STATE OF NEW JERSEY

In the Matter of Kevin Newsom	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2015-2238 OAL Docket Nos. CSR 1620-15 and CSR 10686-19 (on remand)	

ISSUED: MARCH 16, 2020 (DASV)

The appeal of Kevin Newsom, a former Correction Sergeant with New Jersey State Prison, Department of Corrections, of his removal, effective December 30, 2014, on charges, was before Administrative Law Judge Joseph A. Ascione (ALJ), who rendered his initial decision on February 14, 2020. Exceptions were filed on behalf of the appellant, and a reply to the exceptions was filed on behalf of the appointing authority.

Having considered the record and the attached initial decisions, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on March 12, 2020, accepted the Findings of Fact and the Conclusions therein and the recommendation of the ALJ to uphold the appellant's removal.

DISCUSSION

The appellant was removed, effective December 13, 2014, on charges of conduct unbecoming a public employee, other sufficient cause, and violations of departmental policies. Specifically, the appointing authority asserted that the appellant knowingly caused serious bodily injury by using excessive force in striking an inmate in the head several times with a metal baton while handcuffed, shackled, and offering no resistance. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing.

By way of background, the ALJ originally rendered an initial decision on February 24, 2016, upholding the appellant's removal. However, due to the lack of quorum and consent from all parties to extend the time, the Commission was unable to act on the matter within the allotted time for determination. Therefore, the ALJ's original initial decision was deemed adopted as the Commission's final decision. *See In the Matter of Kevin Newsom* (CSC, Deemed Adopted April 25, 2016). It is noted that the appellant did not request reconsideration of the decision nor pursue an appeal to the Superior Court of New Jersey, Appellate Division (Appellate Division).

However, in a letter dated January 9, 2018, the appellant requested that the matter be reopened due to a videotaped statement of the inmate which he claimed exonerated him of the disciplinary charges. The request was denied as an untimely petition for reconsideration. The appellant then appealed this determination to the Appellate Division, which reasoned that the 45-day time period to request reconsideration of a decision was not applicable. Accordingly, the court remanded the matter for the Commission to consider the appellant's request. *See In the Matter of Kevin Newsom*, Docket No. A-3194-17T1 (App. Div. July 30, 2019). The matter was then remanded to the OAL for further proceedings.

As set forth in the second initial decision rendered February 14, 2020, the appellant moved for summary decision, arguing that the findings in a federal matter constitute *res judicata* and that the appointing authority was collaterally estopped from removing him from his position. However, the ALJ determined that *res judicata* and collateral estoppel were not applicable. Further, the ALJ found that the appellant's alleged exculpatory evidence from the inmate's interview after the incident was not credible since the inmate gave three different responses as to who perpetrated the assault. Further, the ALJ indicated that the testimony and statements of the other officers in the original proceeding that the appellant struck the inmate were credible. Therefore, the ALJ reaffirmed the prior determination and found that the appointing authority met its burden of proof and recommended the appellant's removal.

Upon its *de novo* review, the Commission agrees with the ALJ's assessment of the charges and his credibility determinations. Initially, it is noted that the ALJ properly determined that *res judicata* and collateral estoppel are not applicable. The appellant's exceptions in that regard are unpersuasive. With regard to credibility, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes

the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by 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). Nevertheless, upon review, the Commission finds that the ALJ's determinations in this respect were proper and that this strict standard has not been met.

As to the penalty, the Commission's review is also *de novo*. In imposing a penalty, the Commission, in addition to considering the seriousness of the underlying incident, utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). 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). In this case, based on the egregious nature of the offense and considering that the appellant was a Correction Sergeant, it is clear that removal is the proper penalty. The Commission is ever mindful of the high standards that are placed upon law enforcement personnel. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied*, 47 *N.J.* 80 (1966). *See also In re Phillips*, 117 *N.J.* 567 (1990). The fact that such a supervisory law enforcement officer is guilty of such conduct compounds the severity of the offense. Under these circumstances, the penalty imposed by the appointing authority is neither unduly harsh nor disproportionate to the offense and should be upheld.

ORDER

The Civil Service Commission finds that the appointing authority's action in removing the appellant was justified. Therefore, the Commission affirms that action and dismisses the appeal of Kevin Newsom.

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 12TH DAY OF MARCH, 2020

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence:

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

Attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 10686-19
(ON REMAND CSR 01620-15)
AGENCY DKT. NO. 2015-2238

IN THE MATTER OF KEVIN NEWSOM,
NEW JERSEY STATE PRISON.

Frank Crivelli, Esq., for appellant Kevin Newsom (Crivelli & Barbati, attorneys)

Paul Nieves, Deputy Attorney General, for respondent New Jersey State Prison (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: February 3, 2020 Decided: February 14, 2020

BEFORE **JOSEPH A. ASCIONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter is back on remand from the reversed denial by the Civil Service Commission (CSC) of appellant Kevin Newsom's application for reconsideration. The CSC based its denial of reconsideration upon the application's untimeliness. The Appellate Division reversed the CSC's decision and remanded for consideration of the appropriateness of reconsideration based upon recently discovered evidence.

The matter appellant seeks to have reopened, CSR 01620-15, involved appellant's suspension without pay on November 6, 2010, by respondent New Jersey State Prison based upon the use of excessive force on October 29, 2010. Criminal proceedings ensued. Those proceedings were eventually resolved by admission of appellant into a pre-trial intervention program. No allocution of the events of the incident occurred, and sometime in November 2014 the appellant satisfied the conditions of the pre-trial intervention. The above facts are related by appellant's counsel; no documents from that criminal proceeding were reviewed by this tribunal.

On December 30, 2014, a Final Notice of Disciplinary Action was issued by respondent seeking the removal of appellant for violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and N.J.A.C. 4A:2-2.3(a)(11),[1] other sufficient cause, specifically, HRB 84-17 as amended, C-11, conduct unbecoming an employee; HRB 84-17 as amended, C-3, physical or mental abuse of an inmate, patient, client, resident, or employee; and HRB 84-17 as amended, C-5, inappropriate physical contact or mistreatment of an inmate, patient, client, resident, or employee. Specifically, the incident is described as, "On 10-29-10 you were arrested by the Mercer County Prosecutor's Office for an incident where you knowingly caused serious bodily injury to Inmate B.P., to wit: you did use excessive force in striking B.P. in the head several times with a metal baton while B.P. was handcuffed, shackled and offering no resistance." Appellant appealed, and this tribunal found that appellant committed the charged offenses in In re Newsom, CSR 01620-15, Initial Decision (February 24, 2016), deemed adopted, CSC (April 25, 2016), https://njlaw.rutgers.edu/collections/oal/.

The victim of appellant's actions, Bradley Peterson, had commenced a personal-injury action in the United States District Court against numerous defendants, including appellant herein. The victim's personal-injury action resulted in a jury verdict of "no cause." The jury found that the defendants had not violated the inmate's civil rights. During those proceedings, and after the Initial Decision in CSR 01620-15 was deemed adopted, appellant became aware of a portion of a videotaped interview of the victim in which he claimed that "a tall, bald, white guy hit him with the expandable baton."

[1] Amended by R.2012, d.056, effective March 5, 2012; recodified former (a)(11) as (a)(12).

Appellant thereafter requested that the CSC reopen the earlier matter to consider that portion of the videotape. Appellant represented that the full videotape had not been previously disclosed to appellant during the earlier proceeding. The CSC deemed this a request for reconsideration, and denied on procedural grounds. The Superior Court reversed the CSC's decision and remanded for the CSC to consider appellant's application to reopen the hearing. In re Newsom, No. A-3194-17T1 (App. Div. July 30, 2019).

The Civil Service Commission remanded this matter to the Office of Administrative Law (OAL) to comply with the order of the Superior Court. The OAL received the matter on August 6, 2019, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The appellant now moves for summary disposition, arguing that the findings in the federal action constitute "res judicata" or "collateral estoppel" compelling this tribunal to reverse its earlier decision.

Respondent opposes the motion for summary decision. The Appellate Division decision does not require a hearing, only consideration of whether the full videotaped statement of the inmate would alter the earlier decision of this tribunal. The tribunal gave consideration to obtaining the testimony of the victim, who did not appear at the 2015 hearing. Respondent's counsel represented that the victim resides in Rhode Island, but is on probation and cannot leave the state of Rhode Island without a court order. A hearing had been scheduled for January 8, 2020; however, as Mr. Peterson, allegedly did not desire to come down to New Jersey; and, the parties were unable to compel his attendance, so the hearing was cancelled. In light of the discussion below, and in an attempt to promptly address this matter, I did not reschedule a hearing, but reviewed the federal-court trial testimony of the victim, reviewed the videotape of the victim's interview, and closed the matter. This Initial Decision addresses the rehearing of the matter and the motion for summary disposition.

