



STATE OF NEW JERSEY

**DECISION OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Kevin Gonzalez

 CSC Docket No. 2020-705
 OAL Docket No. CSR 06056-20 (on
 remand CSR 13401-19)

ISSUED: JULY 21, 2021 (NFA)

The appeal of Kevin Gonzalez, a Senior Correctional Police Officer with Northern State Prison, Department of Corrections, of his removal, effective August 21, 2019, on charges, was before Administrative Law Judge Barry E. Moscowitz (ALJ), who rendered his initial decision on June 11, 2021. Exceptions were filed on behalf of the appointing authority.

Having considered the record and the attached ALJ's initial decision, including viewing the video of the including and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on July 19, 2021, did not adopt the ALJ's recommendation to reverse the removal. Rather, the Commission modified the removal to a 90 working day suspension.

DISCUSSION

The appellant was served with a Final Notice of Disciplinary Action removing him from employment, effective August 19, 2019, on charges of neglect of duty, conduct unbecoming a public employee, other sufficient cause, and violations of departmental rules and regulations. Specifically, the appointing authority asserted that the appellant used inappropriate physical force against an inmate, failed to call a code and failed to write a report documenting the incident as required. Regarding the use of force, the appointing authority alleged that the appellant punched an inmate where no cause was present. Upon the appellant's appeal to the Commission, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

On November 4, 2019, prior to any hearings being held, the appointing authority filed a motion for summary decision, arguing that no genuine issue of material fact existed and that it should prevail as a matter of law. Upon review of the parties' written submissions, the documentation presented, including certifications of witnesses, and a video recording of the alleged incident, the ALJ agreed that the matter was ripe for summary decision. Specifically, the ALJ found that the appellant did not violate any regulations, policies or procedures regarding the use of force against the inmate. However, the ALJ determined that the appellant should have called a Code 33, a code that must be made when force is used. Additionally, the appellant should have handcuffed the inmate pursuant to policy. Consequently, the ALJ indicated that both the appointing authority and the appellant were entitled to prevail as a matter of law. Thus, the ALJ granted the appointing authority's motion for summary decision in part and recommended that the appellant's removal be modified to a reprimand with back pay, seniority, and counsel fees. Upon its *de novo* review, the Commission did not adopt the ALJ's recommendation. Rather, the Commission remanded the matter for a full hearing. *See In the Matter of Kevin Gonzalez* (CSC, decided March 12, 2020).

On remand, the ALJ recommended dismissing all the charges and reversing the removal. For the use of force charge, the ALJ indicated that based on his review of the video of the incident as well as the testimony presented, including that of the appellant, that the physical force exerted was warranted as the inmate was "noncompliant for a protracted period of time" and "refused to follow directions and orders and his threatening behavior persisted." The ALJ also dismissed the charge underlying the appellant's failure to call a code finding, in essence, that since the appellant did not have a radio during the incident, he could not have called a code. Finally, the ALJ dismissed the charge that the appellant did not file a report on the incident finding that as the appellant was not directed to submit a report, he was not required to do so.

In its exceptions, the appointing authority argues that the ALJ's interpretation of the video of the incident was unreasonable. It also argues that the ALJ misinterpreted both the policy behind the appellant's requirement to call a code and write a report about the incident.

Upon its *de novo* review of the record, the Commission disagrees with the ALJ regarding the charges underlying the appellant's use of force and his failure to write a report. However, it will not disturb the ALJ's dismissal of the charge that the appellant did not call a code. In this regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 N.J. 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record."

See also, In re Taylor, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A. 52:14B-10(c); Cavalieri v. Public Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004). In this matter, there is ample evidence in the record to demonstrate that the ALJ's findings regarding the appellant's use of force were arbitrary, capricious and unreasonable.

In this regard, while the ALJ did not specifically identify the appellant's testimony as credible, he clearly credited the appellant's testimony regarding his perception as to the threat imposed by the inmate. However, this testimony is completely belied by the video of the incident. One does not need to be an expert in corrections to view the video of the incident and *reasonably* conclude that the inmate made absolutely no overt physical movements that could be construed as threatening, especially no such movements that would warrant such a physical response. The Commission's review of the video indicates that the inmate does appear to be agitated and gesturing with his hands, however, it appears to be the other officer, who first strikes the inmate, that is most animated, gesturing with his hands and moving back and forth in front of the inmate, prior to his lunging forward and striking the inmate in the stomach. Conversely, the inmate is leaning against the caged enclosure and does not move forward in a threatening manner. Further, for nearly the entire incident, the appellant is clearly seen in a somewhat relaxed posture, leaning against one hand on the caged enclosure. In fact, the appellant only lowers his hand from that position while striking the inmate and immediately thereafter replaces it and reestablishes his relaxed leaning posture on the caged enclosure. In this regard, the video indeed illustrates that the initial officer's punch as well as the appellant's punch could not be construed as anything but gratuitous and unnecessary. While there is no audio, the axiom that "a picture is worth a thousand words" certainly applies in this matter. Upon viewing the video, the Commission cannot fathom how the ALJ could have *reasonably* concluded that the appellant's testimony regarding the threat imposed by the inmate was credible or that the use of force was appropriate. In that regard, the Commission finds, based specifically on its viewing of the video, that the ALJ's finding that the appellant's use of force against the appellant was appropriate, arbitrary, capricious and unreasonable and not supported by sufficient credible evidence. Accordingly, it rejects that finding. As such, the Commission upholds the charges associated with that action.

