



STATE OF NEW JERSEY

In the Matter of Alton Porter,
Northern State Prison, Department
of Corrections

CSC DKT. NO. 2022-1964
OAL DKT. NO. CSV 01637-22

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 3, 2022

The appeal of Alton Porter, Senior Correctional Police Officer, Northern State Prison, Department of Corrections, removal, effective February 16, 2022, on charges, was heard by Administrative Law Judge Kimberly A. Moss (ALJ), who rendered her initial decision on June 22, 2022. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, including a thorough review of the exceptions and reply, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of August 3, 2022, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision.

The Commission makes the following comments. As indicated above, the Commission thoroughly reviewed the exceptions filed by the appellant in this matter. In that regard, the Commission finds them unpersuasive and mostly unworthy of comment as the ALJ's findings and conclusions in upholding the charges and the penalty imposed based on her thorough assessment of the record are not arbitrary, capricious or unreasonable. In this regard, upon its *de novo* review of the record, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 N.J. 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See also, In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such

determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A. 52:14B-10(c); Cavalieri v. Public Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004). In this matter, the exceptions filed by the appellant are not persuasive in demonstrating that the ALJ's credibility determinations, or her findings and conclusions based on those determinations, were arbitrary, capricious or unreasonable. As such, the Commission has no reason to question those determinations or the findings and conclusions made therefrom.

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 Alton Porter.

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 AUGUST, 2022



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
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 01637-22

AGENCY DKT. NO. N/A

2022-1964

**IN THE MATTER OF ALTON PORTER,
NORTHERN STATE PRISON,**

Robert Cannan, Esq., for Appellant (Markman & Cannan, LLC)

**Andrew J. Sorrol, Esq., for Respondent (Matthew J. Platkin, Acting Attorney
General)**

Record Closed: June 14, 2022

Decided: June 22, 2022

BEFORE KIMBERLY A. MOSS, ALJ:

STATEMENT OF THE CASE

Appellant, Alton Porter (Porter), appeals his removal by respondent, Northern State Prison (NSP), on charges of conduct unbecoming a public employee, other sufficient cause, HRB 84-17 inappropriate physical contact or mistreatment of an inmate, C8 falsification, intentional misstatement of material fact in connection with work, C11 Conduct unbecoming an employee, and D1 negligence in performing duty resulting in injury to persons or damage to property. At issue is whether Porter engaged in the alleged conduct, and, if so, whether it constitutes conduct unbecoming a public employee, inappropriate physical contact, or mistreatment of an inmate, falsification,

intentional misstatement of material fact in connection with work, negligence in performing duty resulting in injury to persons or damage to property warrants removal.

PROCEDURAL HISTORY

On December 8, 2021, NSP served Porter with a Preliminary Notice of Disciplinary Action. NSP served Porter with a Final Notice of Disciplinary Action on or about February 16, 2022, sustaining charges of conduct unbecoming a public employee other sufficient cause, HRB 84-17 inappropriate physical contact or mistreatment of an inmate, falsification, intentional misstatement of material fact in connection with work, conduct unbecoming an employee, and negligence in performing duty resulting in injury to persons or damage to property. Porter requested a hearing and forwarded simultaneous appeals to the Civil Service Commission and the Office of Administrative Law (OAL). The appeal was received by OAL on March 1, 2022. Hearings were conducted on April 22, 2022, and May 31, 2022. Post hearing briefs were filed on June 13, 2022, after which I closed the record.

FACTUAL DISCUSSION

Testimony

Terry Walker

Terry Walker is an inmate at NSP. On September 20, 2019, he was housed in Delta 3 West at NSP. Prior to that date, inmates Green and Gums were harassing inmate Vallejo because he was gay. They were spitting at him, throwing feces at him, and putting garbage in his food. Vallejo reported the harassment to the tier officers. He spoke to officers Sanchez and Turran. On September 19, 2019, Vallejo told Officer Armour of the harassment.

On the date of the incident Walker went to the Delta yard. Walker told Porter to keep his eyes open because there may be a fight. He also told this to Officers Sanchez and Turran as well as Sergeant Armour. Sanchez and Turran were the housing officers on the third floor. There were thirteen inmates going to the yard. They were in one cage. Porter split the inmates into two cages with six or seven people in each cage, to minimize fighting. Walker told Porter that guys would try to jump Vallejo. Porter

repositioned the camera. Walker was strip searched before he went into the yard. Porter was the yard officer.

Walker was not originally on the yard list for that day, but he asked to be put on the yard list.

Walker spoke to a special officer after the incident. He told the investigator that he told Porter "Please don't let this happen." The inmates went into the two cages in the order that they came out of their cells.

Porter's actions minimized the damage to Vallejo. Vallejo was jumped by two inmates instead of nine. Walker thought Porter did an amazing job. Walker trusted Porter.

Walker was interviewed by New Jersey Department of Corrections Special Investigations Department (SID) in October 2020. He stated to the investigator that he told Porter about the fight and that the inmates that were going to fight Vallejo were in the cage with Vallejo. The fight started with Vallejo and Green, then Gums joined the fight to assist Green, then it got out of hand. Porter called a code thirty-three right away. Walker was not shown a video of the fight.

