them to flights of stairs. And of course, there's sharp corners on stairs and other items, that if someone were to fall down them, there would be a much greater risk of injury.

Q: Would you say these risks would have been foreseeable to someone who failed to secure a gate?

A: I would say the risk would be foreseeable, you're trained from Day 1 to expect the worst possibility and hope for the best, but you plan for the worst.

Q: Tell me a little bit more about the training.

A: In the academy they teach a situational awareness training. And it should be reaffirmed in your own training at the facility, where you are not only supposed to be on notice for looking around and seeing what's—what's different on a normal thing, but you're actually looking for it. You're supposed to expect that things are going to happen wrong. . . . . But to have enough disregard to leave gates open in that area means you have no disregard for safety whatsoever, or the possibility that things will go bad. Especially working in the ad-seg unit where individuals have already proven not to be able to follow the rules.

Appellant's Evidence

Appellant chose to call no witnesses, including himself. He did proffer a videotaped interview of SCPO Roberto Villareal, one of the witnesses DeMartino recorded. He also attempted to proffer excerpts from a small portion of the

Departmental hearings.[1] In the recorded statement, Villareal told DeMartino that on the date of the incident, W.V. and A.F. did appear to take their showers as they had everything with them (presumably soap and towels) needed to shower. He never saw what caused those inmates to refuse to lock up after the showers but did observe a Sergeant Adamson place them in "cages" in the hallways until they were allowed to return to cell #323. He also observed the inmates as they were returned from the cages to the cells get "mad," refusing again to be locked in and starting to trash the hallways until the two-tier extraction teams of then men could subdue them. He did, however, also verify that the gate to the stairwell had been left open.

The rest of the defense focused entirely on perceived weaknesses in the case by respondent. For one, the respondent's case mostly relied on the word of three prisoners. They failed to interview another inmate in cell #324, for example. DeMartino explained who to interview was "discretionary." DeMartino also admitted he has known inmates to illegally obtain bleach and keep it in their cells; therefore these two inmates could have been responsible for the damage. Certain things about the incident were left unexplained. DeMartino was asked why, if the inmates were done with their showers, they were put in holding cages in the hallways rather than being led immediately back to their cells. DeMartino could only answer "I don't know, that would be a question for Officer Collins."[2] There is also inconsistency in the stories between the way, when and why the inmates got from the showers to being placed in the cages. The defense also noted the Local Control Point (LCP) officer would have been asked by Collins to open the door to cell #323 in order for him to get into the room and trash it, but no attempt was made to interview him.

DeMartino also admitted under cross-examination that as the prisoners were allowed in their cells without restrictions such as handcuffs before leaving to go to

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[1] In its post-hearing brief, the DOC argues that both proffers should not be considered. I am disallowing any and all excerpts from the departmental hearing, as they are not based on sworn statements and no witness was presented to substantiate the accuracy of the reports contained or as recorded in the departmental hearing. I am allowing the Villareal statement, as DeMartino testified at the hearing and he personally interviewed and recorded this witness, and I reviewed the seventeen-minute interview.

[2] However, DeMartino had taken a "Special" from Collins and also a recorded statement from him and could have asked that question.

recreation of for showers, they could have wrecked their own cell before the incident with the refusal to lock in began.

FINDINGS OF FACT

To resolve disputes of material fact I make the following **FINDINGS**:

1. On January 6, 2019, appellant was the patrolling supervisor of prisoners of 2 wing of the ACSU at Northern State Prison. His partner Robert Vilareal, was in a separate area. keeping track of the prisoners and recording their activities in a log book from a separate area.

2. Collins is accused by three eyewitness inmates on that day of refusing to authorize showers for two other inmates W.V. and A.F. This caused a chain of events, it is alleged, that culminated in W.V and A.F. refusing to re enter their cell after their showers, trashing the tier hallways and stairwells with garbage debris and flooding the stairwell with water while resisting a ten-men team performing a "two tier extraction" to get the two inmates under control. Owing to their resistance, the two inmates were severely injured.