ISSUES TO BE RESOLVED

Does the federal-court jury verdict of no cause rendered against the victim and relieving New Jersey State Prison and Kevin Newsom from personal-injury liability create any right in Kevin Newsom to claim res judicata or collateral estoppel requiring the reversal of the previous Initial Decision in this matter?

Does the review of the videotaped interview of the victim by the prosecutor's office warrant the reopening of the hearing, or reconsideration of the previous Initial Decision?

FACTUAL DISCUSSION

The new evidence is a videotape of an interview with the victim, conducted by the prosecutor's office within two days of a severe beating leaving him with numerous stitches across his forehead. During the interview the victim claimed that "a tall, bald, white guy" hit him with an expandable baton. Appellant does not fit that description, and could not be identified as a white guy. It is on that basis that appellant seeks to change the previous Initial Decision of this tribunal.

The victim filed a complaint in federal court in an action for violation of civil rights against numerous defendants, including the appellant here and the administrator of New Jersey State Prison. I note that the victim's August 21, 2017, pre-trial order's factual positions, paragraphs thirteen to twenty-three, represent that the appellant herein is the perpetrator of the attack with the expandable baton. See Resp't's Opposition to the Motion for Summary Decision, Exh. 3.

Note the opinion from United States District Judge Freda L. Wolfson, 2017 U.S. Dist. LEXIS 66327 (D.N.J. May 2, 2017), in a decision on a summary-judgment motion by Bradley Peterson, the plaintiff therein, seeking to have collateral estoppel applied to the Department of Corrections and Kevin Newsom based upon the Initial Decision from this tribunal identified above. In Judge Wolfson's decision, the court recited the plaintiff's absence of knowledge of the person who hit him with the baton. The victim

represented that he relied on Correction Officer Israel's testimony. This is corroborated by the victim's testimony from the action. See Resp't's Opposition, Exh. 4 at 107, 133. He testified to vision issues even prior to the incident, and could only identify correction officers Albanese, Matlock, and Lewis. Id. at 129.

The undersigned's memory from the 2015 hearing includes allegations that the victim, a difficult inmate, provoked the actions of the correction officers by not being compliant with official directives.

These factors clearly place in question the victim's knowledge and credibility. The jurors' view of the victim's credibility could be the basis for the victim's "no cause" verdict in his action against the defendants. The rejection by the jury of the victim's right to recover does not logically create the fact that the defendants in the federal-court action did not commit the acts alleged. It only creates the fact that the victim could not prove his right to a claim for damages.

The appellant's statement of undisputed material facts in support of the summary disposition motion is a misnomer; respondent substantially disputes many of those asserted facts or factual characterizations. This tribunal will not address those fifty-five items, and considers the entire submission as legal argument. Jurisdictionally, there is only the application for reconsideration, and the applicability of res judicata or collateral estoppel from a subsequent federal proceeding.

FACTUAL FINDINGS

Based upon due consideration of the prior Initial Decision, documentary video-taped evidence, the pre-trial order from the federal-court action, portions of the federal-court trial transcript of the victim's testimony, and the collateral-estoppel decision of Judge Wolfson, and having personally assessed the credibility of the victim in reviewing the videotape of his interview with the prosecutor's office and his federal-court trial testimony, I **FIND** the following **FACTS**:

1. Bradley Peterson, the victim of a severe beating in 2010, gave an interview, someone other than appellant committed an assault upon him with an expandable baton.

2. Bradley Peterson, in a federal-court pre-trial order, represented that Kevin Newsom committed the assault upon him with an expandable baton. See Resp't's Opposition, Exh. 3. This statement was not based upon personal knowledge, but based upon Correction Officer Israel's testimony in the previous Civil Service Violation action.

3. At the federal trial, Bradley Peterson represented that he did not know who hit him with the expandable baton. See Resp't's Opposition, Exh. 4 at 107, 133. He testified to vision issues even prior to the incident, and could only identify correction officers Albanese, Matlock, and Lewis. Id. at 129.

4. The previous statements are all in conflict with each other and provide sufficient basis to question the credibility of the videotaped statement.

5. The testimony from the OAL hearing in 2015 of Correction Officer Israel and Correction Officer Gundy was critical to the conclusions in the Initial Decision of February 24, 2016, and supports the conclusion not to alter the original Initial Decision.

ANALYSIS AND CONCLUSIONS OF LAW

The court in Ghobrial v. Elnashfan, 2018 N.J. Super. LEXIS 179, Superior Court of New Jersey, Law Division, Hudson County, Special Civil Part, No. DC-10038-18 (December 24, 2018), collected a trove of decisions identifying the obligation of one determining a motion for reconsideration, pursuant to R. 4:49-2.

> A motion for reconsideration must state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the

> court has overlooked or as to which it has erred. Id. The rule is applicable only when the court's decision is based on plainly incorrect reasoning or when the court failed to consider evidence or there is good reason for it to reconsider new information. Cummings v. Bahr, 295 N.J. Super. 374, 384–85, 685 A.2d 60 (App. Div. 1996). . . .
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> . . . [A] motion for reconsideration is not warranted where the apparent purpose of the motion is for the movant to express disagreement with the Court's initial decision. D'Atria v. D'Atria, 242 N.J. Super. 392, 401–02, 576 A.2d 957 (Ch. Div. 1990). ("A litigant should not seek reconsideration merely because of dissatisfaction with a decision of the Court."). Essentially, "a litigant must initially demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process." Ibid.
>
> Reconsideration should be utilized only for those cases where (1) the court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the court either did not consider, or failed to appreciate the significance of probative, competent evidence. Ibid. But if a litigant wishes to bring new or additional information to the court's attention, which it could not have provided, on the first application, the court should, in the interest of justice (and in the exercise of sound discretion), consider the evidence. . . . [T]he court must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration. Ibid.

Here, the tribunal issued the Initial Decision after eight days of hearing presented by experienced and competent counsel, seriously weighing the required preponderance of the evidence, burden of proof, absence of physical evidence connecting the appellant to the weapon, and testimony of the numerous witnesses. The victim was not one of those witnesses. However, the victim's recollection of the events of the incident had a limited bearing on the decision process. Numerous correction officers were present during the incident, and one was conscientious enough to identify appellant as the perpetrator of an assault after the victim had been restrained. Another identified the profusion of blood from the head wounds after the expandable baton made contact. These factual statements were afforded great credibility, as they were perceived by this tribunal as statements against the witnesses' own professional interests.

The new evidence of the full videotape did provide contradictory evidence to the conclusion of the Initial Decision. This evidence, though, can be afforded little credibility, as on the stand in the personal-injury trial the victim acknowledged his vision problems and the fact that he saw only the three officers who were involved in the initial contact with him, and no other individuals at the scene. He further acknowledged that the statements contained in the complaint were based upon the information provided by the witness to the incident.

Evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Therefore, I 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 & W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted).

With respect to the application of the concept of res judicata to this matter, res judicata, or claim preclusion, provides that a cause of action between parties that has reached a final determination on the merits by a tribunal having jurisdiction cannot be relitigated by those parties or parties in privity with those parties in a new proceeding. Velasquez v. Franz, 123 N.J. 498, 505 (1991). Res judicata is not applicable to this case. The Initial Decision in this matter rendered between New Jersey State Prison and Kevin Newsom did not involve the victim, Peterson, as a party. The federal action between Peterson and numerous defendants did not address the issues raised in the disciplinary proceeding and occurred subsequent to the disciplinary proceeding. Under the doctrine of res judicata, a final judgment forecloses successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit. Taylor v. Sturgell, 553 U.S. 880, 892 (2008). As this litigation does not involve the very same claim of the earlier litigation, the application of res judicata to this claim is not warranted.

With respect to the application of the concept of collateral estoppel to this matter, New Jersey law requires that (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding. Wildoner v. Borough of Ramsey, 316 N.J. Super. 487, 506 (App. Div. 1998) (citing In re Dawson, 136 N.J. 1 (1994)); see also Bd. of Trs. of Trucking Emps. of N.J. Welfare Fund, Inc. v. Centra, 983 F.2d 495, 505 (3d Cir. 1992). In proceeding with the analysis, the federal action is not the prior proceeding. In fact, the court there chose to prevent the plaintiff from using collateral estoppel of the Initial Decision in the federal action. The issues are not identical; the civil-service violations are much broader in scope than the limited issue in the federal action. The federal action did not create a right in Newsom, rather it denied a right to recover to Peterson. No privity existed between Newsom and the Department of Corrections.