Walker has a lawsuit against the Department of Corrections for harassment because he is gay. Porter is not part of his lawsuit. He trusts Porter.

Porter would have no prior knowledge of the harassment of Vallejo because he was not the housing officer,

The yard period is two hours. It begins at 8:00 a.m. Prior to going to the yard, Vallejo told Officers Sanchez and Turran about the problem he was having with inmates Green and Gums. Walker and Vallejo were cellmates. Walker told Vallejo to stand up for himself. Walker told Vallejo that he would get jumped. Walker told him to keep his back against the wall and don't fall.

There was a total of thirteen people in the recreation cages before Porter split them into two cages.

Jennifer Pesce

Jennifer Pesce (Pesce) works for the Department of Corrections in the SID unit as a senior investigator. The investigators conduct criminal and administrative investigations of staff, inmates, and visitors.

Pesce is familiar with Porter. She has no personal disputes with Porter. She investigated the incident with Porter on September 19, 2019. The incident was a physical altercation between three inmates. There were allegations of staff misconduct. She reviewed the video. She reviewed Porter's training, Porter's incident report, the special custody report by nurse Mullings describing injuries to Vallejo and the preliminary incident report. A summary of the incident is that a fight occurred between inmates, Green, Gums and Vallejo. Porter called a code thirty-three. Vallejo had multiple lacerations, loss consciousness and had boot marks on his back. On the date of the incident, the inmates were supposed to be strip searched before going into the yard. One inmate had his hands wrapped. Other inmates had things on their hands. Inmates should not have anything on their hands. Inmates cannot alter property. Porter did not write any sanctions for altering property on the day of the incident. Pesce interviewed Porter, Walker, Green, Gums and Vallejo.

Porter worked the first shift at NSP in September 2019. He was a GA in the Delta Wing. The Delta Wing is a housing unit at NSP. It is used as restorative housing for inmates with disciplinary sanctions. The inmates with disciplinary sanctions are not housed with inmates without disciplinary sanctions.

Pesce created an Initial Administrative Report. The video of the incident shows inmates in the yard. You hear Porter saying, "They won't fight". He possibly says he put them in the cage so that they can fight. He later says, "It better be a good fight." Porter is speaking to Officer Wilford. There is a radio in the booth. Wilford says, "They are squaring up in the corner." Porter says that he has to tell someone about this and calls a code thirty-three. There was a delay from the beginning of the fight until Porter

called the code thirty-three. No OC spray was deployed prior to calling the code thirty-three. No orders were given by Porter to stop fighting prior to calling code thirty-three. Pesce determined the voices based on review of the video and statements. She does not know if a radio was in the booth. Whitford should have had a state issued radio. She does not know if the door to the booth was shut at any time. Body cameras were not in use at this time.

The fight began ten minutes into the video, prior to the fight there was no basis for a code thirty-three. A code thirty-three can be called if officer feels that an incident is about to occur. Twelve officers responded to the code thirty-three. On the video you hear rustling within two seconds of the first fist being thrown. The camera was turned towards the building. Whitford was in control of the camera. The camera records audio and video. She does not know if Whitford had the radio on. Porter and Whitford came out of the booth at the same time. Porter is not seen on the video. If he left the booth, it would be seen on the video.

One radio transmission can cancel out another radio transmission. On the video, Porter is heard calling a code thirty-three. There is a lot of radio transmissions during the first shift. She cannot tell from the radio if a code thirty -three was called between ten to ten-thirty point on the video. Whitford did not make a radio transmission. If Whitford was not close enough to Porter, what Porter said would not be recorded.

There was a video camera facing the cage. It was turned away during the fight to face the wall or ground. Officer Wilford was in charge of the camera. The Yard officers sit in the yard booth when inmates are on the yard. The yard booth is outside of the Delta Wing building. It is a standalone structure that can hold two people. It has a window that faces the cages. The door opens and closes towards the building. It is secured with a key. The yard booth is where the camera is maintained. The camera has a tripod in the booth. It appears that Porter walked out of the booth.

The camera remains in the booth. The camera has a Secure Digital (SD) card, which is taped over if no incidents occur. If an incident occurs, the SD card is retrieved.

Pesce wrote a supplemental report. She interviewed Porter. He stated that the door was closed to the yard booth. Porter stated that he attempted to call a code thirty-three, but it did not go through. He then stepped out of the booth. Porter acknowledged that he could have called the code thirty-three faster. He acknowledged that there was a delay from the beginning of the fight to the time that he called the code.

Pesce also interviewed Walker for the supplemental report. Walker stated that Porter knew about the fight before it occurred. He also stated that Green's hands were wrapped, which is a signal that there would be a fight. She also interviewed Gums who stated that Porter gave them thirty seconds to fight before he initiated the code. In her interview of Green, he stated that Porter gave them two minutes to fight.

Wilford testified before the Grand Jury that he and Porter discussed whether a fight would occur. He admitted his statements and acknowledged Porter's statements.

