STATE OF NEW JERSEY

In the Matter of Michael Isner
Camden County
Department of Corrections

CSC DKT. NO. 2017-3863
OAL DKT. NO. CSR 08454-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: February 5, 2021 BW

The appeal of Michael Isner, County Correctional Police Officer, Camden County, Department of Corrections, removal effective January 27, 2017, on charges, was heard by Administrative Law Judge Dorothy Incarvito-Garrabrant who rendered her initial decision on December 17, 2020. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of February 3, 2021, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Michael Isner.

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 3RD DAY OF FEBRUARY, 2021

Deirdré 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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 08454-17
AGENCY DKT. NO. n/a 2017-3863

IN THE MATTER OF MICHAEL ISNER, CAMDEN COUNTY CORRECTIONAL FACILITY.

Jeffrey S. Ziegelheim, Esq., for Michael Isner, appellant (Dvorak & Associates, LLC, attorneys)

Antonietta Paiva Rinaldi, Esq., Assistant County Counsel, for Camden County Correctional Facility, respondent (Christopher A. Orlando, County Counsel, attorney)

Record Closed: November 15, 2020 Decided: December 17, 2020

BEFORE **DOROTHY INCARVITO-GARRABRANT**, ALJ:

STATEMENT OF THE CASE

Appellant, Michael Isner, a Corrections Officer at the Camden County Correctional Facility (CCCF), appeals his removal, effective January 27, 2017, from his position by respondent for incompetency, inefficiency, and failure to perform duties in violation of N.J.A.C. 4A:2-2.3(a)(1); conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7), and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11), specifically violations of CCCCF Rules of

Conduct, 1.1 violations in general; 1.2 conduct unbecoming; 1.3 neglect of duty; 3.6 departmental reports; 3.8 use of force; General Order #13; General Order #73; and General Order #74. (R-9.)

The appellant denies the allegations that he used excessive force on an inmate on October 6, 2016. He contends that his actions were necessary and proper.

PROCEDURAL HISTORY

On January 30, 2017, respondent issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications against appellant. On February 10, 2017, respondent issued an amended PNDA setting for the charges and specifications against appellant. Following a departmental hearing, the respondent issued a Final Notice of Disciplinary Action (FNDA) on June 7, 2017, sustaining the charges in the PNDA and the amended PNDA and removing appellant from his position. (R-9.) Appellant filed a timely notice of appeal.

The matter was transmitted to the Office of Administrative Law on June 19, 2017, for hearing as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. Appellant filed a waiver of the 180-day rule to allow this matter to continue to a full hearing. The matter was heard on October 18, 2018, November 14, 2018, December 4, 2018, and December 18, 2018. The parties filed post-hearing briefs, after their receipt of the transcripts. Thereafter the record closed. Subsequently, the record was reopened to determine whether respondent utilized a published schedule of charges and range of penalties. This tribunal recognizes that respondent is not required to utilize one, but sought clarification to assure a complete record. It was determined that respondent did not publish or utilize such a schedule. Subsequently, the record closed.

FACTUAL DISCUSSION

Testimony

For Respondent

John Jones (Jones) is a Lieutenant, who has been employed by the respondent for eighteen and one-half years. He has worked in Internal Affairs (IA) for approximately eleven and one-half years. His job duties included conducting criminal and administrative investigations. He was tasked with investigating an excessive force complaint relating to an inmate, W.P., against appellant regarding an incident, which occurred in jail admissions on October 9, 2016. At the conclusion of his investigation, Jones prepared a report for the appellant's matter. (R-1.) In conducting his investigation, Jones reviewed appellant's General Incident Report and Use of Force Report. (R-2.)

Per appellant's reports the incident occurred on October 9, 2016, after approximately 7:50 a.m.. On that date, appellant was assigned to jail admissions and was responsible for photographing and fingerprinting inmates. W.P. was initially held in Cell 37, having been received at the jail the night before. He and appellant exchanged some comments and profanities. W.P. was unhappy with the length of time it was taking to process him. Appellant wanted to move W.P. into cell 38, which was a quieter cell. Appellant walked W.P. from cell 37 to cell 38, at which time W.P. entered the cell, but stopped inside at the threshold. Appellant attempted several times to close the cell door; however, it would not close. Appellant wrote that W.P. put his foot in the cell door and prevented it from closing. As a result, appellant entered the cell and moved W.P. back towards the bench in the cell. He ordered W.P. to sit on the bench. W.P. did not comply with appellant's order. Appellant attempted to physically move W.P. toward the bench. W.P. became rigid in stance. As a result, appellant punched W.P. with a closed fist to the head to gain control. Appellant filed several charges against W.P. Jones testified that appellant made no mention of any verbal or physical threats by W.P. to him.

Jones reviewed the general incident report which was authored by Sergeant Richer (Richer), who was not a witness to the incident, and a general incident report completed by Sergeant Daniel Armstrong (Armstrong). (R-3.) Armstrong was the jail

admissions supervisor on the date of the incident. Armstrong reported that he heard commotion coming from the holding cells and he headed to those cells. He observed appellant attempting to place W.P. in cell 38. The door malfunctioned and would not close. Armstrong noted that he was later informed by appellant that the door would not close, because W.P. placed his foot in the door preventing it from closing. Appellant ordered W.P. to sit on the bench several times, but W.P. did not comply. Appellant entered the cell, at which time W.P. tensed his body. He refused to take a seated position on the bench. At that time, appellant struck W.P. in the head with a closed fist to gain compliance. Armstrong then assisted in restraining the inmate on the floor.

Jones also reviewed a video of the incident. (R-4.) Jones described the video as showing the jail admissions cells. In particular, cell 37 and cell 38 were visible. At the beginning of the video an inmate was located in cell 38 and the door is secured. Appellant entered cell 37. It is at this point that appellant and W.P. exchanged profanities.[1] Appellant left the cell and attended to other inmates. Subsequently, he re-entered the cell and verbally engaged with W.P. Appellant wants W.P. to put on his shirt. Additional profanities were exchanged. Appellant wanted to move W.P. to cell 38 which is quieter and has a glass door.

When appellant places W.P. in cell 38, the door bounced open. Appellant attempted to close the door several more times. However, it would not close. Appellant pushed W.P. into the cell. Jones testified that based on his observations, W.P. did not block the door with his foot.

Next, appellant grabbed hold of W.P. and pushed him against the wall in the cell. W.P.'s hands remained down by his side at all times. Appellant then struck W.P. in the head one time. W.P. went to the floor. Jones testified that appellant struck W.P. in the head two more times, when they were on the floor. At this point, Armstrong entered the cell and helped restrain W.P. Jones testified that he observed three strikes to W.P. by appellant.

[1]Jones testified about the video placing it in context with the reports he reviewed. Jones' testimony about the video included a synthesis of his own findings, the reports and other information he reviewed.

After reviewing the reports and video, Jones met with Deputy Warden Christopher Foschini (Deputy Warden), to discuss his investigation. The Deputy Warden placed appellant on a no inmate contact status, which removed him from having any contact with inmates for his safety and for their safety. This was normal Standard Operating Procedure.

On October 10, 2016, Jones conducted an audiotaped interview with W.P. (R-5.) Jones testified that W.P. positively identified appellant as the officer who assaulted him. W.P. was in jail admissions waiting to be processed for his seven day sentence. He had been to jail many times and knew the procedures. W.P. was questioning appellant about when he was going to go up to intake and began complaining, when appellant was leaving the cell. W.P. and appellant cursed at each other. Appellant grabbed W.P. by his arm and walked him to cell 38. W.P. said that there was something wrong with the lock on cell 38. W.P. denied blocking the door or standing in the threshold of the door. Appellant told W.P. to sit down. W.P. stated that he followed all of the orders that appellant gave him. He was about to sit down on the bench when appellant struck him in the head three times. Appellant threw him to the floor and placed a knee into his back. W.P. stated that both his hands were down at his sides, when he was struck by appellant. W.P. denied threatening appellant. W.P. sustained a small bruise on the back of his head.

Jones sent W.P.'s excessive force complaint and his investigation to the Camden County Prosecutor's Office Special Prosecution Unit for a review for criminality. They declined to charge appellant and remanded the matter back to internal affairs for an administrative investigation.

On December 21, 2019, Jones interviewed appellant. (R-5.) He confirmed the exchange between him and W.P. in cell 37. Appellant wanted to move W.P. to cell 38 to keep the noise level down, because there were eight to ten other inmates in cell 37. Appellant stated that W.P. stopped at the threshold of cell 38. He had placed his shoulder on the door and then on the wall. W.P. continued to use profanities. Appellant told W.P. to sit on the bench. Appellant attempted to close the cell door two or three times; however, it bounced open. Appellant believed that W.P. placed his foot in the doorway to prevent the door from closing. Appellant scooted the inmate with his hand towards the

bench. Appellant stated that W.P.'s stance became rigid, at which time, he punched the inmate in the head one time. Appellant stated that he immediately felt pain in his right hand, after they fell to the floor.

Jones testified that he observed the inmate on the video. He did not flail his arms. He appeared to be non-threatening. The inmate was standing in the cell and had complied with appellant's orders. There is no policy or procedure that inmates are required to sit on a bench. Jones further testified that appellant had other options available to deal with this situation. He and Armstrong could have entered the cell together. Appellant could have handcuffed W.P. or used his OC spray on W.P.. He could have taken W.P. to another cell. Appellant admitted that he could have deescalated the situation.