In Smith v. Borough of Dunmore, 516 F. App'x. 194, 199 (3d Cir. 2013), the court held that even if the technical requirements for collateral estoppel are met, it is not an abuse of discretion for the tribunal to not apply the offensive use of collateral estoppel. This tribunal does not see the applicability of collateral estoppel to the Initial Decision.

I **CONCLUDE** that neither res judicata nor collateral estoppel warrants the reversal of the Final Decision in the matter of In re Newsom, CSR 01620-15, Initial Decision (February 24, 2016), deemed adopted, CSC (April 25, 2016), https://njlaw.rutgers.edu/collections/oal/.

Ultimately, appellant has failed to persuade this tribunal that the tribunal acted arbitrarily, capriciously, or unreasonably. The tribunal considered all cogent evidence, and made a determination based on the tribunal's review and interpretation of such evidence, in accordance with this tribunal's role as the finder of fact. Accordingly, this tribunal must **CONCLUDE** that appellant's application for reconsideration fails.

I **FURTHER CONCLUDE** that the application for reconsideration has been considered, and the preponderance of the competent and credible evidence supports the prior final decision in this matter and establishes that appellant violated N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and N.J.A.C. 4A:2-2.3(a)(11),[2] other sufficient cause, specifically, HRB 84-17 as amended, C-11, conduct unbecoming an employee; HRB 84-17 as amended, C-3, physical or mental abuse of an inmate, patient, client, resident, or employee; and HRB 84-17 as amended, C-5, inappropriate physical contact or mistreatment of an inmate, patient, client, resident, or employee.

For the reasons set forth above and in the absence of competent proofs, I **CONCLUDE** that respondent has met its burden of proof on this major disciplinary charge and that the disciplinary charge against appellant is **REAFFIRMED**.

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action is hereby **REAFFIRMED AND GRANTED**.

This tribunal issued a salary order in January 2020 directing no reinstitution of salary.

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.

[2] See n.1.

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.

February 14, 2020
DATE

Joseph A. Ascione
JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 2/14/2020

Mailed to Parties: 2/14/2020

APPENDIX

Witnesses

For appellant:

None

For respondent:

None

Exhibits

For appellant:

A-1 Moving papers, with attachments

For respondent:

R-1 Opposition papers

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 01620-15
AGENCY REF. NO. N/A

IN THE MATTER OF KEVIN NEWSOM,
NEW JERSEY STATE PRISON.

Frank M. Crivelli, Esq., and **Michael DeRose**, Esq., for appellant Kevin Newsom (Crivelli & Barbati, LLC, attorneys)

Paul D. Nieves and **Brian M. Scott**, Deputy Attorneys General, for respondent New Jersey State Prison (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: November 12, 2015 Decided: February 24, 2016

BEFORE **JOSEPH A. ASCIONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Kevin Newsom (appellant) appeals from the December 30, 2014, decision of the New Jersey State Prison (NJSP) to remove him from his position as a correction sergeant at NJSP on charges in violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; of N.J.A.C. 4A:2-2.3(a)(11),[1] other sufficient cause; of HRB 84-17, as amended, C 11, conduct unbecoming an employee; of HRB 84-17, as

[1] Effective March 5, 2012, former (a)(11) was recodified as (a)(12).

amended, C 3, physical or mental abuse of an inmate, patient, client, resident or employee; and of HRB 84-17, as amended, C 5, inappropriate physical contact or treatment of an inmate, patient, client, resident or employee, relating to an alleged use of excessive force on July 13, 2010, ("incident") against an inmate, B.P.

On November 3, 2010, NJSP served a Preliminary Notice of Disciplinary Action (PNDA) dated November 1, 2010, suspending appellant with pay pending a Loudermill hearing; on November 5, 2010, subsequent to a Loudermill hearing, NJSP served an amended PNDA suspending appellant without pay effective November 6, 2010; on November 5, 2010, NJSP served an amended PNDA suspending appellant indefinitely based upon actions involving criminal matters pursuant to N.J.A.C. 4A:2-2.7. NJSP served a Final Notice of Disciplinary Action (FNDA) on March 11, 2011. The Mercer County Prosecutor's Office indicted the appellant on charges of aggravated assault with a weapon, and other charges. The Superior Court dismissed the initial indictment. On or about April 8, 2013, NJSP served an amended PNDA on appellant, sustaining the indefinite suspension without pay. The prosecutor's office again indicted the appellant. The criminal charges were dismissed without cost based upon appellant's entry into a pre-trial intervention program. On December 30, 2014, the NJSP served appellant with an FNDA based upon the charges identified in the previous paragraph. (See R-1.) Appellant timely appealed that removal based upon his denial that he used a baton on inmate B.P. Under the expedited procedures of P.L. 2009, c. 16, N.J.S.A. 40A:14-202(d), the matter was filed simultaneously with the Civil Service Commission and the Office of Administrative Law (OAL), where it was received on January 28, 2015, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The hearing commenced on August 10, 2015, and continued on August 13, September 14, 17, and 18, and October 1, 8, and 15, 2015. At the close of the plenary hearing, I permitted counsel to present written closing statements and briefs. The record closed on November 12, 2015, after initial review of the post-hearing submissions. The Director of the OAL granted an extension of the due date of the Initial Decision.

FACTUAL DISCUSSION

NJSP pursued its removal of appellant based upon the eyewitness testimony of senior correction officers (SCOs) Christopher Israel, Damian Albanese, and Nathan Gundy (retired). On July 13, 2010, they all placed appellant at the North Compound Close Custody scene of a Code 33, a general alarm to all NJSP personnel that an officer needs emergency assistance, requiring an immediate response. The eyewitnesses placed appellant within close proximity of B.P.'s head, and confirmed that appellant possessed and displayed an expandable baton (EB). Eyewitness Israel gave a statement to the prosecutor that appellant, after the inmate had already been subdued, struck B.P. in the face with the EB. Appellant testified that he had deployed but did not use the EB, consistent with standard operating procedure (SOP). The NJSP disputed this testimony by testimony from Lieutenant Ganesh, and neither party presented an SOP supporting the authority to display the EB. The NJSP provided an expert medical report of Dr. Jonathan Briskin (R-30) and photographs of the injuries to B.P. (R-43.) Dr. Briskin's report concludes that the injuries to B.P. are consistent with the use of such an EB, rather than resulting from fist or foot kicks to the inmate's head. NJSP trained appellant in the use of deadly force. Use of deadly force is limited to circumstances where an officer reasonably believes that the immediate use of deadly force is necessary to prevent the imminent risk of death or serious injury to a fellow officer or another person in the event that deadly force is not used. (R-37.)

Appellant denies the use of the EB on B.P.'s face. His counsel presents the dismissal of the initial indictment and subsequent entry into the Pretrial Intervention Program (PTI) resolving the second indictment as providing no basis for the disciplinary charges herein, and insinuates that those who gave testimony to the Mercer County Prosecutor's Office were intimidated to place blame upon the appellant. Appellant's medical expert, Dr. Randy Tartacoff, challenges the expert report of Dr. Briskin, and maintains that the inmate's injuries did not come from an EB, but rather from fists or foot kicks.

There is no video of the incident. This tribunal is compelled to consider the testimony of the eyewitnesses, the appellant, the other witnesses, and the experts and

make credibility determinations as to the twenty witnesses heard over the eight days of hearing.

TESTIMONY

SCO Albert C. Matlock, Jr. (Matlock)

Matlock has approximately nineteen years of experience in the Department of Corrections. He testified that at approximately 8:00 a.m. on July 13, 2010, he was assigned to Unit 3, Bravo Left, (hereinafter "3B Left") within NJSP. (1T24:6–8).[2] Officer Matlock explained that the inmates housed within this area were "management control inmates." (1T26:16–27:21.) "Management control inmates" were inmates that were segregated by the NJDOC/NJSP administration from the general population for various reasons, including being a danger to prison staff and/or other inmates.

Matlock described an altercation he had with inmate B.P. on July 13, 2010. While B.P. was being prepared for the recreational yard, B.P. approached Matlock in an aggressive manner and began to throw punches in Matlock's direction. (1T36:23–37:2.) Matlock was forced to engage B.P. to protect himself. He threw several punches at B.P.'s face in an effort to subdue him. (1T37:9–18.) Matlock testified that he feared for his life and did not hold back his punches. (1T55:17–19.) Matlock testified to his amateur boxing experience. (1T56:3–10.) Matlock heard the Code 33 call; B.P. had managed to scramble under a stairwell, and the officers that responded to the Code 33 attended to extricating B.P. from the stairwell. Another officer relieved Matlock and advised him to vacate the area and attend to his injuries. Prior to leaving the area, Matlock observed that another officer handcuffed B.P. in a face-down position. (1T59:20–60:8.) Matlock's injuries consisted of a strained finger. (1T46:7–17.) Matlock testified that he did not see Newsom strike B.P.