Regarding the appellant's failure to write a report, the ALJ essentially found that such a report was not necessary unless the appellant was ordered to write a report. The Commission finds this interpretation of the appointing authority's

report policy to be in error. The policy specifically states that for an "unusual incident":

A staff member who witnessed or was involved in an unusual incident or event shall document the incident or event via a written Special Custody Report. Unusual incidents include, but are not limited to . . . use of force . . .

Thus, the Commission finds that it was mandatory for the appellant to have written a report of the incident in question. In this regard, it rejects the ALJ's interpretation that a later section stating that reports must be submitted "as directed by supervisory staff" alleviates an officer from having to write a report. That section clearly refers only to the timeframes upon which reports are required, not as to the necessity of the report. Regardless, that section later states that "The procedures outlined in this IMP cannot cover every possible situation that may arise . . . In the event of uncertainty or doubt you are to contact the Shift Commander for instructions." Thus, even if not ordered to write a report for such an unusual incident, an officer should at least have sought further instructions. Accordingly, the Commission upholds the charge that the appellant failed to submit a report of the incident.

The ALJ dismissed the charge that the appellant did not call a code, even though the appellant acknowledged that he should have, based on his finding that the appellant did not have a radio during the incident. This finding is apparently based on the appellant's testimony to that effect. In its exceptions, the appointing authority contends that the appellant's radio can be clearly seen on the video of the incident. Upon its review of the video, the Commission cannot be sure, and thus finds that the preponderance of the evidence supports that the appellant did not have a radio during the incident and thus, could not have called a code. Therefore, he is not guilty of the associated charge.

In determining the proper penalty, the Commission's review is also *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). In assessing the penalty in relation to the employee's conduct, it is important to emphasize that the nature of the offense must be balanced against mitigating circumstances, including any prior disciplinary history. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding

a largely unblemished prior record. *See Carter v. Bordentown*, 191 N.J. 474 (2007).

In this case, the appellant's actions are clearly serious, especially in a correctional setting. In this regard, even when a Senior Correctional Police Officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense occurring in the environment of a correctional facility may, nevertheless warrant the penalty of removal where it compromises the safety and security of the institution, or has the potential to subvert prison order and discipline. *See Henry, supra*, 81 N.J. at 579-80. In this regard, the Commission emphasizes that a Senior Correctional Police Officer is a law enforcement officer who, by the very nature of his job duties, is held to a higher standard of conduct than other public employees. *See Moorestown v. Armstrong*, 89 N.J. Super. 560 (App. Div. 1965), *cert. denied*, 47 N.J. 80 (1966). *See also, In re Phillips*, 117 N.J. 567 (1990). Notwithstanding the above, the Commission finds the following mitigating factor in not imposing removal. While the appellant's actions should not have occurred and were clearly inappropriate, given that his punch was in response to the initial officer's punch, it is at least arguable that the appellant felt that force was necessary at that point to subdue the inmate. Given this circumstance, the Commission finds that removal would not be warranted for the appellant's use of force. Further, while the appellant's failure to properly report the incident was also a serious infraction, such an infraction is normally insufficient, absent a significant prior disciplinary history, to support the penalty of removal. Accordingly, the Commission finds that, while it does not condone the appellant's behavior in any way, the appropriate penalty in this matter is a 90 working day suspension. This penalty should impress upon the appellant that any future infraction may lead to more significant disciplinary penalties, up to removal from employment.

Since the penalty has been modified, the appellant is entitled to back pay, benefits and seniority 90 working days from the first date of his separation to the actual date of his reinstatement. *See N.J.A.C. 4A:2-2.10*. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C. 4A:2-2.12(a)*, an award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield*, 282 N.J. Super. 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. Mar. 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this case, the Commission has sustained charges and imposed major discipline. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12(a)*, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. In light of the Appellate Division's decision in *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. However, under no circumstances should the appellant's reinstatement be delayed pending any dispute as to the amount of back pay.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore modifies the removal to a 90 working suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority as specified above. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of income earned, and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending any dispute as to the amount of back pay.

Counsel fees are denied pursuant to *N.J.A.C. 4A:2-2.12*.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*. After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21ST DAY OF JULY, 2021



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 06056-20
AGENCY DKT. NO. 2020-705

ON REMAND

OAL DKT. NO. CSR 13401-19

**IN THE MATTER OF KEVIN GONZALEZ,
NORTHERN STATE PRISON,
DEPARTMENT OF CORRECTIONS.**

Robert R. Cannan, Esq., for appellant Kevin Gonzalez (Markman & Cannan, attorneys)

Sean P. Havern, Deputy Attorney General, for respondent Northern State Prison (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: June 7, 2021

Decided: June 11, 2021

BEFORE **BARRY E. MOSCOWITZ, ALJ:**

STATEMENT OF THE CASE

Kevin Gonzalez, a senior correctional police officer at Northern State Prison, struck an inmate with his hand to deescalate threatening behavior. The amount of force he used was objectively reasonable under the circumstances. Should Gonzalez be terminated? No. Under the use-of-force policy at the prison, a custody staff member may use the amount of force reasonably necessary, including striking an inmate with his hands, to accomplish the law-enforcement objective.