On the video 9:58 (nine minutes and fifty-eight seconds) at the beginning of the fight Whitford says "We have to push the button either way." At 10:06, six minutes later rustling is heard on the video but not the sound for a code thirty-three. At 10:10 someone hit the radio to get transmission, inmates in the yard can be heard. At 10:23 the camera outside of the booth can hear activity outside of the booth. At 10:27 you hear the radio but no code thirty-three. At 10:29 the code thirty-three is called. At 11:09 you hear other officers giving commands to get on the ground. These officers were responding to the code thirty-three.

The Office of Public Interest and Accountability (OPIA) conducted a grand jury investigation into this matter as part of the Attorney General's Office. Pesce shared information regarding this investigation with OPIA. Pesce gave Whitford his Miranda rights and he refused to provide a statement. Whitford was provided with immunity to testify before the grand jury. Armour told Whitford that there was a possibility of a fight between inmates prior to the incident.

Armour was interviewed by Pesce. He stated that he had no knowledge that there would be a fight. Porter did not say in his interview with Pesce that Armour told

him that there would be a fight. Sanchez stated that he had no knowledge that there would be an altercation in the yard. Whitford resigned before there were any administrative charges.

Porter was a GA twenty. GA stands for General Assignment. Twenty is the equipment number. Porter was assigned to the Delta Wing. One of his assignments in the Delta Wing was to escort inmates from the unit to the yard.

Pesce determined by virtue of the video surveillance and witness statements that the code thirty-three was called thirty seconds after the fight began.

Bradford Engelberger

Bradford Engelberger works at NSP. He is the Administrative Major. His duties include security of the prison, disciplinary hearings, process, policy, and procedure. He is familiar with conduct as it applies to law enforcement staff.

Engelberger reviewed the SID investigation report and video of the Delta Wing yard to reach his findings.

When officers are hired, they receive a copy of the Rules and Regulations of Law Enforcement and the New Jersey Code of Ethics. Porter received both of these.

Engelberger believes that Internal Management Procedure (IMP) NSP.CUS 327, General Assignment Officers Post Order (R-17) was in effect on September 19, 2019. It applied to all General Assignment Officers. All GA Officers should be familiar with all Post Orders. Post Order IMP-PO 8.02 for Delta Yard Officers(R-15) was in effect as far as he knew on the date of the incident. If an officer is working in the Delta yard, his primary concern should be with the Delta Yard Post Orders. IMP NSP.CUS 206 regards yard recreation procedures. It was in effect on the date of the incident. It has not been rescinded to his knowledge.

Delta is a restricted close custody unit. Engelberger began at NSP in February 2022.

Brenden Whitford

Whitford worked for the Department of Corrections as a Corrections Officer at NSP from the end of 2019 to September 2021. One of his assignments was Delta Yard at NSP. Delta Yard has two separate cage areas. One for Delta East and one for Delta West. Inmates from Delta East use the east cages and inmates from Delta West use the west cages. There are four individual cages inside a larger cage. He would be between the east and west cage when he worked at Delta Yard. There was a booth between the east and west cages. He would report to Delta Yard east twice a week and Delta Yard west twice a week. He was the clinic officer on the other day.

The Yard officer always has a radio on. He could hear transmissions from others who were on the same radio channel as he was. The inmates are brought out into the yard and placed in the east or west cages. Whitfield usually put inmates into the cages. Any officer from Delta Wing can assist escorting the inmates to the cages.

The booth is between the Delta east and west cages. There are two cameras in the booth. One on the east side and one on the west side. The cameras face the cages. The cameras are secured at night. In the morning, Whitford retrieves the cameras and sets them up in the booth of Delta Yard to record yard movement.

The video from Delta Yard on September 19, 2019, shows the one of four cages. There is a second cage behind the first, there does not appear to be inmates in the second cage. Porter was present, controlling movement and opening and closing the cage doors. At the .25 mark of the video there is a sound from the radio. The sound is another radio being used on the same channel. The radio has a button that is pressed when speaking. The radio has two channels one for administrative segregation and Delta Wing and the other for the rest of NSP. Whitford as yard officer was positioned between the east and west cage. The camera is located between the cages.

Prior to going to the Delta Yard, Sergeant Armour, who was in charge of Delta Wing told him to keep aware of a potential fight. The yard officers have an interest in

knowing if a fight may break out. He does not recall Armour talking about inmates in the West side of Delta Wing,

Porter and Whitford worked Delta Yard on September 19, 2019. They worked together weekly. The Delta Yard assistant is usually a GA officer.

At the 1:16 to 2:27 point of the video, there is a conversation between Whitford and Porter regarding the inmates in the yard. The first voice heard is Whitford. Porter is heard saying no. At 5:46 Porter says in a cage, so they can fight. At 6:06 Porter says, "Should be a good fight." Whitford says "Especially if you are going to do dumb shit on camera." At this time the camera is inside of the booth. At 9:09 on the tape an am/fm radio is heard. It is in the booth.

At 9:30 of the tape Whitford says "All squared up in different corners." He does not know what that was in reference to. At 9:38 Porter says, "I have to tell someone this Shit." Whitford does not know what Porter is referring to. At 9:42 the video shows an inmate making a hand gesture. Whitford does not know what the hand gesture means. At 9:55 two inmates are in the back of the cage facing each other. At 9:57, one of the inmates' swings at the other. This looks like the beginning of a fight.

