STATE OF NEW JERSEY

In the Matter of Andrew Gales, Edna Mahan Correctional Facility, Department of Corrections	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC DKT. NO. 2020-980 and 2020-1951 OAL DKT. NOS. CSR 16941-19 and 04864-19	:	
(Consolidated)	:	

ISSUED: NOVEMBER 2, 2022

The appeals of Andrew Gales, Senior Correctional Police Officer, Edna Mahan Correctional Facility, Department of Corrections, removals, effective October 17, 2019, on charges, were heard by Administrative Law Judge Jeffrey N. Rabin, who rendered his initial decision on October 5, 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 November 2, 2022, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision.

As indicated above, the Commission thoroughly reviewed the exceptions filed in this matter. Upon that review, it finds no reason to extensively comment as those filings do not persuade the Commission that the ALJ's findings and conclusions, or his recommendation to uphold the removals were arbitrary, capricious or unreasonable. Accordingly, it upholds those actions for the reasons expressed by the ALJ. It makes only the following comments.

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 determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. 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). Even when a public safety employee 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.* In this regard, the Commission emphasizes that a Senior Correctional Police Officer is a law enforcement officer who, by the very nature of her job duties, is held to a higher standard of conduct than other public employees. *See Moorestown v. Armstrong,* 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied,* 47 *N.J.* 80 (1966). *See also, In re Phillips,* 117 *N.J.* 567 (1990). Moreover, even when a Correction Officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense such as in this matter may, nevertheless, warrant the penalty of removal. In this matter, notwithstanding the appellant's minor disciplinary history, the Commission agrees with the ALJ that removal is appropriate. In this regard, the ALJ stated:

> Appellant took a nearly three-hour meal break on the date in question. During that time, he hung out in a television room, chatting with a fellow officer and allowing himself to shut his eyes for a while. He failed to conduct his inmate counts, yet he falsely wrote in his logbook that he had. Appellant's neglect and failure to perform his duties gave opportunity to an inmate to escape out a second-floor window and remain on the loose for approximately two hours before she was caught. The inmate was injured during her attempted escape. Appellant's failure to conduct his official duties left a wing of a correctional facility unsecured. Further, appellant falsified his timesheets and logbook entries, then lied about his entries during the official investigation. Finally, in an apparent reaction to other officers talking about his failures leading to an escape attempt, appellant made threats of physical violence against his fellow officers.
>
> The public good would be affected by returning an officer to a position where he previously failed to perform his official duties then falsified records to cover up his violations. Appellant Gales was assigned the job of monitoring the security of a wing of a correctional institution. He allowed an escape attempt to take place on his watch. Although thwarted, an escaped convict would pose a security threat to other inmates, other prison officials, and the public at large. Prison safety was of paramount concern, and the failure to follow official

> protocols was an egregious offense. Appellant Gales was held to a higher standard of conduct than other State employees, and was expected to act in a responsible manner, with honesty, integrity, and good faith. He failed to meet these standards. Appellant was expected to follow designed protocols to ensure safety, and his failure to do so presented the public with the image of an undependable officer. There was a reason that strict discipline was important in settings such as police departments and correctional facilities, and why the failure to obey orders could not be tolerated: failure to adhere to guidelines and protocols could cause a direct threat of harm to the general public.

The Commission wholeheartedly agrees with the above assessment and finds that removal from employment is neither disproportionate to the offenses or shocking to the conscious.

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 appeals of Andrew Gales.

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 2ND DAY OF NOVEMBER, 2022

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. CSR 16941-19
and CSR 04864-20
AGENCY DKT. NO.: N/A
2020-980 +
2020-1951

ANDREW GALES,
Appellant,
v.
EDNA MAHAN CORRECTIONAL FACILITY
Respondent.