PROCEDURAL HISTORY

On May 28, 2019, the New Jersey Department of Corrections (NJDOC) issued a Preliminary Notice of Disciplinary Action, charging Gonzalez with numerous violations of the Civil Service Code, N.J.A.C. 4A:1-1.1 et seq., and of the Human Resources Bulletin of the NJDOC, HRB 84-17.

In particular, the NJDOC charged Gonzalez with conduct unbecoming an 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); other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12); physical or mental abuse of an inmate in violation of HRB 84-17, as amended, C3; inappropriate physical contact or mistreatment of an inmate in violation of HRB 84-17, as amended, C5; conduct unbecoming an employee in violation of HRB 84-17, as amended, C11; violation of administrative procedures and regulations involving safety and security in violation of HRB 84-17, as amended, D7; and violation of a rule, regulation, policy, procedure, order, or administrative decision in violation of HRB 84-17, as amended, E1.

The NJDOC specified that on October 30, 2018, Gonzalez failed to report an altercation that occurred between Gonzalez (together with other custodial staff) and an inmate in the non-contact visit area. In addition, the NJDOC specified that Gonzalez (together with other custodial staff) used excessive physical force with the inmate when Gonzalez punched the inmate in his body area. Finally, the NJDOC specified that Gonzalez placed other staff members and other inmates at risk by failing to activate a Code 33, report the incident, and document it. As a result, the NJDOC sought his removal.

On August 19, 2019, a departmental hearing was held; on August 26, 2019, the NJDOC issued a Final Notice of Disciplinary Action sustaining all of the charges and specifications; and on that date, Gonzalez was removed from his position as a senior correctional police officer.

On September 18, 2019, Gonzalez appealed the determination to the Office of Administrative Law under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the office, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On October 11, 2019, the case was assigned to me for hearing. On October 24, 2019, an initial prehearing conference was held, and the case was scheduled for hearing on December 2, December 4, and December 5, 2019. During this conference, no party contemplated filing any motion, and no motion was pending.

On November 4, 2019, the NJDOC filed a motion for summary decision, and on November 15, 2019, I convened a telephone conference call to discuss it. During that telephone conference call, I suggested that we hold the motion in abeyance pending the completion of the hearing, so the NJDOC would have the opportunity to cross-examine witnesses and amplify policies. The NJDOC, however, persisted. Therefore, I adjourned the hearing dates over the objection of Gonzalez, and established a briefing schedule for opposition and response.

On December 13, 2019, Gonzalez filed his opposition, and on December 20, 2019, the NJDOC filed its response.

On January 30, 2020, I issued my decision. In that initial decision, I granted the NJDOC's motion for summary decision but did not remove Gonzalez from his position. I recommended a reprimand instead.

On March 12, 2020, the Civil Service Commission issued its decision. In that final decision, the Civil Service Commission ordered that the case be remanded for a hearing. The Commission agreed with me that the case should have proceeded to hearing from the start so the NJDOC would have had the opportunity to cross-examine witnesses and amplify policies. Toward this end, the hearing was held on January 6, 2021, and January 8, 2021.

At the conclusion of the hearing, I suggested that post-hearing briefs were not needed, but the NJDOC insisted that post-hearing briefs must be filed, and I again acquiesced over the objection of Gonzalez.

On May 28, 2021, the NJDOC submitted its post-hearing brief.

FINDINGS OF FACT

Based on the testimony the parties provided, and my assessment of its credibility, together with the documents the parties submitted, and my assessment of their sufficiency, I **FIND** the following as **FACT**:

I.

On October 30, 2018, Gonzalez was working as a general assignment officer at Northern State Prison, which meant that he was not assigned to one housing unit or physical location within Northern State Prison, but was available to be moved from post to post at the discretion of his supervisors. On that day, Gonzalez's supervisor, Sergeant Wilkens, instructed Gonzalez to go to the visitation area for an escort, because an inmate and his fiancé had acted inappropriately during their visit, and the lieutenant who was in charge of the compound that day, Lieutenant James Russo, was terminating the visit. Upon receiving the instruction, Gonzalez walked to the visitation area, only a short distance away, where he met another senior correctional police officer, Officer Duprie Fortune, and another supervisor, Sergeant Alterie Walters.

When Gonzalez arrived at the visitation area, Walters asked Gonzalez to help escort the inmate, J.W., whose visit had been terminated because of the inappropriate behavior. The inmate, however, protested. What the NJDOC challenges is the nature of the protest. The NJDOC argues in its papers and through its witnesses that the inmate posed no threat and that the use of physical force was not warranted. Problematically, the NJDOC rejects the statements of all officers involved and posits its own narrative based on a video of the incident without any sound.

II.

The protest by J.W. to the early termination of his visit with his fiancé increased in volume as Gonzalez approached the cage in which the inmate had sat for the visit. J.W. was not handcuffed either before or after he left the cage. The implication from the evidence was that no need existed to handcuff J.W. because J.W. was a general population inmate who was merely having his visit with his fiancé terminated early without the imposition of discipline. In other words, no need existed to handcuff him because no discipline was to be exacted and no resistance was to be expected. This turned out to be a miscalculation on the part of all officers involved, beginning with Russo.

Once J.W. left the cage, he walked alongside the gates that enclosed the other cages in the visiting area, escorted by Fortune, who walked in front of him and to his left, and by Gonzalez, who walked behind him and to his right.