At 10:02 a radio transmission is heard on the video. Whitford does not know what was said. He does not know when the channel closed after the transmission heard at 10:02. At 10:07 the camera is Whitford removes the camera from the booth to tape the fight. If there is an incident in the cages, it is his duty to record it. There is a verbal radio transmission from 10:14 to 10:19. The sound at 10:20 on the video is the opening of a radio transmission. Whitford does not know who opened the radio transmission. There is a radio transmission at 10:26 and 10:29. The 10:29 transmission is from someone who is nearby. He hears Porter call a code thirty-three at 10:28 on the video. At 11:10 on the video an officer approaches the cages with a cannister of OC spray in his hand. The officer waives the OC spray canister around but does not discharge it. The officer came within thirty seconds of the code. Whitford may have gone to the yard gate to let officers into Delta Yard. The gates are usually open.

Whitford does not know if Porter has a key to the gate. Prior to the other officer arriving, Whitford went into the yard with a handheld camera and told the inmates to get down.

The conversation between Whitford and Porter took place between the east and west cages. Whitford did not know that Armour spoke to Porter about a possible fight. Porter and Whitfield do talk about a possible inmate fight between a small loud inmate and another over money. They also mention a gay inmate from Chicago. Whitford does not know who inmate Green is.

The code thirty-three audio was picked up by the camera. He is not sure if it was from Porter's radio or if it was picked up on the video. It sounded like it came from the radio. He did not see Porter when the code thirty-three was called. Whitford's radio was on the Delta/ administrative segregation channel. Porter's radio would be on the same channel. If Porter's radio was on the other radio channel, Whitford would not hear the transmission. There are incidents where the microphone key is left open.

Whitford does not recall if the inmates were speaking during the fight. He does not remember how many times Porter called code thirty-three. Whitford prepared a special custody report regarding the September 19, 2019, incident.

Code thirty-three calls are recorded. The SD card is removed and given to the sergeant. Whitford does not recall giving the SD card to Armour. Whitfield had no knowledge of a possible fight on September 19, 2019, except what Armour told him, which he discussed with Porter.

Earlier Porter communicated with Delta officers by radio regarding yard movement.

Alton Porter

Alton Porter began working at NSP in December 2008. He became a senior correction officer the next year. His bided position was Delta East and West first floor relief for four days, the fifth day, Thursday was a float day.

When Porter arrived at Delta Yard on September 19, 2019, inmates from Delta East were on the yard. Whitford had brought the inmates in before Porter arrived. Porter assisted Whitford. Porter switched his radio to channel three to speak with Sanchez. He told Sanchez to send the other from inmates from Delta 300 down. There were twelve or thirteen inmates sent down at that time. Porter is not familiar with the inmates in Delta 300. He did not have direct supervision over them.

The Delta West Yard has four cages. When he arrived on September 19, 2019, none of the inmates were in the cages. Each cage holds ten inmates. He was expecting fourteen inmates. He split the inmates in the cages. He was going to put seven inmates in each cage. Yard time for the inmates is 8:00 to 10:30 a.m. The incident occurred at 8:42 a.m. Porter spoke to Whitford when he arrived. Porter also spoke to Armour. Armour told him to "watch cage five there is supposed to be a fight. The short guy owes the tall guy money." Porter did not know who the inmates Armour spoke about were.

Whitford and Porter spoke about the possible fight in the Yard. They laughed about it. Porter knew inmate Walker because Porter had responded to codes for fights involving Walker. Porter knew that Green was very disrespectful. He had no interaction with Green. Green, Vallejo and Gums were involved in the fight. The dispute was about an incident between Vallejo and a friend of Green's at Borden House. The inmates involved in the fight were not the inmates Armour told him might be involved in a fight. Porter wanted to tell Whitford about a supervisor and a female officer who were in a relationship. Porter said, "Better be a good fight." This was twisted jail humor. The inmates in Delta unit lose privileges. They have no phone, visiting, radio or television. He said "better be a good fight" because the inmates risk losing even more privileges in Delta Wing. Whitford and Porter spoke in the booth. Porter's radio was on channel one, but the volume was low. Only one radio was heard in the booth on the video.

A code thirty-three is called when there is a fight. Armour could have closed the yard because of the possibility of a fight, but NSP does not like to close the yard. Armour could have had more armed officers assigned to the yard.

The inmates squared up and the shorter one took a swing at the other one. At the 10:00 point of the video, Porter left the booth. He saw inmates throwing punches. He wanted to have his eyes on the yard, so he came out of the booth. Porter called a code thirty-three on channel one. He was aware that it would be difficult to get a code three through on channel one. He went to the gate and noticed that the officers that he sees are not responding to the code thirty-three. The gate is twenty feet away from the booth. He had the keys to open the gate and let the other officers into the yard. Porter went to the gate before he made the second code thirty-three call on the radio. He went to the gate to open it and let the officers responding to the code thirty-three in. His call got stepped on by another call on channel one. He called the code thirty-three on channel one, which is not the channel Delta Wing uses. All of the rest of NSP would hear that code. There are many people transmitting on channel one. There is a lot of chatter. He called a second code thirty-three which is heard on the video at 10:30. He did this on the Delta yard. An officer with OC spray arrives within thirty seconds. The OC spray was not deployed. The inmates complied once the officer pulled out the OC spray. The inmates were removed from the yard one by one with no incident.