Jones further testified that the first time appellant mentioned that W.P. threatened him was during his Internal Affairs (IA) interview. Appellant stated that W.P. threatened him by saying "[w]hen I get out of here come see me." However, appellant did not include this in his reports. Appellant did not charge W.P. with threatening him. (R-1.) Jones testified that appellant was angry at W.P.

After the incident, appellant was transported to a medical facility. He ultimately had surgery on his right hand.

Jones also interviewed Armstrong. Armstrong stated that appellant relocated W.P. from cell 37 to cell 38. The door to cell 38 malfunctioned. Armstrong later learned from appellant that W.P. was using his foot to prevent the door from closing. Appellant told W.P. to sit on the bench several times, but he did not comply. Armstrong stated that W.P. threatened appellant by saying "I'll f**k you up. I'll see you on the streets." Armstrong did not include this threat in his report. Again, the first time Jones heard about this threat from Armstrong was during his IA interview. Armstrong stated that appellant struck W.P. in the head. W.P fell to the floor. Armstrong helped appellant handcuff W.P. Appellant was then transported to the hospital.

Armstrong accepted responsibility. He was the sergeant in charge and should have intervened in the situation sooner to deescalate it. Armstrong stated that appellant's actions were wrong. He should not have struck W.P. in the head for failing to comply and sit on a bench.

After the interviews, Jones met with the Deputy Warden and advised him about the investigation and what his recommendations would be. Jones recommended that appellant receive disciplinary action for striking the inmate in the head three times, because W.P. failed to comply with his orders to sit on a bench. Appellant lied in his general report that W.P placed his foot in the door preventing it from shutting. Appellant failed to document in his general incident report that W.P. threatened him. Jones concluded that appellant used force inappropriately against W.P..

On cross-examination, Jones testified that it was the officer's responsibility to sign in and out handcuffs and OC spray, both of which may be used in the facility under appropriate circumstances. Appellant and Armstrong were not equipped with either tool on the day of the incident. W.P. never stated that Appellant punched him while he was on the ground. Jones confirmed that during his interview, W.P. initially denied using profanities at appellant, and then later admitted he had. Jones indicated that W.P said appellant grabbed him. In the video, Jones could only observe that appellant reaches toward W.P. (R-4.) He could not confirm that appellant grabbed W.P.

Jones testified that appellant is not known to be a "hot head." Jones believed "in this case he had a bad day." In the video, Jones stated that he did not see W.P.'s foot in the door at any time. The fan blocked the view of some of the appellant's actions with W.P. in cell 38.

Jones detailed that appellant charged W.P. with four institutional charges. The first was for tampering or blocking a devise. Jones testified that this was a false charge because the inmate did not tamper or block a device. The second charge was that W.P. refused to obey an order of a staff member, because he refused to sit on the bench when told do so. The third charge was using abusive or obscene language to a staff member. The last charge was that when W.P. used the abusive language he engaged in conduct

which disrupts the operation of the organization. Appellant did not file any charge against W.P. for threatening him, although he could have.

Rebecca Franceschini (Franceschini) is a Captain, who has been employed by the respondent for seventeen years. She was the Captain on October 9, 2016. In her position, she is primarily responsible for the safety and security of the facility. She reviews and updates policies. She is a member of the disciplinary review board. She reviews 31-As and 31-Bs, and discusses recommendations from the review board with the Warden. She was familiar with the appellant's case. The disciplinary review board recommended termination. The final decision maker is the Warden. She identified the amended 31-A. (R-9.) The 31-A was dated January 30, 2017. The amended 31-A was dated February 10, 2017. The 31-B and 31-C were issued on June 7, 2017.

The amended 31-A charges listed on the left-hand side were suggested by Franceschini. The department has rules of conduct. (R-10.) Respondent charged appellant with violating Rule of Conduct 1.1 for violating the department's policies and procedures. Respondent charged appellant with violating Rule of Conduct 1.2 for engaging in unbecoming conduct. That is conduct which brings the department into disrepute, reflects discredit upon an employee as a member of the department or which impairs the operation or efficiency of the department. Franceschini testified that appellant was angry at this inmate, because he was cursing at him. His objective was to have this inmate sit on the bench. He punched the inmate in the head with a closed fist to gain control. That was a violation.

Respondent was charged with violating of Rule of Conduct 1.3 for neglecting his duty. Appellant was required to give suitable attention to the performance of his duties. Franceschini indicated that any act of omission or commission indicating a failure to perform or the negligent performance of compliance with any rule regulation or directive violates this Rule. Appellant admittedly punched the inmate in the head to gain control over him. He did not document in his incident report the reasons why he felt that the use of physical force was immediately necessary. Franceschini stated that appellant had other options available to him including backing out of the cell, calling his sergeant for

assistance, shut the door, handcuffed the inmate, or could have placed the inmate in another cell. He did none of those options.

Franceschini indicated that appellant used excessive force because he was angry. He lied during his IA investigation, when he stated that his whole objective was to have that inmate sit on that bench, so that he could figure out why the door was malfunctioning. This was a lie because appellant wrote in his incident report that the inmate was blocking the door with his foot. This was a violation of Rule of Conduct 3.6. Further, appellant did not report that any threats were made to him by the inmate. Appellant did not document that the inmate made any threats to him or that he felt physically threatened in any manner during the incident.

Relative to Rule of Conduct 3.8, Franceschini testified that it requires as follows:

> personnel shall not inflict corporal punishment on a person of an inmate, prisoner, or other person, nor shall they strike or lay hands on an inmate, prisoner, or other person, unless it is in self-defense or unless to prevent escape, serious bodily injury to person or property, to quell a disturbance or affect an arrest where resistance is offered. In all circumstances, only the amount of force necessary to accomplish the desired role is used.

Franceschini stated that appellant was not acting in self-defense. He never indicated in his report that the inmate threatened him or that he felt physically threatened. He was not acting to prevent escape. He was not preventing serious injury to another person or property. He was not quelling a disturbance. He was not affecting an arrest where resistance was offered.

Appellant also violated General Order #13. (R-11.) Similarly, none of the circumstances permitting the use of force in a, b, c, d, e, or f were occurring. Appellant never documented that the inmate was a threat. General Order #13 provides that alternatives to the use force should be the first response. Force should never be the first response. Appellant admittedly had other options available to him. Franceschini noted that appellant never indicated the inmate threatened him, until later on during the IA investigation. It was not reported in appellant's General Incident Report or Use of Force

report. W.P. was not charged with threatening an officer. General Order #13, requires that officers must use the minimum force that is objectively reasonable under the totality of the circumstances consistent with facility policy and procedure. Franceschini stated that appellant struck the inmate with a closed fist to the head because he was angry. Appellant used excessive and unjustified use of force. Respondent also charged appellant with violating General Order #73, Personal Conduct of Employees, (R-12), and General Order #74. (R-13.) Appellant was not professional on that day.

The Warden reviewed the recommendations of the disciplinary review board. The Warden believed appellant was unjustified in his use of force and that the force was excessive.

Franceschini reviewed appellant's incident report. She did not know what his physical condition was at the time he offered the report, although she knew he subsequently had surgery on his hand. Franceschini did not believe that W.P. was causing a threat to appellant when he refused to comply and became rigid in stance. Franceschini indicated Armstrong did not report any threats in his report. Franceschini indicated that the video showed that there was not any physical threat. The situation between appellant and W.P. was confrontational. Franceschini believed that Isner punched W.P. once, but that appellant stomped the inmate twice while they were on the ground. An officer should direct blows away from the head, if it is avoidable.

Gary Merline (Merline) testified for respondent. Merline worked in law enforcement for twenty-five years. During that time, he worked inside a correctional facility. (R-14.) He developed the IA Unit in Atlantic County. He was ultimately appointed the director of this unit, which is commonly called IA. He was responsible for administrative, criminal, and lawsuit investigations. He has investigated in excess of one thousand excessive force cases. Merline was qualified and accepted as an expert in this matter.

Merline produced a report relative to this matter. (R-15.) Merline testified that relative to evaluating a use of force incident, the first step is to review the facts and circumstances known to the officer at the time force was used. Appellant's disclosed

relevant facts were as follows. The incident began with the difficulty closing the cell door. The reports indicated that W.P. was blocking the door. As a result, appellant ordered W.P. to sit on a bench in the cell. W.P. did not comply, so appellant directed W.P. to the bench.

In reviewing the video, Merline did not observe W.P. being belligerent, non-compliant, or creating a disturbance. Appellant's sole purpose of going into the cell was to get W.P. to sit on the bench. The force incident begins when appellant grabbed W.P.'s arms and directed him back against the wall. Appellant did not indicate that he was threatened or that W.P. moved forward at him. The only information that appellant provided was that he believed he was about to be struck; however, there were not any observations or facts provided anywhere in appellant's report or statement to support this belief.

Merline testified that there was not any policy or procedure requiring inmates to sit on benches. Merline maintained that in the video appellant held W.P. against the wall and that he struck him with his right hand on the left side of his face. They both went to the ground. Merline observed that there were two more swinging motions when W.P. was on the ground; however, he could not determine if W.P. was struck.