3. When interviewed, inmate W.V. told DeMartino and the investigators that Collins had "skipped them" in selecting who could take their showers but he and his cellmate instead of reporting to recreation went for their showers anyway. They did not say that Collins had ever skipped them before, nor that they were not getting at least their minimum three showers a week. W.V. told them he refused to enter the cell when he saw what it looked like; however, he didn't blame or accuse anyone for the condition it was in, nor did he claim he knew or thought Collins was behind it.

4. Both Villareal and Collins verified that Sergeant Adamson had placed the two resistant inmates in a holding cage or cages before finally calling for the extraction teams.

5. When Adamson was interviewed, he advised DeMartino that he went to the area and attempted to talk to them. Apparently Adamson was not questioned about what the prisoners were complaining of, nor whether he saw the condition of cell #323.

6. The bulk of the DOC's evidence relies on interviews with two inmates and the written statement from a third, all of whom presently are incarcerated in the ACSU, which the witness DeMartino described as a "jail for people who are already in jail," i.e. high-risk prisoners who have shown they can't follow the rules.

7. Although these interviews with the inmate witnesses, R.W. and S.T. were video recorded as were the ones with the W.V. and A.F., the records were not offered as evidence nor were transcripts of their statements. The criminal records of R.W., S.T., and R.W.318 (the inmate who volunteered a written statement) were not entered as evidence. Nothing was told about them except that they are high-risk prisoners apparently serving terms in New Jersey State Prison.

8. Although his tenure as a SCPO has been brief, a little over two years at the time of the incident for which he was removed, Collins had an unblemished record to that point.

9. No live witnesses for the respondent who might have had first-hand knowledge about the destruction of the inmates' property were presented, nor were video recordings or complete transcripts of their statements provided as exhibits.

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a civil service employee's rights and duties. The act is an important inducement to attract qualified personnel to public service. It is to be liberally constructed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1 N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J.

138, 147 (1965). The Act also recognizes that the public policy of New Jersey is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A1-2(b). To carry out this policy, the Act also includes provisions authorizing the discipline of public employees. Consistent with public policy and civil service law, a civil service employee may be subject to major discipline. N.J.S.A. 11A:1-2(a). As noted, the Board had adopted, for its non-instructional staff, the Rules and Regulations of the Civil Service Commission and Office of Administrative Law with respect to disciplinary procedures. Major discipline may include removal, disciplinary demotion, a fine or suspension no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. Hearings at the Office of Administrative Law are conducted de novo and determine the appellant's guilt or innocence as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987); Ennslin v. Twp. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994), certif. den., 142 N.J. 446 (1995).

In an appeal from a disciplinary action, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson, 37 N.J. 143; In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein, 26 N.J. 263. Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W.R.R., 111 N.J.L. 487, 490 (E. & A. 1933). Preponderance may be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

On such appeals, the Civil Service Commission may increase or decrease the penalty, N.J.S.A. 11A:2-19, and the concept of progressive discipline guides that determination, In re Carter, 191 N.J. 474, 483-86 (2007). Thus, an employee's prior disciplinary record is inherently relevant to determining an appropriate penalty for a subsequent offense, Id. at 483, and the question upon appellate review is whether such punishment is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." Id. at 484 (quoting Polk, 90 N.J. at 578 (internal quotes omitted)).

A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. See Bock, 38 N.J. at 523-24. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of the concept of progressive discipline is the nature, number and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential. In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, a fine or suspension no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

N.J.A.C. 4A:2-2.3(a)(6) (conduct unbecoming a public employee)

There is no precise definition for conduct unbecoming a public employee, and the question of whether conduct is unbecoming is made on a case-by-case basis. King

v. County of Mercer, CSV 2768-02, Initial Decision (February 24, 2003), adopted, Merit Sys. Bd. (April 9, 2003), http://njlaw.rutgers.edu/collections/oal/.