When J.W., Fortune, and Gonzalez reached the last cage at the end of the visiting area, they were greeted by Walters, who halted them because J.W. had been, and was continuing to be, animated, raising his voice in protest and using his hands to argue, all of which was perceived by Walters, Fortune, and Gonzalez as threatening behavior because J.W. refused to follow their instructions and orders to lower his voice and hands and face the cage. Only some of this can be seen on the video, but all of it was reported by Walters, Fortune, and Gonzalez. It was also reported by another senior correctional police officer, Officer Joseph Lewis, who arrived a full minute after this protest and argument, but just before physical force was used to deescalate the situation and gain compliance.

To be clear, Walters had specifically stopped J.W. at the end of the visiting area for the express purpose of deescalating the situation and gaining compliance. Indeed, all of the officers, Walters, Fortune, and Gonzalez, in one way or another, had ordered J.W. to lower his voice and hands and to face the cage, but J.W. refused, continuing his protest and argument for nearly that full minute. As Gonzalez certified, "The [inmate] became increasingly threatening by moving his arms." In fact, as one can see on the video, J.W. had become so animated and so threatening that he had attracted the attention of at least

two other custody staff members, one of whom can be seen peering in through the doorway, and then Lewis who entered the visiting area through the doorway to join Walters, Fortune, and Gonzalez.

At the hearing, Gonzalez underscored this point. He testified that J.W. had become irate, as evidenced by his cursing at the officers, and that J.W. had become aggressive, as evidenced by his moving his hands. Gonzalez further testified that he, as well as the other officers, used constructive authority to gain compliance by ordering J.W. to turn around and face the cage so he could be handcuffed, but J.W. refused to comply with their orders and continued his protest. Gonzalez testified that he had even tried to lower the J.W.'s hands—hand on hand or hand on arm—but that this physical attempt to gain the compliance was ignored. That Gonzalez tried to lower J.W.'s hand is easy to miss from the video and could only be discerned when noted by Gonzalez during his review of the video at the hearing. (His attempt to lower J.W.'s hand can be seen at the 7:18:36 mark.) As such, J.W. had, in fact, become increasingly threatening, and I too underscore this point, making it an explicit finding.

III.

At this point in the video and in the chronology, Walters is standing directly in front of J.W., Fortune is standing in front of J.W. and to his right, Gonzalez is standing directly behind J.W. but leaning to his left, and Lewis is standing in front of J.W. between Walters and Fortune.

The NJDOC made much of Gonzalez's stance at the hearing. Aaron Erven is the Director of Officer Training at the NJDOC who reviewed the video and gave his opinion about what he saw. He was neither offered nor accepted as an expert witness, yet he was asked by the NJDOC to give opinion about what he saw. As such, I consider his opinion lay opinion only.

After reviewing the video and considering the other evidence the parties submitted, including the recorded statements and the live testimony, I do not find Erven to be a credible witness upon whose testimony and opinion I can rely.

Erven testified that no threat existed because Gonzalez was leaning against the cage with his feet crossed while Walters had his hands in his pockets. This is a mischaracterization of the circumstance. As Gonzalez testified, his feet were staggered, with his left foot in front of his right foot, and with his left hand outstretched over his head against the cage, not to support his bodyweight, but to track the inmate's hand so he could grab the inmate's hand if the inmate suddenly struck. Gonzalez noted that he was concerned that the inmate had bodily fluids on his hands, which Gonzalez considered a potential threat.

Erven's testimony is also a mischaracterization of the circumstance because it extrapolates a moment in time. Even if his characterization of this frame of the video is true, it is just moment of time, a mere segment in a series of unfolding events, because immediately thereafter, in subsequent frames and in successive seconds, the threat escalates, and Walters takes his hands out of his pocket, almost immediately, readying himself in the interview position, just as Erven professed that Walters should. Gonzalez also testified that he had begun to steel himself too, which is when other officers come into view.

Yet Erven's mischaracterization of the circumstance continues. Erven's implication is that the arrival of the other officers is a threat to the inmate, not to the officers, and that the four-to-one ratio of officers to inmate makes impermissible the use of force by any of the officers, especially Gonzalez, because Gonzalez was behind the inmate, as if the inmate could not swing around. Erven's testimony makes no sense. It is also unsupported by any policy or procedure or any credible testimony for that matter.

To recapitulate, Gonzalez had explicitly instructed the inmate to keep his hands down, to stop moving them, and to face the cage. Gonzalez had also attempted to redirect the inmate physically, but the inmate refused to follow his orders. Again, this refusal carried on for a full minute. As a result, Fortune, who viewed this protracted noncompliance as physical resistance to his authority (as well as to the authority of his colleagues) and as an immediate threat to his personal safety (as well as to the personal safety of his colleagues) used non-deadly force, that is, he delivered a single, isolated

strike, with a closed fist, to the front of J.W.'s midsection, to deescalate the situation and gain compliance.

Gonzalez, who also viewed the noncompliance as physical resistance to their authority and as an immediate threat to their personal safety, followed suit in coordinated fashion, as he too delivered a single, isolated strike, with a closed fist, but to the back of J.W.'s midsection, to deescalate the situation and gain compliance.

By all objective measures, the use of non-deadly force by both Fortune and Gonzalez was reasonable. It was also exercised with restraint as J.W. merely hunched over from the first strike by Fortune, as if caught by surprise, not as if he had been hurt, and barely moved from the second strike by Gonzalez. Plus, J.W. recovered quickly. He quickly stood erect, needed no medical treatment, and walked out of the visiting area under his own power. Again, it appears as if J.W. was surprised by Fortune, perhaps winded momentarily, but unfazed by Gonzalez, as no physical reaction is evidenced.