When reviewing W.P.'s interview, Merline noted that W.P. denied putting his foot in the door and denied saying anything inappropriate to the officer. Merline stated that this lack of information from an inmate is common. W.P. stated he was not struck when he was on the ground. Even if W.P. was untruthful about these facts, Merline would not change his opinion about the use of force being excessive. Merline stated that the fact that someone says something inappropriate to you does not justify the use of physical force. Isner was inconsistent when he reported that W.P. blocked the door from closing, but told his sergeant that he knew the door had malfunctioned. Appellant knew he made a bad decision and had other options available to him. Merline acknowledged that an

officer does not have to wait to be physically assaulted before physical force is used against an inmate.

Merline reviewed Armstrong's report and the use of force report. Merline noted that appellant stated that the incident occurred because W.P. blocked the door. This was inconsistent with what appellant stated, when he was interviewed later. At that time, appellant stated that he knew W.P. did not block the door and that the door malfunctioned. This inconsistency goes to appellant's truthfulness.

Merline reviewed appellant's statement regarding the incident. Merline found a major inconsistency between the statement and the video. Appellant claimed in his initial report that W.P. was blocking the door. While he wrote in his statement that he later realized that the door was malfunctioning, this was not what he indicated in his incident report or told Armstrong. Appellant's objective was to have the inmate sit down. Force should not have been his first action with a disrespectful inmate. Appellant acknowledged he had other options. Appellant never provided any information in his report or statement that W.P. made any threat to him that would require a physical response.

While Merline acknowledged that Armstrong indicated that W.P. resisted by tensing his body and refusing to assume a seated position, he indicated that, even if that were true, that is not a fighting stance which would have required the use of force by the officer. Merline opined that an officer might have reasonably believed that a threat is being made against them, but some sort of fact that it is immediate is required for the officer to use force.

Merline reviewed the Rules of Conduct, and the Use of Force Policy General Order #13. (R-10, R-11.) Merline opined that the use of force was unjustified. Appellant did not punch W.P in self-defense. The fact that W.P. tensed his body in direct contradiction of an order was not sufficient for appellant to believe that he is going to be struck. This incident lacked facts which would have led appellant to believe that it was immediately necessary to use force. Appellant was not preventing W.P. from escaping or committing suicide. Appellant was not in danger of serious injury. Appellant had a multitude of other options to address W.P. He could have walked out of the cell or shut the door until

assistance arrive. He could have called a "code," asking for help. He could have asked Armstrong for help.

Merline opined that there was no direct, immediate event to justify the use of force. Based on the foregoing, Merline testified with a reasonable degree of certainty that the force used by appellant was excessive.

For Appellant

Michael Isner, appellant, testified that he began employment as a Corrections Officer with the Camden County Department of Corrections on April 3, 2005, after completion of the corrections academy. In 2012, appellant began working in the admissions area of the facility. Appellant was appointed to this position by Lieutenant Frank Franceschini, the husband of Captain Franceschini, who testified in this matter. Appellant did not bid this position.

Appellant testified that on Sunday, October 9, 2016, he was working in admissions. The day before, appellant worked from 6:45 a.m. through approximately midnight. His October 9, 2016 shift began at 6:15 a.m.

On October 9, 2016, when appellant began his shift, they had roll call upstairs. No information about issues in admissions was given to appellant at that time. When he reached admissions, there were approximately ten individuals in cell 37, who were waiting to go upstairs into the cell block. The individuals were sleeping. Armstrong was the boss that day. There were two other processing officers seated at desks about fifteen feet from cell 37. Including appellant and Armstrong, five corrections officers were working in admissions that day.

At 8:00 a.m. cell 38 was occupied with an inmate. One of the processing officers took him out and processed him. Appellant looked into cell 37 to see what the situation was. At 8:02-8:03 a.m., appellant entered the cell to take out another inmate, R.S. W.P. started cursing and asking when he was going to go upstairs. W.P. was acting erratically.

W.P. threated appellant by saying "that you guys are tough when, you know, when I get outta here come see me." Appellant stated he hears statements like this often.

W.P. became more verbally abusive. Appellant testified that he told him how the process was going to occur. R.S. was removed from the cell to be processed. Appellant then went back into cell 37 to quiet W.P., because appellant did not want W.P. to be a danger to himself or the other inmates. Upon hearing this, W.P. jumped up and got in appellant's face. W.P. was not happy. He made threats and used profanities. Armstrong approached cell 37, but did not enter the cell. W.P. then approached appellant in a white t-shirt with his left arm above his head. Appellant testified that he felt threatened by this. He told W.P. that he was being moved to another cell to resolve these concerns. Appellant told W.P. he was moving him to cell 38, which had a glass door and was more soundproof than the other cells. Armstrong entered cell 37. W.P. picked up his orange jail shirt and was directed out of cell 37 by appellant.

Appellant testified that the threats made by W.P. "heightened [his] awareness." The first threat was in cell 37. W.P. stated "[y]ou guys are real tough. When I get outta here, you come see me." W.P. then got up "pretty abruptly," when appellant told him he was going to be moved to cell 38. When appellant re-entered the cell W.P. said to him, "[y]ou guys are real tough. Come see me." He said this with his left hand above his head. Appellant identified 8:03:30 on the video as the point at which W.P. was in his face. On cross-examination, appellant testified that W.P. complied while being walked to cell 38 and that W.P. did not come anywhere near him.

Appellant walked W.P. to cell #38 and W.P. entered the cell. Appellant described that W.P. stood in the threshold to the cell. Appellant attempted to shut the door, but it bounced open. Appellant looked at W.P. in the cell and told W.P. to back away from the door. Appellant looked at W.P.'s feet, because he thought W.P.'s foot caused the door to not lock. Appellant testified that when he told W.P. to step back, W.P. stepped forward instead. This was approximately at 8:03:49 on the video. Appellant kept his eyes on

W.P. and attempted to shut the door to the cell for the third time. Appellant stated that W.P. continued to stand in the threshold of the cell.

Appellant testified that he then ordered W.P. to step away from the door. Appellant gestured to W.P. to have a seat on the bench in the cell, because he did not want W.P. to come outside the cell and because appellant wanted him on the right side of the cell.[2] Appellant explained that the further back in the cell W.P. was, the less chance something could happen. As appellant attempted to close the door again, W.P. flailed his hands in the air again and did not sit on the bench. Appellant perceived that W.P. was making a lot of unnecessary movements. W.P. backed up at one point, but after more attempts by appellant to close the door, W.P. approached the threshold area again.

Appellant explained that at 8:04:03 seconds, he entered the cell and again ordered W.P. to sit on the bench. Appellant indicated he did this so that W.P. was less of a threat and could not exit the cell. The door was not secured. W.P. did not comply. This heightened appellant's awareness. At 8:04:18, appellant took W.P. and scooted him. Appellant then turned W.P. around to move him to the bench. He did this by placing his hands on W.P.'s sides. Appellant indicated he did this to avoid getting struck by W.P., who had used profanities and made threats to him. Appellant stated that Armstrong is also telling W.P. to sit on the bench. W.P. did not comply.

Appellant explained that at 8:04:20 seconds, he had moved W.P. back three feet. Appellant testified that the bench was three or four steps behind W.P. At this point, W.P. became rigid. He did not comply and did not move. This also heightened appellant's awareness. At this point, appellant testified that W.P. was rigid and pushed his weight into appellant. On the third push by W.P., appellant explained that he felt the "most force coming at me when [W.P.] was moving." As a result, appellant stated he struck W.P with his right hand, which hit W.P.'s ear, side of his face, and head. W.P. went down to the ground. Appellant indicated he was still standing there for a second. Then he went down on top of W.P. to get his hands behind his back. Appellant got W.P.'s left hand behind his back.

[2] The opening to cell 38 was on the left side of the cell, when looking at it from outside the cell on the door side.

Appellant testified that he immediately felt pain, when he struck W.P. He denied striking W.P. while he was on the ground. Appellant testified that his hand movements were associated with trying to get W.P. secured. Appellant stated he was looking for handcuffs, because he did not have any. According to appellant, when he worked "picture and print" he did not wear handcuffs or OC pepper spray, because he had to work in close proximity to inmates, whose hands were at his waist level. In the past they grabbed his handcuffs. Appellant admitted that he should have at the minimum had handcuffs. While on the ground, W.P. continued cursing and moving around a little bit.

Armstrong helped W.P. get to his feet. Appellant had already exited the cell. Armstrong then ordered Officer Pruitt (Pruitt) to bring handcuffs. Pruitt brought leg irons instead. A different sergeant then comes in with his handcuffs. He handed Pruitt back the leg irons. Appellant left admissions to seek medical attention.

After this, appellant was driven to MedExpress for treatment. Appellant's hand was swollen and his pain level was a ten, on a scale of one to ten. He was ultimately diagnosed with a torn tendon, for which he had surgery two months later.

When he returned from medical care to respondent's facility, he produced reports including a Use of Force report. (R-2.) Appellant attempted to type the first report. However, he was in pain and unable to type effectively. It took two hours to produce the first report. As a result, he requested that Officer Barr (Barr) help him. While in pain, appellant dictated the reports to Barr.