In Jones v. Essex County, CSV 3552-98, Initial Decision (May 16, 2001), adopted, Merit System Board (June 26, 2001), http://njlaw.rutgers.edu/collections/oal/, it was observed that conduct unbecoming a public employee is conduct that adversely affects morale or efficiency or has a tendency to destroy public respect for governmental employees and confidence in the operation of public services. Unbecoming conduct is not precisely defined in N.J.S.A. 11A or N.J.A.C. 4A; see, e.g., In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). In Karins v. City of Atlantic City, 152 N.J. 532 (1998), an off-duty firefighter directed a racial epithet at an on-duty police officer during a traffic stop. The Court noted that the phrase "unbecoming conduct" is an "elastic one that includes any conduct that adversely affects morale or efficiency by destroying public respect for municipal employees and confidence in the operation of municipal services." Id. at 554.

This charge 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. In this case, petitioner was a correction officer and it is sufficient that his complained of conduct is such to offend accepted standards of decency and behavior. Ibid.

According to the Final Notice of Disciplinary Action (FNDA), this appellant was charged with "intentionally misstating material fact" in connection with the incident culminating in the double tier extraction on "ACSU 2W on second shift January 6, 2019." Further, it is charged that his "actions" on that day "including the search of a cell, and leaving gates unsecured" violated administrative procedures and violated the rules, regulations, and policies of the NJDOC, resulting in "damage to property of inmates" under his supervision.

Except for leaving the gate to the stairwell between the tiers unsecured, which appellant readily admitted to, the primary evidence against Collins were the statements

of three other inmates, one from cell #324, the other from cell #325, who were interviewed on video by Investigator DeMartino and one from cell #318, who volunteered a written statement three days after the incident. Neither of the two inmates from cells #324 and #325 video-recorded interviews were entered as evidence, nor was a transcript of the recording prepared. Rather, Investigator DeMartino gave a brief summary of each of those witness's statements. The written statement of the third inmate, from cell #318 was also not proffered as evidence. There was not even a summary of that statement, rather DeMartino's report and testimony merely stated this written statement mirrored the two alleged eyewitnesses. Similarly, Collins statement was video recorded and again was not proffered not was a transcript of the actual statement.

Turning to the allegation of misstating material facts, I could not find any misstatements unless it be the conclusion that Collins's Special on January 6 and/or his recorded statement given a month later to DeMartino failed to tell the "truth" about Collins involvement in the incident, as there are no obvious inconsistencies in either the Special or his statement.. Collins did relate the basic facts that after taking their showers, the two inmates refused to re-enter their cell, that Collins then called his supervisor Sergeant Adamson, and that the two inmates began trashing the hallways with garbage and flooded the same with water, necessitating the two-tier extraction. Although DeMartino found an inconsistency—or as he termed it an inaccuracy—between the Special and the recorded statement, because, he said, the Special failed to mention more of Adamson's role in the matter. Given the underlying allegations and the myriad of events that unfolded that day, it would have been unlikely that the "Special" was intended to be a substitute for an interview, and would contain all of the details of these events. In any event, it was not explained and is certainly not clear how the missing details in the special would have helped Collins evade responsibility or cover up his role in the incident. Therefore, only if you accept the DOC's basic story, that Collins trashed the inmate's cell and doused it with bleach, could one conclude that Collins's Special or interview contained misstatements of material facts.

Regarding Collins's "actions" in searching the cell, I cannot conclude by a preponderance of the reliable evidence, that Collins entered cell #323, "searched" it, trash it, and/or douse it with bleach. There simply was no reliable or credible direct evidence proffered by the respondent. No reason was given for failing to produce any witness either in person or via some other media or even to permit their testimony from Northern State Prison. Nor was any reason given for respondent failing to at least produce the video recordings of the witnesses, including Collins's own statement. I find no inherent credibility in summarized investigative reports, at least where the source of information are the "statements" of convicted criminals serving time in an extra secured area of prison because they cannot even be trusted to follow the rules in prison. Also, no physical evidence, such as the existence of a so-called bottle of bleach was found.