Porter was given a memo by the sergeant which stated that inmates going into the yard were not to be strip searched. He received this while he was in Delta Wing east. The incident occurred within one week of receiving the memo. A day after the incidents inmates were to be strip searched before coming into the yards.

There were many inconsistencies in Delta Wing. When inmates complain enough a policy can be changed. Inmates wanted more time in the yard.

Porter did not receive any information about a possible fight from anyone but Armour. One half hour before he arrived at the Delta Yard, he did not know which inmates would be in the Delta Yard. He did not know that Gums, Green, Vallejo or Walker would be in Delta Yard on September 19, 2019.

The day after the incident, Porter was placed on no inmate contact. He worked the first shift until October 21, 2021. Porter had knee surgery on October 21, 2021. He was on disability. Porter was informed that he was terminated on November 23, 2021.

He was placed on administrative leave with pay until December 9, 2021, when he was removed. He did not have a hearing prior to December 9, 2021.

When Porter was interviewed by SID, he stated that he had no knowledge that a fight would occur. He did not mention that Armour told him a fight might occur. He would not disclose this in a report. Porter stated that he first knew that a fight was going to occur when he saw punches thrown.

Porter did not call a code after the first punch. He did not give a verbal order to stop. He did not mention that he called code thirty-three on channel one.

The radio has orange button to press to transmit. The button beeps but there is no way to know where the person pressing the button is located. It is more effective to call a code thirty-three on the radio.

Porter spoke to Sanchez on channel three on the radio to send inmates to the yard. After that he turned his radio on channel one because after the Yard time was over, he was to report back to manpower.

Porter brought fighting charges against Green, Gumbs and Vallejo. Porter was not aware if the inmates had been searched.

FACTUAL DISCUSSION

In light of the contradictory testimony presented by respondent's witnesses and appellant and his witness, the resolution of the charges against Porter requires that I make credibility determinations with regard to the critical facts. The choice of accepting or rejecting the witness's testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 60 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A

credibility determination 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). A fact finder "is free to weigh the evidence and to reject the testimony of a witness even though not contradicted 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." In re Perrone, 5 N.J. 514, 521-522 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to observe the demeanor of the witnesses, I **FIND** Walker, Pesce, and Engelberger and Whitford to be credible. Walker stated that Porter was one of the officers at NSP that he trusted Porter and believed Porter did a good job with the incident. He also knew why the altercation took place. Pesce was clear in her testimony, and it was consistent with her reports and the video. Engelberger's testimony was clear and concise. Whitford's testimony was clear and consistent although he did not recall some things.

I **FIND** Porter's testimony to be less credible. Some of his testimony conflicts with his prior statement such as the fact that in his prior statement he stated no one mentioned to him that there might be a fight in the yard, but when he testified, he stated that Armour told him that there might be a fight in Delta Yard. He testified that when he made the first code thirty-three call his radio was on channel one, he did not mention that his radio was on channel one in the SID interview. In his SID interview he stated that when the fight started, he called a code thirty-three. He was in the booth when the fight started, however, he did not call the code thirty-three while in the booth.

Having heard the testimony and reviewed the evidence, I make the following findings of **FACT**:

Porter was an officer at NSP since December 2008. His bided position on September 19, 2019, was Delta East relief two days and Delta West relief two days both on the first floor and the fifth day, Thursdays, was a float day.

September 19, 2019 was a Thursday, a float day for Porter. He reported at 6:00 a.m. to Sergeant Gibbons at manpower. He was told to collect the count slips and take them to center control. At 6:00 a.m. everyday there is a count at NSP. Which is logged and sent to Center Control. Porter completed this at approximately 6:45 a.m. He was next told to escort a nurse from C wing to medical and back to C wing. He completed this at approximately 7:15 a.m. He was then told to go to Alpha and Bravo unit so that the officers there could get a meal break. On his float day he gets a radio from the manpower booth. The radio has four channels one is main campus of NSP, 2 is administrative segregation and Delta Wing. There is another channel for transportation. His radio was on channel one during the first assignments. When he works on Delta Wing, his radio is on channel three.

Porter was next directed to report to Delta Yard, to Sgt. Armour in Delta Wing, who told him to watch cage five, there is supposed to be a fight and to help with Yard movements. Delta Wing is a restricted Wing at NSP. When Porter reported to Delta Wing, the yard gate was open. The yard gates are controlled by the tower. Delta Wing is on the other side of the gate. Delta 100 is downstairs, and Delta 300 is upstairs. Porter is familiar with the inmates on Delta 100. Porter had been assigned to Delta Yard once or twice between September 2018 and September 2019. Porter escorted the inmates from Delta 300 to the yard. Walker was one of the inmates being escorted to the yard. He told Porter that some of the inmates were going to jump Vallejo in the yard. Green, Gumbs, Walker and Vallejo are inmates in Delta 300.