Above all, the use of non-deadly force by both Fortune and Gonzalez worked, because J.W. immediately deescalated his behavior and became compliant. He also needed no medical attention. As the officers reported, J.W. became contrite, exclaiming, "I got it, I got it," and when Walters asked J.W. if he wanted to go to the medical unit or if he required any assistance, J.W. said, "No." Thus, J.W., together with the officers, exited the visiting area, with J.W. walking out the through the doorway under his own power—without trouble, without incident, and without any physical restraints.

For his part, Gonzalez only accompanied Walters, Fortune, and Lewis an additional 75 to 90 feet, after which Walters, Fortune, and Lewis continued without him to escort J.W. to his housing unit.

In his certification, Gonzalez captured the moment, noting how the use of other means, such MACE, would have been unwise in this circumstance:

Whereas the I/M remained aggressive and threatening, and in an effort to have control of the situation returned to the officers, I delivered a closed fist strike to the back/mid-section

in a measured and moderate amount of force to finally gain compliance. I had considered using my department issued Mace but quickly realized that due to the proximity of the Sgt. and other officers and myself to the I/M, the discharge of MACE would have potentially incapacitated some or all of us. This Punch had the desired effect, and I believe that it was successful in finally de-escalating the situation.

[Certification of Gonzalez, dated December 12, 2019, at 3, para. 17.]

At the hearing, Gonzalez underscored this point as well. Gonzalez testified that when he arrived at the cage in which J.W. had sat for the visit, the cage had already been opened, and that he could not handcuff the inmate because he did not have any handcuffs, due to institutional shortages. Gonzalez added that he did not have a radio or baton either, only his MACE (his oleoresin capsicum or pepper spray). Moreover, Gonzalez explained that he later considered using the MACE, but that he thought it unwise because the other officers were too close, and he did not want to risk incapacitating them.

Gonzalez further testified that Walters and Fortune were the ones originally instructing and ordering J.W. to calm down, to face the cage so they could handcuff him, and to stop using his hands, but that the inmate refused to follow their orders. Gonzalez further explained that J.W. was not merely talking with his hands, but that he had become increasingly aggressive, and that he had kept his back to the cage in defiance of their orders. Gonzalez further stated that he too ordered J.W. to stop using his hands and face the cage, but that his order too was ignored, and that he too kept himself in a ready position for any eventuality.

Curiously, Erven had only recommended retraining for Gonzalez and the other officers after his review of the video for the first time, six months later. In other words, Erven did not recommend any discipline. In his email dated May 28, 2019, Erven memorialized that he had been asked to provide his opinion after his review of the video and the report from the Special Investigation Division. Again, the video had no audio and the statements he reviewed were the ones cast by the Special Investigation Division in its report. As such, Erven did not have the totality of the circumstances before him. Nevertheless, Erven wrote that the physical force Gonzalez used was "unnecessary and

not justifiable” under the “totality of the circumstances” and concluded that “all four members need to be retrained in the proper use of force, [the] proper response to an incident[,] and report writing.” Once more, Erven does not recommend any discipline.

Worse, on cross-examination, Erven stated that he dismissed the officers’ statements, suggesting, in concert with the NJDOC’s representative, that they were lies, self-serving statements not to be trusted, whereas the NJDOC’s statements were truthful, as if no other possibility could exist.

In addition, Erven criticized Gonzalez for not using handcuffs when he acknowledged that he did not know if Gonzalez even had handcuffs.

Moreover, Erven criticized Gonzalez and the other officers for escalating the flow of events when the actions Gonzalez and the other officers took deescalated them.

Still, Erven testified that if the inmate was ordered to do something but did not comply, then the officers could have used physical force, yet Erven insisted that the inmate posed no threat, even unrestrained, when it is self-evident that the inmate, possessed of considerable size and presumptive strength, could lunge at any officer at any time and cause bodily harm, given his proximity to the officers and the absence of any physical restraints.

IV.

An investigator with the Special Investigation Division, Senior Investigator Paul Fiore provided his own lay opinion at the hearing, but I give it no weight as it was even less trustworthy and less reliable than the lay opinion Erven provided. Fiore had no first-hand knowledge of the incident and read from his report. Like Erven, his bias was evident on its face.

First, Fiore testified that Gonzalez was “laid back” and that the inmate was “not a threat.” Again, I specifically reject this characterization. To repeat, I specifically found that the inmate was a threat, and that Gonzalez was on alert.

Second, Fiore made no distinction between the force used by Fortune, calling it "a shot to body," when it was made with more than moderate force, and the force used by Gonzalez, calling it "a shot to the back area," when it was made with only moderate force.

Third, Fiore testified that the officers "attacked" the inmate, as if the inmate were some innocent happened upon by a group of thugs, and that the physical force was not necessary because the inmate did not show any aggression, even though all of the officers on the scene provided statements to the contrary. This testimony is even more concerning because Fiore is the incident's investigator, and without the benefit of the audio, these officers' statements become all the more important. That Fiore chooses to ignore these statements in their entirety undermine his credibility, especially when Fiore testified that his only job is to write what happened and not to pass judgment.