Moreover, none of the statements sounded basically truthful. Inmate S.T. reported that this was the "second time" since December 2018 that inmates W.V and A.F. had been denied showers from Collins. It was unexplained how S.T. would know that, as it is not likely S.T. would be tracking or recording such a seemingly innocuous event. For one thing, the evidence was clear that prisoners are supposed to have three showers a week. That means on a regular basis prisoner may be "denied" showers four times a week. Second, it is more likely that inmates R.W. and S.T., who both said W.V and A.F. were denied showers on the incident date were told this story by W.V. and A.F. themselves. while they were all at the showers, a fact that should have been disclosed or at least admitted to as a possible source for that information. Possibilities such as these makes it bewildering as to why the full video-recorded statements were not produced.

Moreover, W.V. and A.F. never said they had been denied showers except being "skipped" on that day, yet the respondent went to great lengths to prove that this denial motivated the prisoners to eventually refuse to re-enter their cells and then committed uncontested mayhem and destruction to prison property by trashing the hallways with garbage and flooding it with water, causing the dangerous two tier extraction. Further, I cannot agree with the respondent's theory which so easily dismisses the theory that W.V. and A.F. wrecked their own cell. According to the evidence offered by the

respondent, they did not blame Collins for it, they simply, according to one of them, claimed they refused to reenter it "when they saw what it looked like." It is entirely possible they refused to re-enter the cell because they realized they faced punishment for causing the damage and were not looking forward for cleaning up their own mess. As to the respondent's contention, that the damage to their cell would cost them at minimum one day's pay (DeMartino explained prisoners get $5 a day) to replace all the "property," which was described as inmate clothing and clothing bags and items from the commissary, it is not at all likely that prisoners, confined to such a highly secured area for past rules violations, and who don't always act logically and calculate the cost of acting out, that a sum of "more than five dollars" worth of property was enough incentive for them to even calculate if they wanted to trash their cell. Finally, the uncontested fact that the prisoners then trashed the hallways and fought off a ten-man team leaving "pools of blood" and leaving themselves severely wounded is further proof, if any more were needed, that that they had not only the better opportunity than Collins had, but also an explainable "motive" to trash their own cell.

Respondent has asked for an adverse inference for Collins's refusal to testify at the hearing. I agree that such an inference should be drawn in that such testimony appears to be superior to what the respondent utilized in respect to the fact to be proven. However, the respondent made no effort to compel Collins's testimony and, as noted failed to proffer even his video-recorded interview. At most I can only find that with an adverse inference, the evidence is closer to being in equipoise than it would be without it given the lack of direct and reliable evidence that Collins committed what would be an incredibly stupid and meaningless act of wrecking the prisoner's cell, nor was anything stated or even implied about Collins from any reliable source (or unreliable one for that matter) that he has the character (or lack thereof) to commit such an offense. By the respondent's own evidence, prisons are indeed a powder keg; easily set to explode without much or any warning. By a preponderance of the evidence I **CANNOT FIND** that Collins ignited it. Nor did he make any material misstatement of fact about the incident or his conduct during it.

I therefore **CONCLUDE** that appellant did not commit an offense or offenses constituting conduct unbecoming a SCPO for the DOC.

N.J.A.C. 4A:2-2.3(a)(7), Neglect of Duty

Appellant is also charged with neglect of duty. There is no definition in the New Jersey Administrative Code for neglect of duty, but the charge has been interpreted to mean that an employee has failed to perform, and act as required by the description of their job title. Neglect of duty can arise from an omission or failure to perform a duty and includes official misconduct or misdoing, as well as negligence. Generally, the term 'negligent' connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977) (neglect of duty implies nonperformance of some official duty imposed upon a public employee, not merely commission of an imprudent act); Rushin v. Bd. of Child Welfare, 65 N.J. Super. 504, 515 (App. Div. 1961).

Neglect of duty has been interpreted to mean that "an employee . . . neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009) (citation omitted), adopted, Civil Service Commission (March 27, 2009), < http://njlaw.rutgers.edu/collections/oal/>. The term "neglect" means a deviation from the normal standards of conduct. Kerlin, 151 N.J. Super. at 186. "Duty" means conformance to "the legal standard of reasonable conduct in 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.