On December 21, 2016, appellant was interviewed by Jones and Officer Coleman about the incident. He was not given the opportunity to review the video before he gave his statement. Appellant testified that he was asked about being angry. He indicated that he never stated that he punched W.P. out of anger.

Appellant testified that Armstrong knew, after the threat in cell 37, that W.P. had threatened him and got in his face. Then, appellant retracted this statement. Appellant testified that the threat was not in his Use of Force report. (R-2.) Appellant stated he did

not include it because his hand was in pain, when he wrote this report and it "didn't seem important because that's—I hit him because he resisted and became rigid inside of cell 38." On cross-examination, appellant testified that it did not bother him that W.P. threatened him with the "come see him" threat.

Appellant testified that it was his responsibility to check all the cell doors before he relieved the officer before him. Appellant testified he did not check cell 38's door. He also indicated it was the collective responsibility of the officers on that shift. Subsequently, appellant stated that he checked cell 38's door and it was to his "knowledge" working.

Appellant stated that at 8:03:14 seconds, W.P. was verbally assaulting him. In this regard, W.P. was being verbally disruptive and using profanities. Appellant considered them to be a verbal assault ,because the profanities were directed at him. At 8:04:43 appellant felt the door was not working because he believed W.P.'s foot was in there. The video did not show W.P.'s foot is in the doorframe. Appellant testified that he did not include in his report that he realized it was not W.P.'s foot preventing the door from closing. Appellant stated that he knew before he wrote the report that the door had malfunctioned. Appellant testified that W.P. was making "furtive movements" while at the threshold of the door. He described those as putting his hands up and aggressively flailing around. Appellant did not put this in his report.

Appellant testified that W.P.'s hands were flailing while he was in cell 38; however, he also stated that he did not include that in his report. Appellant further testified that the flailing arms were not his concern. His concern was that W.P. would not obey orders and back away from the door.

Appellant testified that at no point in time was W.P. back against the wall. Appellant believed this was a very important fact. However, he did not include this in his report, because his hand hurt when he was writing the report. Appellant never mentioned that W.P. was not against the wall in his interview and he never told IA that he was in pain when he did his report.

Appellant testified that he did not include in his report that W.P. moved forward toward him. He reiterated that W.P.'s rigidness made him believe it was an immediate threat. Appellant did put in the report that W.P. took a rigid stance and resisted. Appellant testified that he was upset in cell 37 and cell 38. Appellant testified that upset and anger are basically the same word to him. Appellant then testified that he was angry in cell 37 and remained angry through cell 38. He testified that W.P. was a threat the entire time he was in cell 38. Appellant believed he could not call for a code, because he would have been hit in the face. Appellant stated that W.P. "was comin' after me." Appellant testified that he held W.P.'s hands at his side to keep from being hit.

Armstrong's report indicated that the threat was "I'll f**k you up. See you on the streets." Appellant stated that W.P. said that too. He was continuously mouthing off.

Appellant charged W.P. with four charges. First, he charged W.P. with tampering or blocking the device. He did this because he believed W.P.'s foot was in the door. Second, he charged W.P with refusing to obey an order because he would not sit on the bench. Third, he charged W.P. with using abusive or obscene language. This is permitted, if the inmate is curing excessively. Fourth, he charged W.P. with conduct which disrupts. He never charged W.P. with threatening him even though he was rigid, came at him, and got in his face.

Appellant denied that his answers to IA were different than his testimony. Appellant then testified that they were different answers because he had seen the video. He offered that at the time he wrote his report, he was in pain and watching the video later helped him to recall what occurred. Appellant stated he had already watched the video by the time he had given some of his answers during the IA interview. Appellant maintained he did not do anything wrong during the October 9, 2016 incident. He indicated that he might have done something wrong with failing to have his handcuffs on him. He maintained his actions were correct and he would not have done anything differently. In his interview, appellant indicated that he did have other options.

Edmond Ciccho (Ciccho) testified as an expert on behalf of the appellant. Ciccho was employed in the fields of corrections and law enforcement for thirty-four years. He

held various positions including juvenile detention officer, supervising juvenile detention officer, supervisor, assistant superintendent and superintendent of youth activities, Adult Center Deputy Warden, and Warden Middlesex County Department of Corrections. In some of these positions, Ciccho had experience reviewing IA complaints and investigation results and making personnel and disciplinary decisions. As Warden, Ciccho had experience terminating employees from their jobs because of excessive force issues. Ciccho was qualified and accepted as an expert in fields of corrections and use of force. Ciccho reviewed the appellant's and Armstrong's incident reports, internal affairs reports, inmate statement, and the video. Ciccho also interviewed appellant.

Ciccho was familiar with a facility's admissions area, where inmates are brought in to be processed. Ciccho opined that admissions is the most volatile part of a facility. Ciccho explained that at the time a new shift is taking over there is a muster period. During this time, the new shift of employees is made are of any problems or situations they may have to address. This includes physical problems with the facility. Officers should be equipped with a duty belt, handcuffs, OC spray, gloves, etc. Ciccho testified that appellant was not equipped with any of these items.

Relative to the video, Ciccho testified as follows. He understood from the reports and his interview with appellant, that W.P. was in cell 37, with ten other inmates, and was belligerent. W.P. did not follow orders and was verbally disruptive. This behavior could have incited confrontations with the other inmates in cell 37. In the video, appellant is trying to get control of the situation. He wants to move W.P. to another cell, which in Ciccho's opinion was a good idea. Appellant moves W.P. to cell 38. Appellant attempted several times to close the door. Ciccho opined that for the first three failed attempts it was objectively reasonable to believe that the inmate was causing the problem because of his proximity to the door. Appellant was not notified prior to his shift that the door was not operational. W.P. knew the door was not operational because he had been in cell 37, prior to appellant beginning his shift.

Ciccho testified that the combination of difficult inmate and the malfunctioning door made the situation more volatile in the admissions area. Ciccho faulted Armstrong for not exhibiting good supervising practices by helping appellant and diffusing the situation with

W.P.. Ciccho testified that he believed appellant wanted W.P. to sit to get control of him, so that he was away from the door, which would not close. This would have allowed appellant to get help from another officer. That help should have happened long before this point. When appellant had problems with cell 38, a code should have been called to aid appellant. Ciccho testified that no code could have been called because appellant and Armstrong did not have radios, which would have allowed them to push the code button.

After the door did not shut, appellant attempted to move W.P. to sit down. The door was a security problem. Ciccho testified that this was a legitimate correctional function. W.P. resisted sitting. Ciccho observed that at that point, W.P. "appears to be....tensing up," and moving towards the appellant. Ciccho opined it was reasonable for appellant to assume that W.P. was coming at him. At that point, appellant struck W.P., which under these circumstances was an appropriate use of force. An officer does not have to wait to be physically assaulted, before they may use physical force against an inmate. Ciccho testified that the force continuum allows an officer to use one step of force above what is being used on them. Ciccho opined that appellant had an objectively reasonable belief that he was about to be assaulted. Ciccho acknowledged that once P.W. was on the ground, appellant and Armstrong did not have handcuffs to secure him.

Relative to Merline's opinion, Ciccho said he disagreed with it. First, Ciccho indicated he did not see three strikes. Second, Merline failed to note that Armstrong and appellant did not possess duty belts. Third, Merline failed to mention that it is good correctional practice to have the sergeant assist in this situation to deescalate it. Finally, Ciccho disagreed with Merline's opinion. Appellant's use of force was appropriate.

On cross-examination, Ciccho stated that appellant's recollection of the incident during their conversation was a little different from his report. The report was written an hour or so after being at the hospital. Ciccho maintained it was not appellant's responsibility to make sure he had his duty belt. His supervisor would have been

responsible to have appellant wear it. Ciccho conceded that appellant was "stupid for not having them on."

Ciccho stated that the only thing that made W.P. belligerent was the fact that he used profanities. Ciccho insisted that Armstrong should have diffused the situation between appellant and W.P., while W.P. was still in cell 37. This was Armstrong's fault. Armstrong should have taken over the situation and taken the inmate out of there. When the door did not shut, a code should have been called. Although appellant never stated in any of his reports that W.P. was coming towards him, that is what appellant told Ciccho when they spoke, almost one year after the incident. While it is not a legitimate correctional function to punch an inmate in the head for failing to comply with a verbal request to sit on a bench, that is not what occurred here.

Ciccho acknowledged that W.P. was compliant when he was moved from cell 37 to cell 38. Ciccho also maintained that W.P. was belligerent the whole time from the beginning of his interaction in cell 37, where he was verbally "threatening" appellant through the end of the video. Ciccho acknowledged that appellant did not say in his report that he was threatened. Ciccho disagreed with appellant that he had other viable options to address this situation.

Ciccho wrote in his report that appellant was "charged with being angry." Ciccho indicated he wrote this because he read it somewhere. Ciccho did not observe W.P. blocking or not blocking the door. Ciccho opined that Isner's use of force was appropriate and in accordance with General Order 13, Section a, c, and d. (R-11.) Section a relates to being able to defend oneself against assault. Ciccho stated he observed W.P. assault appellant in the video. Section c relates to preventing escape. Ciccho said that force was appropriate to keep W.P. from escaping the unit. Section d speaks to quelling a riot or disturbance. Ciccho indicated that appellant was quelling a disturbance. Ciccho relied on what he "witnessed in that video and what I know could happen in that type of situation."