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[2] The transcript of the OAL hearing contains eight volumes: "1T" refers to the transcript of August 10, 2015; "2T" refers to the transcript of August 13, 2015; "3T" refers to the transcript of September 14, 2015; "4T" refers to the transcript of September 17, 2015; "5T" refers to the transcript of September 18, 2015; "6T" refers to the transcript of October 1, 2015; "7T" refers to the transcript of October 8, 2015; and "8T" refers to the transcript of October 15, 2015.

Upon being shown R-43, DOC 803, a photograph of B.P.'s injuries to his face and forehead, SCO Matlock stated that he did not cause the injuries to B.P.'s forehead depicted in the photo (1T48:8–12).

SCO Reginald Lewis, Jr. (R. Lewis)

R. Lewis has approximately eleven years of experience in Corrections. At approximately 8:00 a.m. on July 13, 2010, R. Lewis was assigned to 3B Left. (1T68:11–13.) He concisely testified to the same events that Matlock described. R. Lewis said that after he saw the scuffle between B.P. and Matlock, he grabbed B.P. from behind, pulled B.P. away from Matlock, and wrested him to the floor. R. Lewis threw punches at B.P.'s head and face, though B.P. kept kicking. (1T72:11–18.) On the arrival of other officers to the area, B.P. ran under the stairs. R. Lewis heard what he believed was B.P.'s head hitting the stairs. (1T73:18–22.) He testified that he first observed B.P.'s face with a little blood when he was under the stairs (1T73:23–74:11); he did not observe the injuries appearing on the middle of B.P.'s forehead as depicted in R-43, DOC # 803 (1T75:22–76:3). R. Lewis also related the size of B.P. as approximately 6'3", 275 pounds—very large, bigger than both Matlock and him. (1T84:1–15.) An officer ordered Matlock and R. Lewis to leave the scene and attend to their injuries. (1T76:4–10.)

SCO Damien Albanese (Albanese)

Albanese has approximately seven years of experience at NJSP. On July 13, 2010, Albanese was one of the officers who responded to the Code 33 called in response to the physical altercation between B.P. and Matlock. (1T120:10–14.) Albanese saw B.P. under the stairs. Albanese, after unsuccessfully attempting to get B.P. to respond to commands, grabbed one of B.P.'s legs and proceeded to pull him out from under the stairwell. (1T103:6–11.) Albanese noticed that B.P. was bleeding from the center of his facial area prior to being pulled out. (1T108:10–109:14.) Albanese assisted in getting the inmate onto his stomach. (1T103:25–104:12.) In an effort to get the inmate handcuffed and shackled, Albanese was lying on the inmate's lower legs with his complete body weight to immobilize him. During this time, B.P. was being hit with batons on his body and/or leg area. (1T105:8–106:25.) Albanese testified that there

were several officers, approximately five to ten, standing near B.P.'s head after restraining him. Albanese identified SCO Christopher Israel, as well as Sergeant Newsom, in this group. (1T131:6–132:8.) Albanese testified that he did not see anyone use a baton on B.P.'s face. (1T133:12–17.)

Albanese's assignment that day was to escort B.P., under Sergeant Newsom. He escorted B.P. to the infirmary, noting that B.P. fell a few times during the escort and a "come-along" technique was employed. (1T114:8–13; 1T136:16–138:2.) Albanese clarified that he limited his Special Custody Report (SCR) (R-15) to the facts of the escort, and did not include the restraint of B.P. in 3B Left. (1T134:17–22.) Albanese stated that Sergeant Newsom did not give him an unlawful order in connection with the incident. (1T151:5–14.)

Albanese testified to his "very poor" treatment by the Mercer County Prosecutor's Office (MCPO). (1T144:3–7.) He testified that shortly after executing the Garrity Warning, he was threatened and called a liar, prior to any substantive questions being asked. He stated that hostile and inappropriate language was used, and that he was denied contact with his union representative. (1T144:10–19.) Albanese testified that the representative of the prosecutor's officer called him a liar when Albanese denied seeing Newsom strike B.P. (1T145:4–146:10.) At the interview approximately four months after the event, Albanese implied that the prosecutor's office elicited testimony that Newsom's position was near B.P.'s face. During his testimony, Albanese acknowledged Newsom's presence near B.P.'s face, and that he did not feel pressured into that testimony. He maintained that he did not lie to the prosecutor. (1T157:5–25.) He testified that there were other officers near B.P.'s face, as well as Newsom.

SCO Nathan Gundy (Gundy)

Gundy has approximately twenty-five years of experience in Corrections, and retired in October 2011. On July 13, 2010, Gundy was one of the officers who responded to the Code 33 called in response to the physical altercation between B.P. and Matlock. (2T8:1–3.) The substance of Gundy's testimony was that he did not see Newsom hit B.P.'s face, only that Newsom had swung his baton for what Gundy

believed was the purpose of readying it. (2T16:4–21.) He disputed the prior signed statement given to the MCPO, in which it appears he is acknowledging that Newson struck the inmate with the EB. He claimed that the MCPO obtained the statement due to prosecutorial intimidation, misleading language, and his inability to change the MCPO's signed statement. He specifically disputes the MCPO's representation that he saw Newsom strike B.P., after which B.P. "bled like a pig." He did testify that Newsom's proximity was toward B.P.'s head, and that Newsom swung the baton within the proximity of B.P.'s head. (2T28:1–6.) Gundy identified his escort report (R-20), his prosecutor's statement (R-21), and his signed Garrity Warning (R-22).

SCO Christopher Israel (Israel)

Israel has approximately fourteen years of experience in Corrections, ten at NJSP. On July 13, 2010, Israel was one of the officers who responded to the Code 33 called in response to the physical altercation between B.P. and Matlock. (2T77:17–19.) He testified to completing his escort report (R-24), and his prosecutor's statement (R-25). Israel testified that restraints were applied to B.P., at which time Newsom said, "I got you now," and then Newsom expanded the baton and struck B.P. twice in the center of the forehead with an underhand swing. At the time of the expanded-baton strikes, B.P. was restrained and posed no threat to the other officers. (2T92:11–19.) Israel testified that Newsom advised him what should be contained in his escort report. (2T95:14–18.) He said that he received, read and signed the Garrity Warning. (2T99:15–22.) The prosecutor did not suggest Newsom as the perpetrator to Israel. (2T99:23–100:12.) Israel testified that he has no animus toward Newsom. (2T101:23–102:3.) He stated that he stood by the statement he gave to the prosecutor. (2T103:20–22.) Israel testified that contrary to the answer appearing in the prosecutor's statement, he did feel intimidated and at risk, despite having been given and signed the Garrity Warning. On October 20, 2010, the prosecutor sought "to have somebody's head on a platter," not necessarily Newsom's; the prosecutor wanted someone to blame for the incident. (2T127:9–130:6.) Israel also testified that his SCR (R-24) did not mention the use of the baton by Newsom. (2T134:16–20.) Israel explained that Newsom supervised him, and would have reviewed the report. (2T136:3–8.) Israel said that things would

have been bad in the prison for him if he had included that information in the SCR. (2T136:8–21.)

SCO Michael Wolhfert (Wolhfert)

Wolhfert, a six-year employee of the Correctional Facility Training Academy, trains recruits and senior line officers in the use-of-force policies and baton policies. He identified Newsom's annual training history, as well as his history from 2009 (R-32), the policies of the facility (R-37), the Attorney General's policies (R-38), the baton technique (R-39), the PowerPoint presentation of baton technique (R-40), and the Baton Technique In-Service Lesson Plan (R-41). He testified that a strike to the head makes the baton use deadly force.

Newsom does not dispute Wolhfert's testimony or his conclusion regarding deadly force; he does deny that he used the baton on B.P.'s face.

Lt. Mervin Ganesh (Ganesh)

Ganesh has approximately nineteen years of experience with Corrections, and is the administrative lieutenant at NJSP. He testified to policy HRB 84-17 (R-45). Ganesh also attempted to introduce Newsom's prior disciplinary records (R-46 to R-61), but this was rejected by this tribunal as premature. The parties agreed that all prior disciplines but one were related to time and attendance.