Fourth, his report undermines his testimony because at the hearing, Fiore testified that the use of physical force by Gonzalez was "inappropriate" and "unprofessional," yet in his report, Fiore did not concern himself with the use of physical force. Like Erven, Fiore concerned himself with the alleged failure to call a Code 33 and write a report about it. Thus, it is evident that his testimony, as well as Erven's, was elicited as support for a later-conceived charge.

Meanwhile, Gonzalez acknowledged that he should have called a Code 33 because force was used, but he did not and still does not believe that he was obligated to fill out a "Use of Force Report," otherwise known as a "Special Custody Report," because he was neither asked nor ordered to do so by any of his supervising officers.

In fact, Gonzalez's testimony is supported by Russo, one of the NJDOC's own witnesses, who testified that it was he who decided to terminate the inmate's visit early. Russo is now an assistant superintendent at Northern State Prison, and Russo stated that he decided to terminate the inmate's visit early after Walters had told him that the inmate and his fiancé had been acting inappropriately. Russo explained that these kinds of incidents had been occurring with greater frequency at Northern State Prison, and that

he could avoid the paperwork for discipline if he merely terminated the visit early, so he decided to have Walters terminate the visit and counsel the inmate instead. Russo continued that it was within his discretion to do so and that he did not require a report from anyone. Moreover, Russo noted that when he spoke to Walters afterward, Walters never told him that any incident had occurred, or that any physical force had been used.

Upon review of the incident, Russo believed that Walters should have written a report, and that he should have told Gonzalez that he would be writing the report, but that Walters should have also told Gonzalez that he would have to write a report as well.

More significantly, Russo testified that did not believe that either Walters or Gonzalez should be faulted for not calling a Code 33. Russo explained that Walters had the primary responsibility for calling a Code 33 and that it was within his discretion not to call one. Indeed, Russo noted that calling a Code 33 does come with attendant risk, as personnel throughout the facility have to be pulled from their posts.

Finally, Russo acknowledged that Gonzalez could not have called a Code 33 if he did not have a radio.

To be sure, all witnesses recognized that radios and handcuffs were in short supply during the time of the incident and that Gonzalez, who was only in his second year of service, would have been among the last to receive a radio or handcuffs.

In contrast to Erven and Fiore, Russo was matter of fact throughout his testimony and without pretense. He was also candid. In short, I found him to be a credible and reliable witness.

V.

Like Russo, Major Bruce Kerner, who is an administrative major at Northern State Prison, and Russo's superior, was candid throughout his testimony. Kerner, however, was not a witness to the incident, either directly or indirectly, and had no input into the decision-making to terminate Gonzalez in this case, so his testimony simply centered on

prison policy and procedure. Even so, Kerner provided no meaningful testimony because the policies and procedures at issue are understandable as written, and Kerner provided no meaningful explication beyond their written words. Still, I found Kerner to be a credible witness.

Kerner testified about the need to report “unusual incidents” as contained in R-13; the definition of “physical force” and its permissible use as contained in R-16; the need to write “special custody” reports as contained in R-14; and the range of discipline to be imposed for the violation of any of these policies and procedures as contained in R-17.

Tellingly, Kerner testified that the discipline the NJDOC seeks to impose on Gonzalez is for a “malicious act” done “with the intent to cause pain, injury, suffering, or anguish,” when in this case, and I explicitly find, Gonzalez did not intend to cause pain, injury, suffering, or anguish.

In fact, it was also revealed on cross-examination that Gonzalez and the other officers followed the policy and procedure as written because Kerner testified that an officer should first attempt to remedy the situation by issuing a verbal order to cease before resorting to physical force—but that the officers should have called a Code 33 and handcuffed the inmate if they considered him a threat. Parenthetically, Kerner did not know if any of the officers, including Gonzalez, had a radio to call a Code 33 or handcuffs to restrain the inmate. Nevertheless, since the officers did, in fact, order the inmate to cease his threatening behavior and to face the cage so they could handcuff him, Gonzalez and the other officers did, in fact, follow the policy and procedure as written, except for writing a report about it, which Gonzalez had admitted during the investigation, in his certification, and at the hearing. Still, Russo absolved Gonzalez of that primary responsibility at the hearing by stating that the primary responsibility laid with Walters.

Finally, Kerner testified that a Code 33 should have been called, not because it was his independent judgment but because the Special Investigation Division deemed it so—the statements of the officers notwithstanding.

CONCLUSIONS OF LAW

I.

Internal Management Procedure NSP.CUS.101, Use of Force and Security Equipment, contains the policy and procedure for the use of force at the Northern State Prison. To begin, the policy and procedure define “physical contact” as “contact that involves routine or procedural contact with an individual necessary to effectively accomplish a legitimate law enforcement objective,” and “physical force” as “contact with and an individual beyond that which is generally utilized to effect a law enforcement objective.” Toward this end, physical force may be used “when necessary to overcome an individual’s physical resistance to the exertion of the custody staff member’s authority or to protect persons or property.” Significantly, examples include “wrestling an individual to the ground, using wrist locks or arm locks, striking with the hands or feet, or similar methods of hand-to-hand confrontation.”