Credibility

Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Cmty. Affairs Dep't, 182 N.J. Super. 415, 421 (App. Div. 1981).

The testimony presented by Jones and Franceschini about their investigatory actions, observations of appellant's behavior and statements, review of Armstrong's statements and reports, and the facts as detailed in Jones' report were consistent. They were also consistent with the documentary and video evidence. Collectively, their testimony of the events of the incident and the information they gathered during their investigation made sense and hung together to describe what occurred. Contrary to appellant's inference and arguments, Jones and Franceschini expressed no pre-existing

issues with or animosity toward appellant, which made their testimony believable. There was no competent evidence in the record to support appellant's contention that the investigation into this incident or the discipline appellant received was politically motivated or undertaken in bad faith. Jones' testimony that appellant was not known as a "hot head" and that he had a "bad day," further bolstered the reliability of Jones' testimony and investigatory actions. These statements were inconsistent with appellant's allegations of bias or motive. Appellant's inference alone was insufficient to mar the credibility of Jones and Franceschini.

It further failed to demonstrate that appellant's expanding rendition of the facts was reliable. It is during appellant's IA interview, that, for the first time, he expands the facts recorded in his report to include verbal threats made by W.P. against him and that appellant believed he was in danger of being physically assaulted. This appeared only to be offered in the IA interview to justify his actions and conduct. Further, justification for his action and expanding the record of events was undermined by appellant's own testimony during the hearing, in which he indicated that he hears threats like that often and that these threats are not why he used physical forced against W.P.. Appellant's testimony was confusing. He contradicted himself and his IA interview statements.

In sum, appellant's expanding statements and justifications could not be reconciled with the contemporaneous reports or his inconsistent testimony to justify his conduct and absolve him of responsibility. The other witnesses' renditions of the disputed facts have a greater "ring of truth," than the scenarios offered by appellant, who plainly had a greater interest in the outcome of this proceeding.

I accept Jones's testimony about his investigation, the interviews he conducted and his conclusions.

Additionally, the record in this matter contains the testimony two experts on the use of force, Merline and Ciccho, both of whom offered differing opinions regarding the appropriateness of appellant's actions. In weighing the opinions of these experts, it is well settled that "'[t]he weight to which an expert opinion is entitled can rise no higher than the facts and reasoning upon which that opinion is predicated.'" Johnson v. Salem Corp.,

97 N.J. 78, 91 (1984) (citation omitted). In this regard, it is within the province of the finder of facts to determine the credibility, weight and probative value of the expert testimony. State v. Frost, 242 N.J. Super. 601, 615 (App. Div.), certif. denied, 127 N.J. 321 (1990); Rubanick v. Witco Chem. Corp., 242 N.J. Super. 36, 48 (App. Div. 1990), modified on other grounds and remanded, 125 N.J. 421 (1991).

Here, Merline's testimony and conclusions were more persuasive. Merline's analysis of the video and reports made sense. Merline analysis was thorough and lacked any material inconsistencies. His opinion, that the fact that someone says something inappropriate to you does not justify the use of physical force, was supported by the pertinent Rules of Conduct and CCCF General Orders, which were applicable in this matter, including but not limited to General Order #13. While an officer does not have to wait to be physically assaulted before using physical force against an inmate, the decision to use force requires objective, reasonable facts demonstrating that there is an immediate threat or danger to the officer. W.P. committed no action that could reasonably be believed to be an immediate threat against appellant that required the physical use of force, in this case punching W.P. in the head with a closed fist.

To the contrary, Ciccho's analysis and opinion was less persuasive. It was disabled by the inconsistencies between appellant's reports, the video, and appellant's statements in the interviews which they had. Ciccho's analysis was further disabled because he relied upon the position that Armstrong was more to blame than appellant. While Armstrong was appellant's supervisor, he was not responsible to predict that appellant would punch W.P. under the circumstances herein. He was not responsible for appellant's decision to punch W.P. in the head with a close fist for refusing to obey a command to sit on the bench in the cell. Certainly, Armstrong had supervisory responsibility and he may have neglected those obligations; however, this neglect did not excuse appellant's decisions and conduct. Even Armstrong indicated that appellant's actions were wrong. This scapegoating of Armstrong to absolve appellant of responsibility for his violative conduct disabled the credibility of the expert's opinion and made his conclusions less reliable.

Further, Ciccho admitted that it is not a legitimate correctional function to punch an inmate in the head for failing to comply with a verbal request to sit on a bench. His explanation, that that was not what occurred in this situation because W.P. was belligerent and leaned into appellant lacked evidential support. In this regard, his reliance upon the fact that W.P. was belligerent during the entire incident, beginning in cell 37 through the time he was handcuffed, was unsustainable. The video demonstrated that W.P. was not belligerent throughout the incident. Even appellant admitted W.P. transitioned from cell 37 to cell 38 without issue. Additionally, his position that W.P. posed a risk of escape or physical danger to appellant was not reflected in the video or in appellant's reports, statements, and testimony during which he repeatedly affirmed that he struck W.P. because he failed to comply with his order to sit on the bench. Ciccho's opinion appeared to be a contrived attempt to bridge and explain the inconsistencies in appellant's reports and IA interview about what occurred and justify appellant's inappropriate use of force. Ciccho's opinion was not credibly supported by the evidence.

FINDINGS OF FACT

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

Appellant was employed as a corrections officer at the CCCF since April 3, 2005. During his career, appellant received training about the use of force, most recent to this event on May 24, 2016. On October 9, 2016, appellant was assigned to the admissions area of the jail. This was his normal assigned duty since 2012, when he was asked to take that position without bidding for it. This is the intake and processing center for the jail. Appellant was responsible for photographing and fingerprinting inmates. This area of the jail is volatile. Appellant's immediate supervisor was Armstrong. Prior to going to the admissions area, but after arriving for his shift, no one advised appellant that the door to cell 38 had a malfunction and may not close or lock properly. Appellant failed to check the functionality of cell 38's door prior to his shift as required. Additionally, prior to reporting to the admissions area, appellant did not suit up and wear his issued duty belt,

with attached handcuffs, OC spray, or radio. Armstrong also did not don his belt and tools.

Armstrong and appellant proceeded to the admissions area for their shift. Four officers worked in the admissions area on October 9, 2015 with appellant. At approximately 7:50 a.m. appellant began processing inmates. He entered cell 37 and observed that there were approximately ten inmates sleeping in the cell. They were waiting to be processed and sent up into the jail. The following events occur over the next five minutes starting at approximately 8:02 a.m..

Appellant proceeded to remove an inmate, R.S. for processing. While doing this, W.P., another inmate located in cell 37, became loud and disruptive. He was unhappy with the length of time it was taking to process him. Appellant closed the door to cell 37. He then reopened it to respond to W.P.'s verbal outbursts. The situation between appellant and W.P. escalated with each using profanities toward the other.

W.P. continued to be disruptive. Appellant determined that he was going to move W.P. from cell 37 to cell 38 for several reasons. First, cell 38 was quieter and had a glass door, which would muffle his verbal outbursts. Second, appellant was concerned for W.P., his safety, and the safety of the other inmates, who were sleeping in cell 37. Specifically, appellant was concerned that W.P. would continue his verbal outbursts and this was placing him in harm's way with the other inmates in cell 37, because he was disrupting them. Both appellant and Armstrong documented in their General Incident Reports statements that W.P. was combative and disruptive. He used abusive language toward appellant.

After deciding to relocate W.P., appellant directed W.P. to put his white t-shirt on and grab his orange jail shirt, while he was in cell 37. W.P. did that, although he was not completely compliant in dressing. Appellant directed and walked W.P. to cell 38. W.P. was compliant when walking from cell 37 to cell 38. Upon reaching cell 38, appellant directed him into the empty cell. W.P. entered the cell. He turned around to face appellant. W.P. did not go a far distance into the cell or go in and sit on the bench in the cell. Instead, he stood just past the "threshold" area. In this regard, W.P. was beyond

the area in the path of the sliding cell door. He did not stand in that immediate threshold. He was in the cell so far that his feet were also not in the path of the sliding cell door. No part of W.P.'s body was in the path of the sliding door.

Appellant attempted to slide cell 38's door shut. It bounced open. When he slid the door shut, the door did not come in contact with W.P. Appellant attempted two more times to slide the cell door shut. It bounced open each time and would not shut. W.P. kept talking at appellant, while this was occurring. W.P. remained just inside the cell beyond the path of the sliding door. W.P. was attempting to tell appellant that he heard last night, while he was in cell 37, that the door to cell 38 was malfunctioning. Appellant thought that W.P. was obstructing the door and keeping it from closing. Appellant was clearly frustrated, if not upset and angry. Appellant told W.P. to go sit on the bench in cell 38. W.P. did not follow appellant's order. Appellant entered cell 38 and grasped both of W.P.'s arms, which were down by his sides. This began the use of force by appellant in this incident. Appellant began moving W.P. back toward the bench, while telling W.P. to sit on the bench. W.P. did not flail or raise his arms. W.P. only refused to comply with appellant's order to sit on the bench.