Whitford was the Yard officer on Delta Yard on September 19, 2019. Armour also told Whitford to look out for a fight among the inmates. The Delta Yard has two separate cages, one for Delta East and one for Delta West. Each cage has four separate cages in it. There is a booth for the officers between the east and west cages. There are two cameras in the booth, they face the cages. Porter was told that fourteen inmates would be sent down. Only twelve or thirteen inmates were sent down. Each cage holds a maximum of ten inmates. Porter split the inmates into two cages.

Porter and Whitford spoke in the booth. Porter said "I put five in the cage so they can fight at the 5:46 point in the video. Shortly thereafter, he says "Better be a good

fight" at the 6:06 point in the video. Porter and Whitfield both had radios. At the 9:55 point in the video two inmates take fighting stances. Whitford says, "Squaring up in different corners." One inmate swing at the other at the 9:57 point of the video. Porter then states, "We have to hit the button either way." Whitford leaves the booth to record the fight at the 10:07 point of the video. Porter also leaves the booth. Inmate Vallejo and Green begin to fight. Green has a wrapping over his hand. Gumbs joins Green in fighting Vallejo.

At 10:02 a radio transmission is heard on the video. It is unknown when the channel closed after the transmission is heard at 10:02. There is a verbal radio transmission from 10:14 to 10:19. The sound at 10:20 on the video is the opening of a radio transmission. There are radio transmissions at 10:26 and 10:29. The 10:29 transmission is from someone who is nearby. Porter calls a code thirty-three at 10:28 on the video. At 11:10 on the video an officer approaches the cages with a cannister of OC spray in his hand. The officer waives the OC spray canister around but does not discharge it. The officer came within thirty seconds of the code. Vallejo had multiple lacerations, loss consciousness and had boot marks on his back.

Porter wrote a report regarding the incident. His report is sparse. They just state the names of the inmates who fought, and that he called a code thirty-thirty three and inmates responded. He also wrote a disciplinary report against Vallejo and Gumbs. Porter was interviewed by Pesce regarding the September 19, 2019, incident. He stated that he had no prior knowledge that a fight would occur. He stated that when the first punch was thrown was when he knew there would be a fight. This contradicts his testimony where he stated Armour told him there might be a fight. It also contradicts Walker's testimony that he told Porter that there would be a fight.

Porter testified that when he made the first code thirty-three call that his radio was on channel one, not channel three, which is the channel for administrative segregation and Delta Wing. When he was interviewed by Pesce, he did not mention his radio being on channel one when he made a code thirty-three call.

Internal Management Procedure # NSP.CUS 117 Article Two Section Five(a) states:

"An officer on duty shall promptly report incidents in progress: respond to the scene as appropriate and take action when the situation requires." Article Two Section Seven (a) states "No officer shall make or cause to be made, any false or misleading statements. Article Two Section Eight (a) states: "No officer will make false or misleading reports. Article three section two states "No officer shall act or behave, either in an official or private capacity, to the officer's discredit or to the discredit of the department."

Internal Management Procedure # NSP.CUS 109 regards emergency response lists the appropriate procedure for calling a code, a witness code and call by radio. Any code requires an immediate response and Center Control must be advised. A telephone, radio or whistle can be used. It is not appropriate to wait before calling an emergency code.

The Law Enforcement Personnel Rules and Regulations Article Two, performance of duties Section Five states officers shall promptly report incidents in progress. Section Seven of Article Two states that Officers shall not make false or misleading statements or intentionally omit or misrepresent facts. Section Eight of Article Two states that an officer shall not make a false or misleading report.

Custody Post Order IMP PO 8.02 is for Delta Yard Officers. The duty of the Delta Yard officers is to watch the yards and enforce the rules and regulations. When there is an unusual incident in the Delta Yard, all of the gates are secured, all movement must cease, and a code must be called. There are codes for fire, stand-up count, emergency, medical emergency, suicide attempt and escape. A code thirty-three, emergency is a verbal order, to wait for assistance and secure inmates. IMP NSP.P.O. 327 is for General Assignment (GA) officers, whose duties include responding to emergent situations and enforcing the Rules and Regulations. GA officers can be assigned anywhere.

IMP NSP.CUS 206 regards yard recreation periods. It provides guidelines to control, document and monitor yard recreation periods. Section four refers to the Delta

Unit. It can use the recreation yard during approved times. The Yard officer must monitor activity in the yard and make sure that it is recorded on video.

In the Final Notice of Disciplinary Action one of the charges is HRB 84-17 inappropriate physical contact. The penalty for this according to the Human Resources Bulletin Disciplinary Action Policy ranges from reprimand to removal. For the charge of intentional misstatement of fact, the penalty ranges from reprimand to removal. For the charge of conduct unbecoming a public employee, the penalty ranges from a three-day suspension to removal. The charge of neglect of duty resulting in injury or damage to property, the penalty ranges from a five-day suspension to removal. On the charge of violation of Rules and Regulations, the penalty ranges from reprimand to removal. When officers are hired, they receive a copy of the Rules and Regulations of Law Enforcement and the New Jersey Code of Ethics. Porter received both.