More significantly, NSP.CUS.101 contains the policy and procedure for the use of non-deadly force. Under the policy and procedure, the NJDOC justifies the use of non-deadly force, whether mechanical or physical, to protect self or others against unlawful force. The NJDOC also justifies the use of non-deadly force in situations where a custody staff member believes that an inmate’s failure to comply constitutes an immediate threat to correctional facility security or personal safety. There are other circumstances that also justify the use of non-deadly force—all of which are listed below:

A. Use of Force

1. It is the policy of the NJDOC that on-duty custody staff members will use only that force that is objectively reasonable and necessary. The use of force shall never be considered routine. When custody staff is justified in using both mechanical and physical force, the utmost restraint will be exercised.
2. Custody staff members, while off-duty, should not become involved with routine law enforcement duties that are under the jurisdiction of local law enforcement agencies.

B. Use of Non-Deadly Force

1. The NJDOC justifies the use of non-deadly force (mechanical force or physical force) against persons only under the following circumstances:
 - a. To protect self or others against the use of unlawful force;
 - b. To protect self or others against death or serious bodily harm;
 - c. To prevent damage to property;
 - d. To prevent escape;
 - e. To prevent or quell a riot or disturbance;
 - f. To prevent suicide or attempted suicide; or
 - g. To enforce NJDOC/correctional facility regulations where expressly permitted by NJDOC regulations or in situations where a custody staff member with the rank of sergeant or above believes that the inmate's failure to comply constitutes an immediate threat to correctional facility security or personal safety.

[DOC 72.]

In this case, Gonzalez used "physical contact" and "physical force," that is, a single strike with a closed fist to an inmate, to effect a legitimate law-enforcement objective, that is, to deescalate a threatening situation and gain compliance from the inmate, who was not restrained and was physically resisting authority by not lowering his voice and hands and facing the cage. This became necessary because the inmate's threatening behavior was persisting, if not escalating, for a full minute, demonstrating a protracted resistance to a custody staff member's authority, and an increasing threat to his personal safety. At least three other officers told the inmate on at least three other separate occasions during this protracted encounter to lower his voice and hands and to face the cage, but the inmate ignored their instructions and orders and continued with his protest and argument.

A strike with the hand is expressly authorized in this situation. As NSP.CUS.101 states, a custody staff member may strike an inmate with the hands or feet, and a custody staff member may do so to protect himself or others against unlawful force, or in situations where the custody staff member believes that an inmate's failure to comply constitutes an immediate threat to personal safety. Nevertheless, the NJDOC argues that the use of force was not necessary in this case because the custody staff members could have deescalated the situation, gained compliance, and protected personal safety by other means.

I disagree. Just because physical force was used effectively to deescalate the situation, gain compliance, and protect personal safety, does not mean that those legitimate law-enforcement objectives would have been met without the effective use of physical force. That is essentially what the NJDOC argues, and it is entirely speculative on the record. Had physical force not been used, it was entirely possible that the inmate could have lost control of himself, and the officers of the inmate and the situation. This is essentially what both Fortune and Gonzalez deduced, and that is why they used physical force. They sought to deescalate the situation, gain compliance, and protect personal safety; they did not intend to cause pain, injury, suffering, or anguish.

The NJDOC also argues that the inmate was in a compromised situation before Gonzalez delivered the second strike, but I again disagree. In short, the argument is too fine. The argument is too fine because the two strikes must be viewed together, as part of the same transaction, and not piecemeal, because life is not lived piecemeal. Life is lived as a whole, and in this case, the inmate had been noncompliant for a protracted period of time. He had refused to follow directions and orders and his threatening behavior persisted. To break the pattern, Fortune delivered a single strike to the midsection, and to make their message clear, Gonzalez delivered a second strike to the midsection, which he delivered with less force than Fortune, as the inmate was not physically impacted but understood its intent, nonetheless. The inmate's response, "I got it, I got it," underscores this point.

Since I found that the NJDOC did not prove by a preponderance of the evidence any of the alleged misconduct specified in the Final Notice of Disciplinary Action regarding this use of force; that the use of force by Gonzalez in this case was objectively reasonable, necessary, and restrained to overcome the inmate's resistance to authority; and that the use of force was to protect Gonzalez and his colleagues from an immediate threat to their personal safety, I **CONCLUDE** that Gonzalez did not violate any of the regulations, policies, or procedures with which he was charged in the Final Notice of Disciplinary Action regarding this use of force against the inmate; and that Gonzalez should not be disciplined for this alleged misconduct.

II.

Internal Management Procedure NSP.CUS.114, Special Custody Reports, contains the policy for reporting “unusual incidents” at Northern State Prison. According to the policy, NSP.CUS.114, the use of force is such an incident or event, and under the policy, a staff member, who witnessed or was involved in such an incident or event where physical force was used, must document it. The policy specifies that the staff member must write a “Special Custody Report.”

IV. Procedures

A. Unusual Incidents

A staff member who witnessed or was involved in an unusual incident or event shall document the incident or event via a written Special Custody Report. Unusual incidents include, but are not limited to, emergency codes (fire, medical or disturbance), staff or inmate injuries, deaths, suicide attempts, staff or visitor arrests, visitor bans, close custody placement (PHD, TCC, PC, etc.) use of force, escapes, notification of community release escapes, community release and parole returns, emergency trips, maintenance concerns, minimum status inmates laid-in and reasons for, non-routine searches, weapons drugs, cell phone, STG-related materials and other contrabands found, changes to or delays of daily scheduled activities, work stoppage and/or other incident that may affect or threaten the safety, security or orderly running of the institution.

[DOC 65.]