Subsequently, while appellant was holding W.P.'s arms, W.P. became rigid. He then leaned slightly into appellant making contact with him. It was at this time that appellant punched W.P. with a closed fist to the left side of W.P.'s head. This was a disproportionate response. W.P. and appellant went down to the floor of the cell and struggled, while appellant attempted to get him under control and handcuff him. Armstrong entered cell 38 at this point in the incident. Appellant did not have any handcuffs with which to secure W.P., because he failed to wear his duty belt. Armstrong did not have any handcuffs for the same reason. Another officer had to provide aid and handcuff W.P. No code was ever called for officers to aid appellant in his interactions with W.P. Appellant could not call for a code, because he did not have his radio. Appellant was upset or angry, words he believed were interchangeable, with W.P. throughout the incident from its beginning in cell 37.

Appellant's use of force was not in self-defense or to defend others against a physical assault. It was not to prevent serious damage to property. It was not to prevent

W.P. from escaping. It was not to quell a riot and/or disturbance, or prevent a suicide or attempted suicide. W.P.'s refusal to comply with appellant's orders did not constitute an immediate threat to facility security. W.P. made no attempt to escape and no furtive movements, when the cell door malfunctioned. W.P. did not flail his arms. Appellant's perception and alleged fear of an immediate threat to his personal safety was wholly unsupported by the competent evidence in the record. Here, the use of physical force was impermissible. There was not any competent evidence demonstrating that W.P. posed an immediate threat or danger.

After W.P. was secured, appellant left cell 38 and went to MedExpress to obtain medical treatment for a serious injury to his right hand. After receiving acute care, appellant returned to complete his reports relative to the incident.[3] Appellant's pain level and injuries prevented him from typing and completing the reports on his own. Another officer typed the reports, as appellant dictated them.[4] This occurs if an officer cannot type or handwrite his own report. Armstrong and appellant wrote their reports separately at different times.

Appellant completed a General Incident Report and Use of Force Report. In both, appellant did not indicate that W.P. threatened him. He indicated that he punched W.P. in the head because he refused to comply with his order to sit on the bench and because he became rigid. He did not document in his incident report any other reasons why he felt that the use of physical force was immediately necessary. Specifically, appellant wrote:

> I entered cell 38 and ordered inmate [W.P] to sit on the bench. At this time, inmate [W.P.] stated "F**k you". I again ordered inmate [W.P.] to sit on the bench. Inmate [W.P.] did not comply. At this time I attempted to move inmate [W.P.] towards the bench. Inmate [W.P.] became rigid in stance and resisted my attempts to move him towards the bench. After several attempts to get inmate [W.P.] to comply, I struck inmate [W.P.] with a closed fist to gain control." (R-2.)

[3] Appellant suffered a tendon tear in his right hand which subsequently required surgery to repair.
[4] There was not any allegation that the officer who typed the reports made any errors or omissions in completing them.

Armstrong's report echoed appellant's version in his reports. Appellant and Armstrong failed to mention any threats. Appellant did not mention any perceived danger or imminent threat during the altercation. Appellant never amended his report to include any threats. Despite the fact that he was informed prior to writing his report that cell 38's door malfunctioned, appellant wrote that W.P.'s foot blocked cell 38's door from closing.

Armstrong's General Incident Report reflected that the inmate did not comply with appellant's orders, tensed his body, and refused to assume the seated position on the bench. As a result, appellant struck him in the head with a closed fist to gain compliance. Armstrong did not make any mention of any threats by W.P.

Appellant charged W.P. with four institutional charges, to wit: tampering or blocking a device, refusing to obey an order of a staff member, using abusive language to a staff member, and conduct which disrupts. Appellant did not charge W.P. with threatening him.

Subsequently, a use of force complaint was made against appellant for this incident. An IA investigation ensued. W.P. was interviewed. W.P. stated that he and appellant had exchanged profanities starting in cell 37. W.P. stated that when appellant moved him to cell 38 he did not block the door from closing. He did not sit on the bench as ordered. He attempted to tell appellant the door had malfunctioned the night before and would not close. Appellant grabbed him and moved him toward the bench. He did not touch appellant. Appellant then punched him three times in the head, while he was standing. They both went to the ground.

Appellant was interviewed by IA. During his statement, appellant stated that he punched W.P. in the head with a closed fist because W.P. refused to sit on the bench and because he became rigid. His goal was to have W.P. comply and his objective was to have W.P. sit on the bench. However, during the interview, appellant offered for the first time that he punched W.P. because he felt threatened. This expanded his version of the events. It demonstrated that his report was inaccurate and untruthful, because it omitted material facts and events which had occurred in violation of departmental policies and regulations. Appellant indicated that W.P. said ,"[w]hen I get out of here, come see me."

This threat was not contained in appellant's General Incident Report or Use of Force Report. Only after the use of force complaint was being investigated did appellant state that W.P. threatened him. Admittedly, appellant was used to that type of language and statements from inmates. As such, the threats did not demonstrate an immediacy of danger to appellant, which required the use of force. Alternatively, if the threats actually had not occurred during the incident, appellant's statements during his IA interview were then untruthful.

Appellant had other options available to him to deescalate the situation. He could have asked for Armstrong's or one of the other officer's assistance. He could have handcuffed W.P. or used his OC spray on W.P.. He could have taken W.P. to another cell or transitioned him back to cell 37. He could have taken a moment to calm his upset and anger. Appellant admitted that he could have deescalated the situation. He failed to deescalate the situation and chose to use force as the first response. He further failed to direct his blows away from W.P.'s head.

When interviewed, Armstrong stated for the first time that W.P. stated, "I'll f**k you up. I'll see you on the streets." Armstrong believed appellant's actions were wrong.

The events did not support appellant's position that he objectively or reasonably believed that he was about to be assaulted, imminently. Appellant's reports do not include that he perceived he was in danger. Even if appellant genuinely believed W.P.'s foot had blocked the door from closing, appellant then backed W.P. into the cell without resistance. W.P.'s subsequent rigidity was insufficient to warrant or justify a punch with a closed fist to his head. Appellant punched W.P. because W.P. would not comply with his order to sit on the bench in cell 38. No policy required W.P. to sit on the bench. The use of physical force was impermissible to enforce a command or any order, under the totality of circumstances presented herein. At no time during these events was W.P. attempting to escape. Although he was loud and mouthy in cell 37, he did not cause a disturbance which justified the use of force. At no time did W.P.'s actions interfere with the operation of the facility. Appellant was not preventing a suicide. Appellant's actions were unbecoming and were an excessive use of force. Appellant omitted material facts and events from his General Incident Report and his Use of Force Report. He did not amend

or supplement his reports after completing them to correct the inaccuracies or provide a full record of what occurred. His statements were knowingly inaccurate. Rather, he added convenient facts at the time of his interview seeking to justify his use of force.

The PNDA issued on January 30, 2017 and the amended PNDA issued on February 10, 2017, alleging violations violation of N.J.A.C. 4A:2-2.3(a)(1); conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7), and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11), specifically violations of CCCCF Rules of Conduct, 1.1 violations in general; 1.2 conduct unbecoming; 1.3 neglect of duty; 3.6 departmental reports; 3.8 use of force; General Order #13; General Order #73; and General Order #74. For these charges a FNDA was issued on June 7, 2017, sustaining the charges and removing appellant from his employment as a corrections officer.

LEGAL ANALYSIS AND CONCLUSIONS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The appointing authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Appellant's status as a correction's officer subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent "law and order to the citizenry and must present an image of personal

integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

> The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not properly operated, have a capacity to become "tinderboxes."

Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

N.J.A.C.4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties

Appellant failed to perform his duties, when he chose to use force and punch W.P. with a closed fist in the side of his head in order to make him obey an order to sit on the cell's bench. Certainly, appellant allowed his frustration or upset and anger to disable his reasonable conduct on October 9, 2016. Additionally, appellant's failure to include W.P.'s threats to him in his General Incident Report and Use of Force Report was a material, knowing omission, if such threats did in fact occur. Assuming they did, they did not justify appellant's use of physical force in this incident, as even appellant admitted. However, assuming W.P. made those threatening statements, as offered by appellant for the first-time months after the incident during his IA interview, appellant was required to have included them in his General Incident Report and Use of Force Report, in order to provide an accurate recordation of what occurred. He failed to do so.

Appellant's choice to not wear his duty belt with handcuffs, OC spray, and radio was a factor, which hampered appellant's ability to competently perform his duties.

Appellant was unable to request aid and call for a code to deescalate this situation. Appellant's tools would have provided other less drastic options to address W.P.'s disrespectful behavior and resolve the incident. Appellant was unable to handcuff W.P. after the incident.

Finally, appellant's failure to inspect the functionality of cell 38's door prior to his shift was a contributing factor in this incident. Had appellant fulfilled his duties competently, the events which occurred after W.P. was removed from cell 37 may have been completely avoided.

Therefore, I **CONCLUDE** that appellant's behavior did rise to a level of incompetency, inefficiency, and failure to perform duties, in violation of N.J.A.C.4A:2-2.3(a)(1). I **CONCLUDE** that respondent has met its burden of proof on this issue.

N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming

Appellant was charged with "conduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

The primary basis for the charge of conduct unbecoming was that appellant used excessive force by punching W.P. in the head with a closed fist, in order to make him comply with an order to sit on the cell's bench.