Lt. Mark Perkins (Perkins)

Perkins has approximately fourteen years of experience with Corrections. He held the rank of sergeant at the time of the incident. On July 13, 2010, Perkins was the first sergeant who responded to the Code 33 called in response to the physical altercation between B.P. and Matlock. (3T26:18–23.) He identified his SCR (R-10) and his Use of Force report (R-13). He testified to his involvement with the restraint of the inmate in handcuffs and leg irons, including actually placing handcuffs on the inmate. Perkins rose from being on top of B.P. after B.P. had been handcuffed. As this restraint

did not make B.P. submissive, he directed the application of leg irons. After they were applied, he heard, "I got this." He departed the area, deferring to Newsom to escort B.P. to the infirmary. He did not see or hear B.P. hit his head on the steps. He did not see Newsom hit B.P. He did notice a pool of blood on the floor near B.P.'s head. Perkins was ordered to appear at the MCPO approximately two years after the incident. He testified to threats by the prosecutor's office as he maintained that he did not see Newsom strike B.P., but he refused to change his testimony, and the MCPO never obtained a statement from him.

Leigh (Thacker) Johnson (Johnson)

Johnson is presently employed as a sheriff's officer with the Mercer County Sheriff's Department (4T8:5–9). In 2010 and 2012, the MCPO employed her as a clerk/transcriber and eventually a data processing technician. (4T10:20–11:17.) She testified that the interviews of the various witnesses were not recorded or videotaped, but rather a "live transcription" occurred. (4T19:13–21.) After an initial interview, questions were posited, and the answers given were transcribed by her in the presence of the witness. A final copy was provided to the witness, who was asked to review the document for accuracy. Any changes were then made, and the witness would initial and sign the statement. She received good performance reviews. (R-65; R-66.)

Karen Ortman (Ortman)

Ortman worked with the MCPO for twenty-five years, and was a lieutenant during the relevant time period. (8T16:13–17:12.) She is presently employed by New York University as director of public safety. Ortman explained the process the MCPO used in securing the sworn statements, and denied ever threatening anyone to secure a statement. She did testify that she and Doris Gallucci, MCPO, (Gallucci) stressed the need for the truth. She testified that Gallucci explained the ramifications of not telling the truth. (8T26:5–27:10.) Ortman testified to remembering the interview with Israel. Specifically, she recalled that Israel made the statements, "I can't be a rat," "I can't go anywhere," "You don't understand," "This sort of information travels," and, "There is

nowhere I could go and be safe." After this emotional outburst, he stated, "B.P. was hit in the head by Newsom with his baton."

Ortman testified that everyone who testified that they were threatened by the MCPO during the course of the investigation was either lying and/or a liar. (8T46:20–55:5.) Ortman testified that had Israel mentioned that Newsom used the EB against B.P.'s head in the manner of a "golf swing," it would have been recorded in his statement.

Antonio Campos (Campos)

Campos testified to twenty-six years of service with Corrections. He presently serves as the associate administrator of NJSP, and also has served in the titles of administrative/security major. (8T134:17–136:2.) His testimony was offered to refute Newsom's claim that during an escort, the display, expansion, or constructive-force usage (un-holstered display) of an EB was appropriate. Campos testified that he could point to no policy or procedure that authorizes the display, expansion or constructive-force usage of an EB during an escort. (8T153:4–10.) Nor did he recall any training that provided for the un-holstering and exhibition of a baton during an inmate escort. (8T155:25–156:24.) The EB should be holstered unless it is needed for the use of force. (8T155:16–20.) The use of the EB is authorized for the inmate "come-along" procedure, but only by those who are participating in the come-along, not others assigned to the escort. (8T159:23–160:1.)

Campos identified that a management control unit (MCU) inmate is one who cannot be controlled solely by administrative segregation or other restrictions. (8T156:18–25.) He understood B.P. to be an MCU inmate. (8T158:22–24.) Campos testified that there is a lawful utilization of constructive force when the officer can reasonably justify its use. (8T205:18–208:5.)

Jonathan A. Briskin, M.D. (Dr. Briskin)

Dr. Briskin has been a New Jersey certified forensic pathologist since 2005. He is a fellow of the National Association of Medical Examiners and the American Academy of Forensic Sciences. He is licensed to practice medicine in New Jersey (2000), Delaware (2000), and Pennsylvania (1982). He initially received his M.D. from Temple University in 1981. He also has a 1975 J.D. degree from Villanova School of Law. He has practiced as a forensic pathologist since 1985. He has worked for medical examiner's or coroner's offices in Pennsylvania and Delaware. He was accepted as a qualified expert in forensic pathology.

Dr. Briskin's July 13, 2015, report (R-30) is based upon medical records, transcripts, photographs, documents, and a physical examination of an EB, without any examination of B.P. His report notes that the descriptions of the events from the various witnesses are "vague, divergent and contradictory," and he "cannot determine what actually occurred (nor can any medical expert)." He then opines "to a reasonable degree of medical certainty that the lacerations of [inmate B.P.'s] forehead (Y shaped) and over each orbital ridge (eyebrow line) are consistent with having been inflicted by the Autolock Baton demonstrated in the photographs and examined by me." Dr. Briskin explains that the linear pattern of the injuries assisted him in his opinion, as well as the absence of any blood or skin evidence on the shoes of other correction officers. He concludes that "[t]he forehead lacerations are consistent with multiple strikes to this area by the tip piece of the baton."

Dr. Briskin said that he respectfully disagreed with Dr. Tartacoff's opinion that the injuries to B.P. are not from a baton, but rather from a fist or boot.

Randy S. Tartacoff, M.D. (Dr. Tartacoff)

Dr. Tartacoff is a fellow of the American College of Emergency Physicians. He is a licensed doctor in New York and New Jersey. He obtained his M.D. from Mt. Sinai School of Medicine, New York City. He presently is the director of the emergency department at Holy Name Medical Center, Teaneck, New Jersey; he teaches as a

professor at Touro College of Osteopathic Medicine, New York City; and he maintains a private practice at Professional Healthcare Services of Lawrenceville. His residencies were in orthopedics and emergency medicine, respectively, at Einstein Hospital and Lincoln Hospital, Bronx, New York. Dr. Tartacoff is accepted as a qualified expert in emergency medicine.

Dr. Tartacoff's December 10, 2013, report (R-31) reflects that he also did not examine B.P., and he relied on the medical records, transcripts, photographs and documents provided, as listed in his report. He states that the injuries to B.P. are not linear as one would expect from a police baton, "[t]herefore, these injuries are consistent with blunt trauma, more likely from a fist or foot." He stated, "Within a reasonable degree of medical probability, it is . . . my opinion that his facial injuries were not from a police baton, but rather from a fist or foot."

At the hearing, Dr. Tartacoff stated that he saw the EB for the first time on the day of his testimony. He noted the difference from a regular police baton. He maintained that the shape of the EB would not change his opinion. He testified that two to three fist blows created the injuries near the orbital ridge of the inmate's eye.

David B. Lewis (D. Lewis)

On June 20, 2011, D. Lewis retired as an SCO with twenty-seven years of service. On July 13, 2010, he was a medical-escort officer and responded to the Code 33. He testified that on arrival, he held back from involving himself in the restraint of B.P., as this would be against policy as a medical-escort officer. He observed about eight to ten COs within the area, and identified Newsom and the other medical-escort COs as all "laying back," but being in the area. He denied seeing any medical-escort CO, "during the course of the escort," hit B.P. with a baton. (5T15:17–22.) He denied seeing Newsom hit a restrained B.P., saying there were other officers there.

Lewis testified as to his meeting with the MCPO. He said that Gallucci looked for him to say that Newsom struck B.P. He refused make that statement. (5T25:2–20.) He said he was threatened with the loss of his pension. He testified that he was not read

his rights. (5T27:3–27.) He denied recalling receipt of and execution of the Garrity Warning (R-68). He acknowledged not remembering events that occurred more than five years ago. (5T27:3–27.)

Jesse Barnes III (Barnes)

Barnes has approximately twenty-eight years of experience with Corrections. He is a SCO. On July 13, 2010, he called the Code 33 from the control booth when he observed B.P.'s altercation with Matlock. (5T58:1–6.) His view became obscured as twenty to thirty officers responded to the Code 33. (60:17–61:1.)

Dewitt Gamble (Gamble)

Gamble, a retired lieutenant, had approximately twenty-nine years with Corrections. He did not respond to the Code 33 in July 2010. After the Code 33, he became involved with collecting four of the straight batons from the unit where B.P. suffered his injuries. It was not until a few months later that the Special Investigations division sought to collect and replace all of the facility's batons, and a week after that to collect the EBs of the superior officers. These were collected, but Gamble could not testify to what happened to them thereafter, or whether he received Newsom's EB.

Philip Fisher (Fisher)

Fisher, a retired SCO, had approximately twenty-five years of experience with Corrections. He responded to the Code 33 on July 13, 2010. He was on top of B.P., near his lower back, hips and head in the attempt to restrain him. (5T114:11–16.) Fisher lost his glasses in the struggle with B.P. Perkins advised Fisher that B.P. was under control, and he got up to see a lot of blood on his shirt. He did not observe anyone hit B.P. after the restraint of B.P. (5T118:8–11.)