Walker stated that he was searched before he entered Delta Yard on September 19, 2019.

LEGAL ANALYSIS AND CONCLUSION

The purpose of the Civil Service Act is to remove public employment from political control, partisanship, and personal favoritism, as well as to maintain stability and continuity. Connors v. Bayonne, 36 N.J. Super. 390 (App. Div.), certif. denied, 19 N.J. 362 (1955). The appointing authority has the burden of proof in major disciplinary actions. N.J.A.C. 4A:2-1.4. The standard is by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). Major discipline includes removal or fine or suspension for more than five working days. N.J.A.C. 4A:2-2.2. Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee, and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. An employee may be removed for egregious conduct without regard to progressive discipline. In re Carter, 191 N.J. 474 (2007). Otherwise, progressive discipline would apply. W. New York v. Bock, 38 N.J. 500 (1962).

Hearings at the OAL are de novo. Ensslin v. Twp. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994), certif. denied, 142 N.J. 446 (1995).

“Unbecoming conduct” is broadly defined as any conduct which adversely affects the morale or efficiency of the governmental unit, or which has a tendency to destroy public respect and confidences in the delivery of governmental services. The conduct need not 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. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

In this matter, the counts of conduct unbecoming a public employee, inappropriate physical contact or mistreatment of an inmate, other sufficient cause, and negligence in performing duty resulting in injury can be merged. Porter was told by two separate people, Walker and Armour, that a fight was possible in the Delta Yard cages. Porter said to Wilford “I put five in the cage so they can fight.” Shortly thereafter, he says, “Better be a good fight.” Porter sees the two inmates in a fighting position and takes no action. Once the first swing is thrown by the inmate, Porter says “We have to hit the button either way,” but he does not call a code thirty-three. He did not call a code thirty-three for thirty seconds while the fight escalated and inmates Green and Gumbs fought Vallejo. The Vallejo suffered injuries as a result of the fight.

I **CONCLUDE** that the charges of conduct unbecoming a public employee, inappropriate physical contact or mistreatment of an inmate, other sufficient cause, and negligence in performing duty resulting in injury are **SUSTAINED**.

The next charge was falsification, intentional misstatement of material fact in connection with work. Porter, in the SID interview said that he was not told that there could be a fight among inmates on September 19, 2019, in Delta Yard. He in fact testified that Armour warned him about a possible fight. He spoke to Wilford about a possible fight and Walker also told him about a possible fight.

I **CONCLUDE** that the charge of Falsification, intentional misstatement of material fact in connection with work is **SUSTAINED**.

“Although we recognize that a tribunal may not consider an employee’s past record to prove a present charge, West New York v. Bock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense.” In re Phillips, 117 N.J. 567, 581 (1990).

Ultimately, however, “it is the appraisal of the seriousness of the offense which lies at the heart of the matter.” Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

In this matter, the delay in calling the code thirty-three could have had catastrophic consequences. Vallejo suffered injuries as a result of the fight that Porter was advised could occur. I am aware that Porter has not previously had any disciplinary charges filed against him, however the delay in calling the code thirty-three could have resulted in more injuries to more inmates.

I **CONCLUDE** that the discipline of removal is **SUSTAINED**.

N.J.A.C. 4A:2-2.13(h) (3) provides:

If the Commission fails to render a final administrative determination of an appeal of an officer's or firefighter's removal from employment within the required 180 days, the appellant shall begin receiving the base salary that he or she was receiving at the time of his or her removal and shall continue to receive such salary until the Commission renders a final administrative determination, provided, however, that the following days shall not be counted toward the 180-day period:

The period between the date of removal and the date on which the appellant appeals a Final Notice of Disciplinary Action with the Office of Administrative Law and the Civil Service Commission.

N.J.S.A. 40A:14-201 (a) and (b)(1) provides:

When a law enforcement officer employed by a law enforcement agency or a firefighter employed by a public fire department that is subject to the provisions of Title 11A of the New Jersey Statutes is suspended from performing his official duties without pay for a complaint or charges, other than (1) a complaint or charges relating to the subject matter of a pending criminal investigation, inquiry, complaint, or charge whether pre-indictment

or post indictment, or (2) when the complaint or charges allege conduct that also would constitute a violation of the criminal laws of this State or any other jurisdiction, and the law enforcement agency employing the officer or the public fire department employing the firefighter seeks to terminate that officer's or firefighter's employment for the conduct that was the basis for the officer's or firefighter's suspension without pay, a final determination on the officer's or firefighter's suspension and termination shall be rendered within 180 calendar days from the date the officer or firefighter is suspended without pay.

If a final determination is not rendered within those 180 days, as hereinafter calculated, the officer or firefighter shall, commencing on the 181st calendar day, begin again to receive the base salary he was being paid at the time of his suspension and shall continue to do so until a final determination on the officer's or firefighter's termination is rendered.

b. The 180 calendar day period shall commence on the date that the officer or firefighter is suspended without pay and shall be calculated as follows:

(1) The calendar days that accrue between the date the officer or firefighter is terminated by his employing agency or department and the date on which the officer or firefighter files his appeal of his termination with the Office of Administrative Law shall not be used in calculating the date upon which the officer or firefighter is entitled, pursuant to subsection a. of this section, to receive his base salary pending a final determination on his appeal;

N.J. Stat. § 40A:14-201

In this matter Porter was removed on December 9, 2021. His appeal was filed with the Office of Administrative Law and the Civil Service Commission on March 1, 2022. The time from December 9, 2021, to March 1, 2022 shall not be counted toward the 180 day period.