In this case, the appellant readily admitted it was his duty to see that the gate that blocked access between the tiers was left secured and that he failed to do so. As described by the respondent, this made this area of a high security part of the prison

more dangerous. In this event, where a team of ten men were used for the "double tier extraction" made necessary by the recalcitrant inmates, the area of conflict was more likely to result in harm to the guards and prisoners because they were engaged on stairs in addition to the level floors. This fact is mitigated somewhat by there being no evidence that this fact resulted in any greater injury to persons or property because of the gate being left open. Nevertheless, Collins offered no excuse for his negligence and there seems to be none. Therefore, I **CONCLUDE** that Collins actions in leaving the gate unsecured on the incident date constituted Neglect of Duty within the meaning of the code and thus I sustain that charge. Thus, based on the foregoing facts and applicable law, I **CONCLUDE** that respondent has not proven, by a preponderance of the competent, credible evidence, the charge of conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6) but has proven the charge of neglect of duty, N.J.A.C. 4A:2-2.3(a)(7).

PENALTY

Progressive discipline is an indelible part of the disciplinary process. It is well-settled that an employee's past disciplinary record may be used as guidance in determining what the appropriate penalty should be. See Bock, 38 N.J. at 523. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions evaluated by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

Collins had no major disciplinary actions recorded against him, although admittedly he has less than three years tenure at Northern State Prison. To his credit, at least he readily admitted he left a gate open, but his conduct made the prison far less safe at a somewhat dangerous time. This is mitigated by the fact that it appears the two prisoners who caused the mayhem would have done so notwithstanding the gate being unsecured and the only two that were harmed were themselves because they foolishly resisted ten specially trained and equipped guards, another fact which has little to do with the gate being open. However, given the need for heightened security at this part of the prison, this infraction warrants a heavy penalty. Since the charge of neglect of duty is implicated in this regard, and it is the only charge that respondent has proven, by a preponderance of the competent, credible evidence, I **CONCLUDE** that the appropriate penalty should be a one hundred and twenty day suspension, and I hereby **REVERSE** Collins's removal.

ORDER

I **ORDER** that the decision to remove Collins be **REVERSED** and that Collins be reinstated to his position of Senior Correction Police Officer, and that back pay and other benefits be issued to him as dictated by N.J.A.C. 4A:2-2.10. I also **ORDER** Collins be suspended for a period of one hundred and twenty days, and that this penalty to be concurrent with any period of suspension or date of removal, whichever date is earliest.

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, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 17, 2020

Ernest M. Bongiovanni

DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency: January 17, 2020

Date Mailed to Parties: January 22, 2020

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APPENDIX

LIST OF WITNESSES

For Appellant:

None

For Respondent:

Richard DeMartino

David Borg

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

A-1 Video recording of SCPO R. Villareal

For Respondent:

R-1 Preliminary Notice of Disciplinary Action, dated , 2019

R-2 Final Notice of Disciplinary Action, dated , 2019

R-3 Preliminary Incident Report, type of incident "cell extraction" by Lieutenant Sobrun, dated January 7, 2019

R-4 Special Custody Report by Sergeant Adamson, dated January 6, 2019

R-5 Special Custody Report by SCO Villareal

R-6 Special Custody Report by SCO Collins

R-7 Employee Schedule for January 6, 2019

R-8 Second shift logbook excerpts

R-9 Congregate logbook excerpts

R-10 Shower logbooks

R-11 Post-extraction photographs

R-12 Weingarten Administrative Rights

R-13 Special Investigations Division Report by Investigator DeMartino

R-14 Law Enforcement Personnel Rules and Regulations

R-15 Internal Management Procedure (IMP), NSP PO 301 ACSU Housing Unit Custody Post orders

R-16 IMP, NSP CUS 104, Institutional Search Plan

R-17 IMP, NSP CUS 123, Searches of Inmates and Correctional Facilities

R-18 Not entered as evidence

R-19 IMP NSP CUS 195, Restrictive Housing Movements

R-20 New Hire Checklist and Policy Receipts

R-21 Training transcripts