Robert F. McCormack (McCormack)

McCormack has sixteen years of experience as a Corrections employee. On July 13, 2010, he responded to the Code 33. He heard, "be careful of the blood." (6T72:12–18; 6T74:19–22.) He observed, ten feet from the incident, Fisher on top of B.P. attempting to place the handcuffs on; he did not recall the placement of the leg irons. (6T73:11–21.) He saw Newsom, but could not clarify how long Newsom was there. (6T75:3–11.) He denied seeing anyone hit B.P. with a baton or kick him. (6T76:10–13.) He described the meeting with the MCPO, and a threat that he could get five years for withholding information, yet he continued to deny that Newsom hit B.P. (6T77:11–80:21.) He identified R-72 as his SCR from July 13, 2010. He acknowledged that his SCR did not contain the information related on his direct testimony in regard to hearing "be careful of the blood," or seeing the pool of blood, and he did not recall all the officers there. (6T83:22–89:25.) He could not recall Gundy being there, whom he described as knowing very well. (6T96:20–25.) He acknowledged to being on "a lot" of pain medication during the interview with the prosecutor. (6T98:20–25.)

Stephen Alaimo (Alaimo)

Alaimo has worked for Corrections since January 1990, and attained the rank of major. He has worked at NJSP for more than twenty-three years, and was a lieutenant at the time of the incident. On July 13, 2010, he responded to the Code 33. He testified that there were forty-five officers there when he arrived, and they had yet to subdue B.P. (7T105:12–19.) Then he recollected that maybe the handcuffs were on, but not completely, nor were the leg irons applied. He saw a "profuse" amount of blood from the three facial lacerations. (7T107:7–108:7.) He testified that he arrived at the same time as Newsom. (7T109:16–20.) He assigned Newsom and his team to escort the inmate to the clinic to be treated for his injuries. (7T110:17–25.) Newsom did not have negative contact with the inmate at that time. (7T111:11–14.) Alaimo testified that before the inmate was subdued and handcuffed, Newsom was near him, fifteen feet from B.P. (7T113:9–15.) He testified, "He [Newsom] took his baton out because that's what we normally do when we do an escort, we have a baton at the ready." (7T113:21–114:3.) During the Code 33, he never saw Newsom strike B.P. with the baton. (7T114:11–18.)

He identified P-8 as his SCR. In the SCR he noted that B.P. refused to walk; Alaimo explained that B.P. never actually refused verbally, but he complained that the leg shackles were too tight. Alaimo said he looked at them, and told B.P. it would be addressed at the clinic. Alaimo observed B.P. moving from room to room at the clinic. (7T139:1–12.) In the February 2015 civil-action deposition testimony, he answered that he and Newsom responded to 3B Left at the same time, but he did not remember who came in first. (7T126:4–8; 7T128:7–16.) He also identified Israel as being involved in the subduing aspect of the incident, but at the time of Alaimo's arrival the prone B.P. was almost restrained. Alaimo acknowledged that some of his testimony came from reviewing reports. (7T129:7–25.) Alaimo's prior testimony acknowledged that his memory is based upon the reports. (7T131:1–8; P-8 at 73, line 2.)

Alaimo acknowledged that he never treated the physical location as a crime scene, despite the serious injury to B.P.; he saw no evidentiary value to the scene. (7T135:23–136:17.)

Kevin Newsom

Newsom is now working for Angel Transportation. He shuttles homeless and battered women. He also provides shuttle service for seniors to medical and dental facilities or other senior facilities. In 1987 he initially began working as a correction officer at Trenton State Prison. In October 2002 he was promoted to sergeant and went to work in Northern State Prison in Newark. After five to six months he returned to Trenton State Prison (now NJSP), and remained there until terminated on November 10, 2010.

On July 13, 2010, he served as the medical sergeant, and moved inmates from cells to the clinic. His team included Lashley, Israel, Albanese, D. Lewis, Gundy, and a sixth person, whose name he did not recall. He responded to the Code 33, but testified that he did not respond immediately. He testified that forty people were there when he arrived, and he stayed back by the second sallyport door, approximately fifteen feet from the disturbance. He testified that he stayed back because there had to be a supervisor there already. (6T18:24–19:19.) When he first saw B.P., the inmate had

already been shackled and was bleeding (6T23:2–4.) When he saw B.P. for the first time, in addition to his team he saw McCormack and Wolfson (phonetic). (6T23:17–24:1.) He testified that Alaimo ordered him to perform the escort of the inmate to the clinic. He identified Albanese, Israel and D. Lewis to be around B.P. He identified Fisher as having a lot of blood on his uniform. B.P. was lying face down; he tried to come to his knees, but could not get to his feet to walk, so Newsom ordered Israel and Albanese to use a "come-along" procedure. (6T30:17–31:20.) Newsom testified that B.P. fell approximately five times while they were moving him to the elevator to take him to the clinic; however, he did not suffer injury. (6T33:6–14.)

Newsom identified P-6 as his SCR and Use of Force report. (6T40:15–41:1.) He testified that all the reports of his team were written in his office; they were limited to the escort, and if that were insufficient a supervisor would have requested an addendum, which did not occur here. (6T41:16–43:19.) Newsom testified that he completed the Use of Force report because the escort occurred with B.P. in handcuff and leg shackles, and his team in helmets and vests. (6T43:23–44:9.) Newsom testified that upon the completion of the Israel and Albanese reports he first became aware of their negative involvement with B.P.; he would not have allowed them on the escort if he had known of this involvement earlier. (6T44:25–45:11.) Newsom then testified to his November 10, 2010, arrest on an indictment, and the dismissal of the indictment for prosecutorial misconduct. A second indictment was resolved by pre-trial intervention (PTI). Newsom maintained that he denied any guilt in that matter, but accepted the PTI because it was represented to him that it would be two years before he would receive a trial, and he would still face a removal proceeding like this regardless of whether he was found not guilty. (6T47:7–51:6.)

Newsom testified that when he heard the Code 33, he secured what he was doing and hurried to the Code 33. (7T142:8–25. When he arrived at the scene, B.P. was no longer putting up resistance. (7T143:18–20.) Newsom testified to being within five to seven feet of B.P. when he deployed his EB. (7T146:10–12.) Newsom testified that at the time he responded to the Code 33, he had knowledge of prior altercations between B.P. and other inmates at NJSP (7T153:2–5), and prior knowledge of a murder committed by B.P. in Rhode Island (7T154:10–14). Newsom testified that at the clinic he

said, "You're attacking inmates around here and now you're attacking my officers." (7T154:15–20.) Newsom acknowledged that he made an error by not asking his team whether they had had any negative contact with B.P. prior to assigning them to the escort. (7T164:2–11.) He said that he did not recall whether he handed out the SCRs to his team or they took them out of his drawer. (7T167:1–5; 7T167:19–168:4.) Newsom explained that he would tell his unit the inmate's first initial, last name, State number and cell number, and the officers would fill out the rest. He had nothing to do with other similarities in the SCRs of the transport team. (7T169:17–170:10.)

FURTHER FACTUAL DISCUSSION

There is no video of the alleged striking of B.P. by Newsom with the EB, an incident which would have had to occur within a few seconds, nor is there trace evidence of B.P.'s epithelial cells on an EB, to corroborate the other evidence in this matter and assist the determination here. Newsom's actual EB was not introduced. Batons were allegedly collected and cleaned, and, accordingly, lost to providing any evidential assistance to this process. No evidentiary presumption was requested by either litigant, and this tribunal would not favorably consider such a request, as the evidentiary value was lost by the absence of proper evidentiary procedures. The absence of epithelial cells of B.P. on the EB, could not create an inference or presumption in Newsom's favor as Newsom continued to exercise control over the EB for a period after the incident in question.

The batons that were introduced were offered to demonstrate to the tribunal the distinction between a cylindrical baton and an EB that a sergeant would possess. The difference is at the striking end—the EB is thinner than the cylindrical baton until the striking point, which is semi-sphere-shaped. A strike of the cylindrical baton on a softer area of the body, such as the back, leaves railroad tracks on each side of the cylinder, the length of the cylinder (Exhibit R-43, DOC # 837–839). The parties presented no demonstrative evidence of the results of the impact of an EB on a softer, or facial, area of the body.

In light of the opposing testimony of the various witnesses and the recanting of testimony by some witnesses, a credibility analysis is necessary. It is the fact finder's obligation and responsibility to weigh the credibility of the witnesses in order to make a determination. Credibility is the value that a fact finder gives to a witness' testimony. The word contemplates an overall assessment of a witness' story in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Credible testimony has been defined as testimony that must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955) (quoting In re Perrone's Estate, 5 N.J. 514, 522 (1950)). In assessing credibility, the interests, motives or bias of a witness are relevant, and a fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973). Credibility does not depend on the number of witnesses, and the finder of fact is not bound to believe the testimony of any witness. In re Perrone's Estate, supra, 5 N.J. 514.