I **CONCLUDE** the 180-day period in this matter began on March 1, 2022.

ORDER

Based on the foregoing findings of fact and applicable law, it is hereby **ORDERED** that the determination of NSP that Alton Porter be terminated is **SUSTAINED**.

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

This recommended decision may be adopted, modified, or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

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

June 22, 2022



DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

June 22, 2022

Date Mailed to Parties:
ljb

June 22, 2022

APPENDIX

Witnesses

For Appellant

None

For Respondent

Terry Walker

Jennifer Pesce

Bradford Engelberger

Brenden Whitford

EXHIBITS

For Appellant

A-1 NSP Internal Management Procedure NSP.PO. 303 Delta Restrictive Housing Unit Officers Dated September 12, 2019

For Respondent

R-1 Preliminary Notice of Disciplinary Action, dated December 8, 2021

R-2 Final Notice of Disciplinary Action, dated February 16, 2022

R-3 Special Investigation Division Report, Case No. 2019-09-001 NSP, dated July 30, 2021

R-4 Special Investigations Division Supplemental Report, Case No. 2019-09-001-NSP, dated November 22, 2021

R-5 Preliminary Incident Report

R-6 Special Custody Report, a. Porter, Badge #3230, dated September 19, 2019

R-7 Special Custody Report, B. Whitford, Badge #3251, dated September 19, 2019

R-8 Special Custody Report, R. Armour, Badge #N-1602, dated September 19, 2019

R-9 Special Custody Report, A. A. Porter, Badge #3230, dated September 20, 2019

R-10 Disciplinary Report for K. Vallejo, *.004, fight with another person

- R-11 Disciplinary Report for A. Gumbs, *.004, fight with another person
- R-12 Alton Porter Individual Training Summary Report
- R-13 Schedule for September 19, 2019
- R-14 Northern State Prison Level III IMP NSP, CUS, 117 Law Enforcement Code of Ethics
- R-15 Northern State Prison Custody Post Order #IMP-PO 8.02 Delta Yard Officers
- R-16 Northern State Prison Level III IMP NSP. CUS. 109 Emergency Response
- R-17 Northern State Prison Custody Post Order #IMP NSP. PO. 327 General Assignment Officers
- R-18 Law Enforcement Rules and Regulations
- R-19 Northern State Prison Custody Post Order #IMP NSP. CUS 114 Special Custody Reports
- R-20 Northern State Prison Custody Post Order #IMP NSP. CUS. 206 Yard Recreation Periods
- R-21 DOC Human Resources Bulletin 84-17
- R-22 DVD Labeled "Code 33 Yard"
- R-23 DVD Labeled "Interview of SCPO Porter Part 1"
- R-24 DVD Labeled "Interview of SCPO Porter Part 2"
- R-25 DVD Labeled "Interview of Walker October 5, 2020"
- R-26 DVD Labeled "Interview of Greene, Gumbs, Vallejo"
- R-27 DVD Labeled "Interview of Gumbs January 20, 2021"
- R-28 DOC New-Hire Orientation Checklist
- R-29 Orientation Receipt Form
- R-30 Code of Ethics Policy Receipt Form
- R-31 Law Enforcement Rules and Regulations Receipt Form
- R-32 Special Custody Report, Angelene Mullings, R.N., dated September 19, 2019, Staff/Inmate Involved: Vallejo Kevin
- R-33 Special Custody Report, Angelene Mullings, R.N., dated September 19, 2019, Staff/Inmate Involved: Greene, Omar
- R-34 Special Custody Report, Angelene Mullings, R.N., dated September 19, 2019, Staff/Inmate Involved: Gumbs, Altariq
- R-35 Miranda Warning, dated September 24, 2019, signed by Altariq Gumbs
- R-36 Miranda Warning, dated September 24, 2019, signed by Omar Greene

R-37 Miranda Warning, dated September 30, 2019, signed by Omar Greene

R-38 Miranda Warning, dated October 2, 2019, signed by Kevin Vallejo

R-39 SID Statement, dated October 22, 2019, signed by Terry Walker

R-40 Miranda Warning, dated October 5, 2020, signed by Terry Walker

R-41 Witness Acknowledgement Form, dated December 3, 2020, signed by SCPO E. Bobien

R-42 Miranda Warning, dated January 20, 2021, signed by Altariq Gumbs

R-43 Weingarten Administrative Rights Form, dated February 25, 2021, signed by SCPO Figueroa-Sanchez

R-44 Miranda Warning, dated March 25, 2021, signed by SCPO Brendan Whitford

R-45 Weingarten Administrative Rights Form, dated November 9, 2021, signed by SCPO Alton Porter

R-46 Weingarten Administrative Rights Form, dated November 19, 2021, signed by CPS R. Armour