As a corrections officer, appellant had a duty to recognize and appreciate that individuals incarcerated in CCCF had lost their freedom, and that he was entrusted to protect the inmates' limited rights and their dignity in that environment. He was also entrusted to keep W.P. safe and free from physical harm in the jail. Inmates are in a unempowered position in the facility. Allowing his frustration or anger to escalate to the point of punching W.P. in the head with a closed fist without sufficient immediate provocation or danger was violative of appellant's obligations in a position of public trust. It offended publicly accepted standards of respect and decency. Then, to offer new alleged facts months after the incident in an attempt to justify the excessive use of force undermined the integrity of the system and the public confidence.

Whether appellant punched W.P. once as he indicated or three times as W.P. indicated was of no moment. No circumstances existed warranting appellant's use of force on W.P. under the totality of circumstances. Appellant presented no competent evidence demonstrating that W.P. was an immediate threat, because of his verbal threats or refusal to comply with an order. W.P. did not flail his arm's in cell 38, as alleged by appellant. W.P. did not block cell 38's door from closing, as alleged by appellant. Similarly, W.P.'s rigidity was insufficient to satisfy this requirement. In fact, at that moment, appellant was firmly grasping and holding W.P.'s arms in place. The first punch was unwarranted, unjustified, and violative of CCCF policies.

Appellant's use of force was not in self-defense or to defend others against a physical assault. It was not to prevent serious damage to property. It was not to prevent W.P. from escaping. It was not to quell a riot and/or disturbance, or prevent a suicide or attempted suicide. W.P.'s refusal to comply with appellant's orders did not constitute an immediate threat to facility security. W.P. made no attempt to escape and no furtive movements, when the cell door malfunctioned. W.P. did not flail his arms. Appellant's perception and alleged fear of an immediate threat to his personal safety was wholly unsupported by the competent evidence in the record. Here, the use of physical force

was impermissible. Appellant's perceptions and justifications were without merit in light of the documentary and video evidence. Further, appellant had numerous options available to him to deescalate the situation. This would have ensured W.P. and appellant's safety and security.

Appellant's conduct was such that it adversely affected the morale or efficiency of a governmental unit and would have a tendency to destroy public respect in the delivery of governmental services. Under the circumstances presented here, appellant displayed a significant lack of judgment which violated his obligations and duties. I **CONCLUDE** that appellant's behavior did rise to a level of conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6). I **CONCLUDE** that respondent has met its burden of proof on this issue.

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

Neglect of Duty can arise from an omission or failure to perform a duty as well as negligence. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" signifies conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957). Neglect of duty can arise from omission to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Although the term "neglect of duty" is not defined in the New Jersey Administrative Code, the charge has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title or was negligent in its discharge. Avanti v. Dep't of Military and Veterans Affairs, 97 N.J.A.R. 2d (CSV) 564; Ruggiero v. Jackson Twp. Dep't of Law and Safety, 92 N.J.A.R. 2d (CSV) 214.

Appellant neglected his duty when he failed to wear his duty belt, failed to inspect cell 38's door at the start of his shift, failed to accurately report the incidents of October 9, 2016 in his General Incident Report and his Use of Force Report, and used excessive force. Appellant neglected his duty when he deviated from the standard of acceptable

conduct and used excessive and impermissible force on W.P. to make him comply with an order to sit on the cell's bench.

Therefore, I **CONCLUDE** that appellant's behavior did rise to a level of neglect of duty, in violation of N.J.A.C. 4A:2-2.3(a)(7). I **CONCLUDE** that respondent has met its burden of proof on this issue.

CCCF Rules of Conduct

1.1 Violations in General

Rule 1.1 provides as follows:

> Any employee who violates any rule, regulation or procedure, order or directive, either by an act of commission or omission, whether stated in this manual or elsewhere, or who violates the standards operating procedure as dictated by departmental practice, is subject to disciplinary action in accordance with the New Jersey Department of Personnel (Civil Service) rules and regulations. Disciplinary actions shall be based on the nature of the rule, regulation, procedure, order or directive violated, the severity and circumstances of the infraction and the individual's record of conduct.

Based on the foregoing facts and evidence, I **CONCLUDE** that appellant's behavior did rise to a level of violating rules, regulations, and procedures by acts of both commission and omission, in violation of CCCF Rule of Conduct 1.1. I **CONCLUDE** that respondent has met its burden of proof on this issue.

1.2 Conduct Unbecoming

Rule 1.2 provides as follows:

> All personnel are required to conduct themselves, both on and off duty, in such a manner as to reflect favorably on the department. Conduct unbecoming an employee shall include that which brings the department into disrepute, reflects discredit upon the employee as a member of the department, or which impairs the operation or efficiency of the department or the employee.

Based on the foregoing facts and evidence, I **CONCLUDE** that appellant's behavior did rise to a level of unbecoming conduct, in violation of CCCF Rule of Conduct 1.2. I **CONCLUDE** that respondent has met its burden of proof on this issue.

1.3 Neglect of Duty

Rule 1.3 provides as follows:

> Personnel are required to give suitable attention to the performance of their duties. Any act of omission or commission indicating the failure to perform or the negligent performance or compliance to any rule, regulation, directive, order or standard operating procedure as dictated by department practice or as published, which causes any detriment to the department, its personnel, any inmate, prisoner, or to any member of the public shall be considered neglect of duty.

Based on the foregoing facts and evidence, I **CONCLUDE** that appellant's behavior did rise to a level of neglect of duty, in violation of CCCF Rule of Conduct 1.3. I **CONCLUDE** that respondent has met its burden of proof on this issue.

3.6 Departmental Reports

Rule 3.6 provides as follows:

> Personnel shall submit all necessary reports, whether at the direction of a supervisor or upon the occurrence of circumstances requiring a report, prior to going off duty after the request by the supervisor of an incident necessitating a report. Daily reports, logs, etc., shall be submitted by personnel at the end of a normal tour of duty. Reports submitted by personnel shall be truthful and complete. Personnel shall not knowingly enter or cause to be entered any inaccurate, false, or improper information in any departmental report.

Therefore, I **CONCLUDE** that appellant's report was knowingly inaccurate and incomplete in violation of CCCF Rule of Conduct 3.6. Appellant expanded his version of the facts of the incident by offering, for the first time during his IA interview, threatening statements made by W.P.. Appellant knowingly failed to report an accurate and complete recitation of what occurred during the incident on October 9, 2016. The facts regarding cell 38's door malfunction and W.P.'s threats were known to appellant prior to his IA interview. Despite this appellant did not amend or supplement his General Incident Report or his Use of Force Report. Appellant never charged W.P. with threatening him. This expansion of the facts was only meant to provide justification for his use of force.

However, this intention was undermined by appellant's own statements that threats like those from W.P. were commonplace from inmates towards appellant during his career and that the statements would not have warranted appellant's use of force. I **CONCLUDE** that respondent has met its burden of proof on this issue.

3.8 Use of Force (Non-Lethal)

Rule 3.8 provides as follows:

> Personnel shall not inflict corporal punishment on the person of any inmate, prisoner, or other person, nor shall they strike or lay hands on an inmate, prisoner, or other person unless it is in self-defense or unless to prevent escape, serious injury to person or property, to quell a disturbance, or effect an arrest where resistance is offered. In all circumstances, only the amount of force necessary to accomplish the desired result is to be used.

Appellant's use of force was not in self-defense or to prevent W.P. from escaping. It was not to prevent serious injury to person or property, to quell a disturbance, or effect an arrest where resistance is offered. Appellant's stated goal was to make W.P. obey his commands and sit on the bench. I **CONCLUDE** punching W.P. in the head with a closed fist under these circumstances violated CCCF Rule of Conduct 3.8. I **CONCLUDE** that respondent has met its burden of proof on this issue.

General Order #13

General Order #13 provides in pertinent part as follows:

A. Permissable (sic) Force
When force may be used:

a. To defend one's self or others against physical assault;
b. To prevent serious damage to property;
c. To prevent escape;
d. To prevent or quell a riot and/or disturbance;
e. To prevent a suicide or attempted suicide; and
f. To enforce facility regulations or in situations where a ranking supervisor officer believes that the inmate's failure to comply constitutes and immediate threat to facility security or personal safety.

B. Impermissable (sic) Force
When force may not be used:

a. Striking an inmate to discipline him/her for failing to obey an order;
b. Striking an inmate when grasping the inmate to guide him/her, or a push, would have achieve the desired result. (sic)
c. Using force against an inmate after he/she ceased to offer resistance.
d. Striking an inmate with institutional equipment such as keys, handcuffs and flashlights, or striking an inmate restrained by a mechanical device, except as a last resort where there is no practical alternative available to prevent serious physical injury to staff and others.
e. Employing a chokehold or unauthorized weapon of (sic) intentionally striking an inmate's head against the wall, floor or other object.

Appellant's use of force was not in self-defense or to defend others against a physical assault. It was not to prevent serious damage to property. It was not to prevent W.P. from escaping. It was not to quell a riot and/or disturbance, or prevent a suicide or attempted suicide. W.P.'s refusal to comply with appellant's orders did not constitute an immediate threat to facility security. W.P. made no attempt to escape and no furtive movements, when the cell door malfunctioned. W.P. did not flail his arms. Appellant's perception and alleged fear of an immediate threat to his personal safety was wholly unsupported by the competent evidence in the record.