These Use of Force or Special Custody Reports must also be submitted in a timely manner—as directed by supervisory staff:

IV. Procedures

F. Reporting Timeframes

All reports must be submitted in a timely manner as directed by supervisory staff but shall be within 24 hours following an unusual incident or event. Reports written in reference to on-duty incidents must be submitted as directed, prior to the end of the staff member’s tour of duty or shift. Reports written in

reference to off-duty incidents must be submitted upon the staff member's return to duty or as directed by the Administrator, a Major or designee. Staff members may be offered an extension of any previously established timeframe at the supervisor's discretion providing that the extension does not violate any department rule or standard or any directive from a higher-ranking authority.

The procedures outlined in this IMP cannot cover every possible situation that may arise. It is paramount that good common sense and sound judgment is used at all times. In the event of uncertainty or doubt you are to contact the Shift Commander for instructions.

[DOC 67.]

To recapitulate, Subsection IV-A requires an officer to write a Use of Force or Special Custody Report, and Subsection IV-F requires that officer submit it as directed by his or her supervising officer. In this case, Gonzalez was not directed to write or submit such a report by his supervising officer. As such, it cannot be said that he was required to do so.

As Russo testified, it was Walters, as the supervising officer, who had the primary responsibility for writing and submitting a Use of Force Report, and that it was Walters, as the supervising officer, who should have ordered, or at least asked, Gonzalez to write and submit one.

Yet Walters neither asked nor ordered Gonzalez to do so.

Therefore, I **CONCLUDE** that Gonzalez did not violate any of the regulations, policies, or procedures with which he was charged in the Final Notice of Disciplinary Action for his alleged failure to write and submit a Use of Force or Special Custody Report.

III.

That a Code 33 must be called when physical force is used, and that the inmate must be handcuffed when the inmate becomes compliant, is contained in the Certification of Kerner, dated October 30, 2019, as well as in his testimony at the hearing, but it is also

acknowledged by Waters during his interview. It is also tacitly, if not explicitly, acknowledged by Gonzalez. No explication was given, however, how these failures, the failure to call a Code 33 and the failure to handcuff an inmate, put anyone at risk. In fact, Russo testified that it was within the discretion of Walters to call a Code 33, and that he did not fault Walters for not calling a Code 33. Indeed, both Russo and Kerner acknowledged that Gonzalez could not have called a Code 33 if Gonzalez did not have a radio. Regardless, this assertion that a Code 33 must be called when physical force is used, and that the inmate must be handcuffed when the inmate becomes compliant, is unchallenged, so I will accept these assertions as policy and procedure at Northern State Prison.

Gonzalez certified that he believes that he should have called a Code 33 because force was used during the incident, but he testified that he could not have called a Code 33 that day because he did not have a radio.

By contrast, Gonzalez implies that he does not believe that he was obligated to have handcuffed the inmate because he was neither asked nor ordered to do so by any of his supervising officers, and even if he were, he asserts that he could not have handcuffed the inmate that day because he did not have any.

Concerning these last two issues, I do not believe that Gonzalez was obligated to have called a Code 33 and handcuff the inmate because he was not the senior or supervising officer on the scene. Even if Gonzalez was obligated to call a Code 33 and handcuff the inmate, I found that he did not have a radio or any handcuffs with which to do either. To remind, the NJDOC acknowledges that both radios and handcuffs were in short supply at the time and that Gonzalez could not have called a Code 33 or handcuffed the inmate if he did not have these items. As a result, I **CONCLUDE** that Gonzalez did not violate any of the regulations, policies, or procedures with which he was charged in the Final Notice of Disciplinary Action for his alleged failure to call a Code 33 or handcuff the inmate.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that Gonzalez be reinstated to his position of senior correctional police officer, and that he be **AWARDED** all back pay, seniority, and costs, including all attorney fees associated with this appeal.

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 case. 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 under N.J.S.A. 40A:14-204.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 11, 2021
DATE



BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: June 11, 2021

Date Mailed to Parties: June 11, 2021

dr

APPENDIX

Witnesses

For Appellant:

Kevin Gonzalez

For Respondent:

James Russo, Jr.

Paul Fiore

Bruce Kerner

Aaron Erven

Documents

For Appellant:

None

For Respondent:

- R-1 Final Notice of Disciplinary Action dated August 26, 2019
- R-2 Preliminary Notice of Disciplinary Action dated May 28, 2019
- R-3 Video Surveillance dated October 30, 2018
- R-4 Interview of J.W. dated November 1, 2018
- R-5 Interview of Fortune dated November 5, 2018
- R-6 Interview of Lewis dated November 20, 2018
- R-7 Interview of Gonzalez dated April 29, 2019
- R-8 Interview of Walters dated May 1, 2019
- R-9 Use of Force Training Video undated
- R-10 Report by Fiore dated May 23, 2019
- R-11 Training Summary Report dated June 20, 2019
- R-12 Email from Erven to Victoria Kuhn dated May 28, 2019
- R-13 NJDOC Law Enforcement Personnel Rules and Regulations revised January 2012
- R-14 NJSP, Internal Management Procedure, NSP.PO.327, General Assignment Officers, Revised January 23, 2019
- R-15 NSP, Internal Management Procedure, NSP.CUS.114, Special Custody Reports, Revised June 12, 2017

- R-16 NJSP, Internal Management Procedure, NSP. CUS.101, Use of Force and Security Equipment, Revised June 22, 2016
- R-17 NJDOC Human Resources Bulletin 84-17, as amended, Disciplinary Action Policy