The medical testimony provided limited assistance. Dr. Briskin, a forensic pathologist, acknowledged that medically, no doctor could say exactly how the injury happened, yet he and Dr. Tartacoff, an emergency physician, both gave opinions as to what could have caused B.P.'s facial injuries. This tribunal's concern is that both are offering testimony that is not medical, but, rather, their opinions of facts based upon a review of the factual testimony without any medical basis. An emergency physician is not trained to discern the causation of the injury, but how to treat the injury, preferably with a history provided to the physician. Arguably, the forensic pathologist is trained to determine the causation of the injury, but Dr. Briskin acknowledged that it is not medical science that would allow him or any doctor to determine the cause of this injury given the inconsistencies presented. Dr. Briskin did note that he received no evidence that any boot was involved in the injury to B.P. For that reason, I accept Dr. Briskin's opinion that the injury to B.P.'s face resulted from being struck with an EB. Dr. Tartacoff opined that the eyebrow injuries by the orbital lobe were likely the result of being struck with a fist, which is consistent with this tribunal's analysis of the photographic images. This

tribunal's basic understanding from common experience and the medical testimony is that the skin bone area above the eye is a frequent location for lacerations when force is exerted. This tribunal is more concerned with the Y-shaped laceration in the center of the forehead. This tribunal believes that such laceration resulted from a greater force than a fist, and it appears dissimilar to a laceration that one would expect from a kick to the face. B.P.'s testimony in a civil action was that he was kicked, as well as hit with batons. B.P. was unavailable to testify at the OAL hearing due to his present incarceration, and the prior testimony was taken in a civil action where, although the State had representation, that representation was not the present counsel, who may have had and posed other questions regarding that testimony. Respondent's counsel also points out that B.P. had profusely bled from the facial lacerations, and likely could not see much. Even the eyewitnesses to the incident who testified, said they saw a sea of blue, but had trouble distinguishing who participated at the incident. Dr. Tartacoff noted in his opinion that he relied on B.P.'s testimony; for the reasons set forth above, that testimony cannot be relied upon, and Dr. Tartacoff's opinion that B.P.'s Y-shaped facial injuries resulted from a fist or boot is not accepted.

Albanese never testified to viewing Newsom strike B.P. He did testify that Newsom and Israel were near B.P.'s head, but he limited his SCR to the escort. Gundy testified that his prior signed statement to the MCPO resulted from intimidation and misstatement, and he did not see Newsom strike B.P. However, his initial SCR (R-20) reflected that B.P. was already restrained when he arrived at the Code 33, then his statement to the MCPO immediately contradicted that by saying that he saw Albanese participating in the restraint of B.P. Gundy insinuated in his statement to the MCPO that Newsom struck B.P., and B.P. then bled profusely. This tribunal does not accept his recanting of his statement, and finds incredible that the MCPO would have created a statement for Gundy. Nor does it believe that the MCPO misrepresented Gundy's statement.

This tribunal is not naive to the possibility that an overly zealous prosecutor could distort the truth. However, the witnesses who worked at the MCPO at the time of the investigation are no longer employed with the MCPO. Johnson remains with Mercer County, and Ortman is now with New York University in New York City. Any alleged

bias in regard to their testimony is misplaced, as they are no longer employed by the MCPO, and in the case of Ortman, not even employed by the County. The proceeding is not a County disciplinary proceeding, but rather a New Jersey State Prison disciplinary proceeding. The testimony of Ortman and Johnson is viewed as credible, unbiased and not provided to protect their own interests. Their testimony is found credible regarding the conduct of the MCPO procedures for taking statements and stressing their desire for the truth and making potential witnesses aware of the consequences of not providing the truth. The explicit language of Gundy's statement appears to be what Gundy initially said, prior to his recanting. This tribunal accepts that Gundy saw Newsom hit the restrained B.P. with his EB, after which a greater volume of blood pooled next to B.P.'s head. This tribunal also accepts Gundy's statement that Newsom directed him to write in his report that B.P. fell a few times during the escort.

Appellant has provided a theory as to why Israel would fabricate the allegations he made, which is prosecutorial intimidation. However, Israel reaffirmed his statement made to the prosecutor. He did acknowledge prosecutorial intimidation at the time of the interview, but did not see it as a preconceived determination to charge Newsom, just to confirm who committed the act. His MCPO statement referred to a "hush" that permeated the area immediately after Newsom struck B.P. His statement was also supported by the reaction observed by the MCPO's Lieutenant Ortman, who said, "He cried, 'you do not understand, this testimony will follow me.'" The latter comment makes it clear that Israel understood that his statement was against his personal interest. He did not seek to volunteer his statement initially, and complied with limiting his SCR to the facts of the escort as requested by Newsom. It allowed Israel not to initially come forward. (2T95:14–18.) However, when eventually questioned by the prosecutor, he could no longer remain silent; he divulged the details of the incident truthfully. (2T103:20–22; 8T28:16–29:19.) Gundy's statement to the MCPO corroborates Israel's statement regarding the proximity of Newsom to B.P.'s head. It is for these reasons that this tribunal accepts Israel's and Gundy's prior statements as credible.

It is understandable that any employee would not willingly give testimony against a co-worker where that testimony could result in criminal consequences or loss of a job for the co-worker, especially where the perpetrator's actions do not personally harm the

employee. Rumors and ostracism would be a consequence to one who has provided such testimony. In the correctional-institution setting, that employee may have to rely on the co-worker for his physical safety prior to any disposition of events that follows from the adverse testimony. These are substantial factors that weigh in an analysis of bias of a witness who is denying that a criminal act has been perpetrated by a fellow law-enforcement worker against an inmate such as B.P.

This tribunal accepts that this bias is present in those that offered testimony in defense of Newsom: D. Lewis, Barnes, Gamble, Fisher, McCormack and Alaimo. D. Lewis testified that the escort officers all laid back; even Newsom recognized that he erred in having Israel, Albanese, and Gundy as part of the escort. D. Lewis's testimony is not accepted as reliable, as he testified he could not remember events which occurred five years before, and denied being offered and signing a Garrity warning or being read his rights. Barnes had an obscured view from the control room, and little of his testimony is relevant to Newsom's actions. Gamble testified that the collection of batons occurred months after the incident, and the collection of the supervising officers' EBs one week after that. He could not say whether he collected Newsom's EB. Fisher lost his glasses in the struggle to subdue B.P., so his visual observations are suspect. McCormack could not testify to the time Newsom arrived, and could not recall whether Gundy, a well-known acquaintance, was there. He also gave testimony regarding hearing "look out for the blood," which did not appear in his SCR. Accordingly, McCormack's testimony is found unreliable. Alaimo claims that he and Newsom arrived together, but could not say who arrived first. He further testified to ordering Newsom to conduct the escort, but acknowledged Israel's involvement in the restraining of B.P. Then he confirmed that most of his testimony came from reviewing the SCRs and not from memory or actual observations. Again, this testimony is unreliable.

The action of Newsom hitting B.P. two times in the face with his EB likely would have occurred very rapidly. Accordingly, even though twenty to forty correction officers were in the area, one would expect that many of them would not have seen the actual striking contact, and could validly give testimony that they did not witness Newsom strike B.P.

Newsom acknowledged that striking an individual with an EB on the head would constitute the use of deadly force. Accordingly, to protect his position, he had no other alternative than to deny that the event took place. Any admission of contact of his EB with B.P.'s head would conclusively resolve the necessary factual finding in this proceeding. Israel did see this event occur, and Gundy insinuated that he saw Newsom strike B.P.; while Gundy attempted to recant his statement, Israel did not.

Newsom's actions after the incident also displayed an indicia of guilt. He claimed that he did not immediately respond to the Code 33, though he could not say what, if anything, he had been doing, but he then quickly responded to the Code. He never testified to arriving at the scene with Alaimo. Newsom chose to jump to supervise the escort, despite the fact that some of his team had had negative contact with B.P. He alleged that he did not know of this negative contact until the team's reports were filed. Yet, he claimed he was fifteen feet from B.P., therefore he had to know of Gundy's and Albanese's involvement. He supervised the writing of his team's reports. He explained that the reports were limited to the escort, and did not include the events that happened in the cell area, so they would not have included the negative contact with B.P. Even if the reports were not designed to misrepresent the actual events, Newsom designed the reports to attempt to eliminate the likelihood that he would be disciplined for failing to follow protocol regarding some of his team's negative contact with B.P. Newsom had all the officers note in their SCRs the falls of B.P. during the escort, but he claimed that no injury resulted from those falls. (P-12.) B.P.'s statement to the prosecutor acknowledges that his bleeding occurred more profusely after the injury to his face, which occurred after he had been restrained; this is consistent with Gundy's statement to the prosecutor. In all, Newsom's testimony is not credible, but designed to protect his interests.