To the contrary, appellant struck W.P. for his refusal to obey an order. That was an impermissible use of force. No CCCF policy required an inmate to sit on a bench in their cell. Additionally, appellant struck W.P. while he had grasped both of W.P.'s arms to move him back to the bench.

Therefore, I **CONCLUDE** striking W.P. in the head with a closed fist under these circumstances violated CCCF Rule of Conduct 3.8. I **CONCLUDE** that respondent has met its burden of proof on this issue.

General Order #73

General Order #73 provides in pertinent part as follows:

> All department employees, when on and off duty, will conduct themselves in a manner that will not bring discredit or criticism to the department. Common sense, good judgment,

> consistency and the department's mission will be the guiding principles for the expected employee standard of conduct.
>
> 1. Employees are expected to treat fellow employees, offenders and the public with respect and courtesy at all times.
> 2. Employees will not exhibit behavior that demonstrates prejudice or that holds any person, group or organization up to ridicule or contempt. ...

I **CONCLUDE** that appellant's conduct violated General Order #73. Appellant conducted himself in a manner while on duty, which brought criticism to the department. His conduct was a departure from that required of his position. He acted in a way that violated the public trust. I **CONCLUDE** that respondent has met its burden of proof on this issue.

General Order #74

General Order #74 provides that all sworn personnel in the department will conduct themselves in a professional and ethical manner at all times. Conduct which detracts from a professional and ethical manner is prohibited and circumstances suggesting an officer has engaged in unbecoming conduct will be investigated and disciplinary action will be taken when appropriate.

I CONCLUDE that appellant's conduct violated General Order #74, as he did not conduct himself in a professional manner while on duty, and acted in a way that violated the public trust. I **CONCLUDE** that respondent has met its burden of proof on this issue.

N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause

Finally, appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. As detailed above, appellant's

conduct was such that he violated this standard of good behavior. As such, I **CONCLUDE** that the respondent has met its burden of proof on this issue.

I further **CONCLUDE** that all charges brought herein against appellant are **SUSTAINED.**

PENALTY

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. 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.

The law is also clear that a single incident can be egregious enough to warrant removal without reliance on progressive-discipline policies. See, In re Herrmann, 192 N.J. 19, 33 (2007) (Division of Youth and Family Services worker who snapped lighter in front of five-year-old), in which the Court stated:

> ". . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest."

Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the

misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

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.

The penalty sought is removal of appellant from his employment as a corrections officer.

Relative to the existence of mitigating factors, there is no question that appellant had an uneventful disciplinary record, during his eleven years of service. He did not have any prior incidents requiring major discipline. Appellant also had little minor discipline. In this regard, appellant had a one-day suspension for neglect of duty on December 21, 2011. This incident arose from the appellant failing to appropriately monitor inmate conduct. On August 12, 2010, appellant received a written reprimand for neglect of duty. This arose from appellant's failure to shackle and handcuff an inmate while guarding him at a hospital. Finally, on March 5, 2007 appellant received a one day fine for neglect of duty. This arose from failing to properly count inmates.

Appellant worked in the admissions area recognized by nearly all of the witnesses in this matter as the most volatile area of the jail, for four years prior to this incident without issue. Appellant had been a corrections officer since 2005.

Appellant did not receive prior discipline related to physical contact with inmates or use of force.

Respondent acknowledged that appellant was not known to be a "hot head" and that it appeared he had a "bad day, on October 9, 2016.

Armstrong was partly responsible for the events as they occurred on October 9, 2016.

These factors must be evaluated in relation to the following.

Appellant denied the allegations and steadfastly maintained that his use of physical force was appropriate, reasonable, and required to maintain his safety. Appellant further excused his omission of W.P.'s threats against him in his report as a product of the pain he was in when he typed and dictated them. Relative to the issue of the distracting pain, appellant's position was unpersuasive. Appellant did not charge W.P. with threatening him, when he filed his four other charges. Appellant never amended or supplemented his reports to correct this omission or correct the inaccuracy that W.P. used his foot to block the closing of cell 38's door, after appellant's acute pain resolved. Appellant did not subsequently charge W.P. with threatening him. Appellant knew both of these facts to be false, when he included them in his report.

Respondent argued that appellant inappropriately used excessive force and lied about the facts and circumstances of the events on October 9, 2016. Respondent submitted that appellant's conduct brought disrepute to the department. Respondent contended that appellant's actions were egregious. There is no tolerance for the impermissible use of excessive physical force.

One event of severe misconduct which is unbecoming in the employee's position may render an employee unsuitable for continuation in that position. Unfortunately, appellant's conduct during and subsequent to the incident was egregious. His frustration or upset and anger clearly got the better of him and disabled his ability to act reasonably. He was not in control of his emotions or actions. There was simply no competent evidence to support his use of force, in this case a punch with a closed fist to the side of an inmate's head to compel him to comply with an order. W.P.'s actions did not present any reason supporting appellant's belief that W.P. was an imminent threat to himself, appellant, or the facility. CCCF rules require officers to avoid striking inmates in the head due to the significant harm which can result. General Order #13 requires that officers must use the minimum force that is objectively reasonable under the totality of the circumstances consistent with facility policy and procedure. Appellant knew force may not be used to strike an inmate to discipline him

for failing to obey an order. General Order #13B. Additionally, appellant successfully completed an annual Officer In-Service Use of Force Examination most recent to this incident on May 24, 2016. (R-16.) Appellant was charged with keeping W.P. safe from harm in the jail. Appellant violated this duty. He exhibited poor judgment. He caused harm to W.P.. Through his experience and training at CCCF since 2005, appellant knew an excessive use of force could result in a removal from his employment.

Appellant's other conduct in failing to follow departmental rules, regulations and policies, was more than inadvertent. It was knowing. Appellant failed to utilize the issued tools he needed to perform his job safely and to provide options to deescalate this situation. This was undisputed. Appellant failed to inspect the cell doors prior to his shift creating a hazard, which in this matter directly resulted in his misperceptions. Appellant's inaccurate and false reports, which he allowed to continue knowing them to be inaccurate and incomplete, was unbecoming. Appellant's actions in this incident were negligent, inefficient, and incompetent. Appellant's conduct placed not only the public, but the respondent at risk. Appellant's subsequent actions called into question not only his integrity and credibility, but that of the respondent.

Here, progressive discipline must be bypassed. The maximum penalty of a six month suspension would be insufficient in light of appellant's choices and actions. Regrettably, appellant's conduct, which appears out of the norm for his service and demeanor, was so severe and egregious that the penalty of removal of his employment effective January 27, 2017 is justified. Appellant's frustration or upset and anger got the best of his judgment and reasonableness.

Accordingly, I **CONCLUDE** that removal is the appropriate discipline for the violations of incompetency, inefficiency, and failure to perform duties in violation of N.J.A.C. 4A:2-2.3(a)(1); conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7), and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11), specifically violations of CCCCF Rules of Conduct, 1.1 violations in general; 1.2 conduct unbecoming; 1.3 neglect of duty; 3.6 departmental reports; 3.8 use of force; General Order #13; General Order #73; and General Order #74 be **AFFIRMED**.

ORDER

I **ORDER** that the respondent has sustained its burden of proof as to the charges of incompetency, inefficiency, failure to perform duties in violation of N.J.A.C. 4A:2-2.3(a)(1); conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7), and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11), specifically violations of CCCCF Rules of Conduct, 1.1 violations in general; 1.2 conduct unbecoming; 1.3 neglect of duty; 3.6 departmental reports; 3.8 use of force; General Order #13; General Order #73; and General Order #74.

I **ORDER** that the action of the appointing authority removing appellant from his position as a corrections officer is **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, 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.

December 17, 2020
DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/lam

APPENDIX

LIST OF WITNESSES

For Appellant:

Michael Isner, Appellant

Edmond Ciccho, Expert

For Respondent:

Lieutenant John Jones

Captain Rebecca Franceschini

Gary Merline, Expert

LIST OF EXHIBITS

For Appellant:

P-1 Edmond Ciccho CV

P-2 Ciccho Expert Report

P-3 Admissions area diagram

P-4 Photograph of appellant's hand

For Respondent:

R-1 Internal Affairs Report by Investigator Lt. John Jones

R-2 Appellant's General Incident Report and Use of Force Report, dated October 9, 2016

R-3 Armstrong's General Incident Report, dated October 9, 2016.

R-4 Video of incident, dated October 9, 2016

R-5 Internal Affairs interview with W.P., dated December 21, 2016

R-6 Internal Affairs interview with appellant, dated December 21, 2016

R-7 Internal Affairs interview with Armstrong, dated December 27, 2016

R-8 Supervisor Staff Complaint, dated January 5, 2017

R-9 PNDA (31-A), dated January 30, 2017
Amended PNDA (31-A), dated February 10, 2017
FNDA (31-B), dated June 7, 2017
FNDA (31-C), dated June 7, 2017

R-10 Camden County Department of Corrections Rules of Conduct

R-11 Camden County Department of Corrections General Order #13

R-12 Camden County Department of Corrections General Order #73

R-13 Camden County Department of Corrections General Order #74

R-14 Gary Merline Consulting and Training, LLC CV

R-15 Merline Expert Report dated April 3, 2017

R-16 Appellant's Training File

R-17 Appellant's Chronology of Discipline