FACTUAL FINDINGS

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS:**

1. B.P.'s injuries were caused by more force than fist impacts to his facial area.

2. B.P.'s injuries were not caused by a kick to the facial area.

3. After B.P. had been restrained in handcuffs and leg shackles, and no longer presented a threat to Newsom or other prison personnel, Israel saw Newsom strike B.P.'s facial area two times with his EB.

4. Israel did not include this observation on his initial SCR, as Newsom advised him to limit his report to the escort portion of the incident.

5. Gundy's report to the prosecutor acknowledged the contact made between Newsom's EB and B.P.'s face, after which B.P.'s bleeding increased profusely.

6. Newsom's striking of B.P.'s face with his EB constitutes the use of deadly force.

7. Matlock's altercation with B.P. may have resulted in some injury to B.P.'s face; however, Newsom's striking of B.P.'s face with his EB resulted in additional extensive injuries.

ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. 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 Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory and other

personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, the NJSP bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Therefore, I 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. Co., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). Preponderance may also 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). Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554–55 (1954).

It is well recognized that the State correctional facilities operate through a rigidly hierarchical, almost "paramilitary," structure. Lockley v. Dep't of Corr., 177 N.J. 413, 425 (2003). In the instant matter, the NJSP charges appellant with violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee. "Conduct unbecoming a public

employee" has been described as any conduct which adversely affects the morale or efficiency of a department; conduct which has a tendency to destroy respect for public employees and their departments; or conduct which destroys confidence in public service. See In re Emmons, 63 N.J. Super. 136, 140–42 (App. Div. 1960); cf. Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966).

The NJSP also charges a violation of N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause, specifically, violation of HRB 84-17, as amended, C 11, conduct unbecoming an employee; of HRB 84-17, as amended, C 3, physical or mental abuse of an inmate, patient, client, resident or employee; and of HRB 84-17, as amended, C 5, inappropriate physical contact or treatment of an inmate, patient, client, resident or employee, relating to an alleged use of excessive force on July 13, 2010, against an inmate, B.P.

As found from the credible testimony of Israel at the hearing, and the initial statements of Gundy and Albanese in their respective prosecutor's statements, I **CONCLUDE** that the preponderance of the competent and credible evidence has established that appellant violated both N.J.A.C. 4A:2-2.3(a)(6) and N.J.A.C. 4A:2-2.3(a)(11) by striking in the face the handcuffed, leg-shackled, and restrained B.P. with his EB.

For all the reasons set forth above and on the basis of the competent proofs, I **CONCLUDE** that respondent has met its burden on these major disciplinary charges and that the disciplinary charges against appellant must be upheld. The next question is the appropriate level of that discipline. 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, supra, 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 this concept 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, or 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.

With respect to the issue of the appropriate discipline to be imposed, the parties have stipulated that other than one discipline, appellant's prior disciplinary actions were for time-related offenses. While there is no evidential support for finding that appellant acted against any other inmate, here, the action of striking a restrained inmate is egregious, and an institution such as a prison cannot employ an individual who has committed such an act, even if the act is an aberration. The consequences to the public, the reputation of the prison, and the prison's exposure to liability cannot be overstated. Based solely upon the facts set forth in regard to the inappropriate contact with B.P., I **CONCLUDE** that removal is the appropriate discipline for the violations of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming, and N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action is hereby **AFFIRMED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this

matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, 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.

Joseph A. Ascione

February 24, 2016

DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: February 24, 2016

Mailed to Parties:

PA-28

APPENDIX

LIST OF WITNESSES

For Appellant:

Kevin Newsom
Randy S. Tartacoff, M.D.
SCO D. B. Lewis
SCO Jesse Barnes
Ret. Lt. DeWitt Gamble
Ret. SCO Philip Fisher
SCO Robert McCormack
Major Stephen Alaimo

For Respondent:

Ret. SCO Albert Matlock
SCO Reginald Lewis
SCO Christopher Israel
SCO Damian Albanese
SCO Michael Wolhfert
Ret. SCO Nathan Gundy
Lt. Mervin Ganesh
Lt. Mark Perkins
Leigh Thatcher Johnson
Karen Ortman
Jonathan A. Briskin, M.D.
Antonio Campos

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

P-1 D. B. Lewis's prosecutor's statement dated 10/25/2015

P-2	J. Barnes III's SCR dated 7/13/2010
P-3	D. Gamble's SCR dated 7/13/2010
P-4	P. Fisher's SCR regarding Code dated 7/13/2010
P-5	P. Fisher's SCR regarding blood on uniform dated 7/13/2010
P-6	K. Newsom's SCR and Use of Force report dated 7/13/2010
P-7	Pretrial Intervention Program dismissal dated 10/18/2014
P-8	Lt. S. Alaimo's SCR dated 7/13/2010
P-9	Civil Action deposition of B.P. dated 9/25–26/14
P-10	Not offered
P-11	Internal Affairs Policy & Procedure dated November 2000
P-12	B.P.'s Statement to Prosecutor dated 3/3/11
P-13	Internal Management Procedure #101 for North Compound Close Custody Housing Unit dated July 2009
P-14	Internal Management Procedure #435 for Emergency Response dated June 2008

For Respondent:

R-1	PNDAs, dated November 1, November 5, 2010, and April 8, 2013; FNDAs, dated March 11, 2011, and December 30, 2014
R-2 to R-4	Not admitted into evidence
R-5	Matlock's SCR dated 7/13/2010
R-6, R-7	Not admitted into evidence
R-8	R. Lewis's SCR dated 7/13/2010
R-9	Not admitted into evidence
R-10	Perkins's SCR dated 7/13/2010
R-11, R-12	Not admitted into evidence
R-13	Perkins's Use of Force report, dated 7/13/2010
R-14	Not admitted into evidence
R-15	Albanese's SCR dated 7/13/2010
R-16	Albanese's prosecutor's statement dated 10/25/2010
R-17	Albanese's Garrity Warning dated 10/25/2010
R-18	Albanese's prosecutor's statement dated 5/25/2011

R-19	Not admitted into evidence
R-20	Gundy's SCR dated 10/25/2010
R-21	Gundy's prosecutor's statement dated 10/25/2010
R-22	Gundy's Garrity Warning dated 10/25/2010
R-23	Not admitted into evidence
R-24	Israel's SCR dated 7/13/10
R-25	Israel's prosecutor's statement dated 10/20/2010
R-26	Israel's Garrity Warning dated 10/20/2010
R-27	Israel's deposition dated 1/23/2015 (only page 82)
R-28	NJSP B.P.'s medical chart note for Code 33 dated 7/10/2010
R-29	St. Francis Medical Center record dated 7/13/2010
R-30	Dr. Briskin's expert report dated 7/13/2015
R-31	Dr. Tartacoff expert report dated 12/10/13 and résumé
R-32	Wolhfert's Training Summary dated 7/21/2015
R-33	Newsom's Training Summary dated 7/15/2015
R-34	DOC Instructional Unit 5.5 Use of Force Manual, January 2010
R-35	DOC Instructional Unit 5.5 Use of Force PowerPoint
R-36	DOC In-Service Use of Force refresher training 5/2007
R-37	DOC Use of Force Policy dated 10/19/2009
R-38	AG's Use of Force Policy issued April 1985, rev. June 2000
R-39	DOC Instructional Unit 9.7 Baton Techniques rev. 8/2008
R-40	DOC Baton PowerPoint
R-41	DOC In-Service Baton Techniques Refresher Training eff. 4/2010
R-42	Not admitted into evidence
R-43	Photographs, B.P.'s head/facial/body injuries
R-44	Not admitted into evidence
R-45	HRB 84-17 Disciplinary Action Policy
R-46	Newsom's work history
R-47 to R-61	Not admitted into evidence
R-62	Monadnock Autolock Expandable Baton
R-63	Monadnock Straight Baton
R-64	Thacker résumé
R-65	Thacker Evaluation

R-66	Thacker Evaluation
R-67	Not admitted into evidence
R-68	D. B. Lewis's Garrity Warning dated 10/25/2010
R-69	D. B. Lewis's SCR dated 7/13/2010
R-70	Deposition, J. Barnes
R-71	Deposition, P. Fisher
R-72	McCormack's SCR dated 7/13/2010
R-73	Not admitted into evidence
R-74	Not admitted into evidence