(CONSOLIDATED)

Juan Fernandez, Esq., for appellant, (Fernandez Garcia, LLC, attorneys)

Michael (Miguel) Garcia, Esq., for appellant (on the brief) (Fernandez Garcia, LLC, attorneys)

Andy Jong, Deputy Attorney General, for respondent (Matthew J. Platkin, Acting Attorney General of New Jersey, attorney)

Record Closed: October 3, 2022 Decided: October 5, 2022

BEFORE **JEFFREY N. RABIN,** ALJ:

STATEMENT OF THE CASE

Appellant, Andrew Gales, has appealed the termination of his position with respondent, Edna Mahan Correctional Facility (respondentor Mahan). An inmate attempted an escape while appellant was on duty on August 16, 2019, and respondent has terminated his position and charged him with N.J.A.C. 4A:2A-2.3(a)(1) incompetency, inefficiency or failure to perform duties; N.J.A.C. 4A:2A-2.3(a)(7) neglect of duty; N.J.A.C. 4A:2A-2.3(a)(12) other sufficient causes; Human Resources Bulletin (HRB) HRB 84-17, Section B2 neglect of duty, loafing, idleness or willful failure to devote attention to tasks which could result in danger to persons or property; HRB 84-17, Section B4 sleeping while on duty; HRB 84-17, Section C8 falsification: Intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation, or other proceeding; HRB 84-17, Section C11 conduct unbecoming of an employee; HRB 84-17, Section D1 negligence in performing duty resulting in injury to persons or damage to property; HRB 84-17, Section D2 negligently contributing to an elopement or escape; HRB 84-17, Section D7 Violation of administrative procedures and/or regulations involving safety and security; and HRB 84-17, Section E1 violation of a rule, regulation, policy, procedure, order, or administrative decision.

A second PNDA related to a lineup incident charged appellant with N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause; Human Resource Bulletin 84-17, as amended, personal conduct 8. Falsification: intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation or other proceeding; C. personal conduct 11. conduct unbecoming an employee; C. personal conduct 24. threatening, intimidating, harassing, coercing, or interfering with fellow state employees on State Property; and E. General 1. violation of a rule, regulation, policy, procedure, order or administrative decision.

PROCEDURAL HISTORY

On October 1, 2019, appellant, Andrew Gales (Gales), was served with a Preliminary Notice of Disciplinary Action (PNDA) alleging the above-stated violations. Appellant was served with a Final Notice of Disciplinary Action (FNDA) dated October 25, 2019. Appellant was served with another PNDA dated October 16, 2019, and a second FNDA dated January 14, 2020. Appellant was removed from employment effective October 17, 2019.

An appeal was filed by appellant on or about October 9, 2019, and the matter was transmitted to the Office of Administrative Law (OAL), where it was filed on or about December 2, 2019, for determination as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. (OAL Dkt. No. CSR 16941-19)

A second appeal was filed by appellant on or about January 17, 2020, and the matter was transmitted to the OAL, where it was filed on May 4, 2020, for determination as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. (OAL Dkt. No. CSR 04864-20)

The two matters were consolidated and heard before the Honorable Jeffrey N. Rabin on February 9, February 10, February 11, and March 15, 2021. After delays caused by the ongoing Covid-19 protocols, and a partial reconstruction of the record, the record was reopened for final submissions of summation briefs and closed on September 16, 2022.

FACTUAL DISCUSSION

Testimony:

For respondent:

Mathew Leitner had been a Special Investigations Division (SID) Investigator since 2018. Appellant worked third shift on August 16, 2019. The Stowe Two North

logbook showed appellant taking a meal break at 12:42 a.m., finishing at 1:26 a.m. Appellant entered inmate counts in his logbook for 2:00 a.m., 2:30 a.m., 3:00 a.m., 3:30 a.m., 4:00 a.m. and 4:30 a.m.

The surveillance footage showed shared common space between the Stowe Two Housing Units. To the right was the officers' desk, with the Stowe Two North's wings to the right of it. Straight ahead was a food preparation room (break room), with refrigerator and freezer area and a television set. There were metal tables.

The surveillance footage begins at 1:20 a.m. Appellant walks from the officers' desk to the wings. He walked into the break room at 1:24 a.m., staying there 2:15 a.m., when he returns to the officer's desk. He returned to the break room at 2:17 a.m., staying there until 3:41 a.m. Appellant walked towards the front door of the housing unit then returned to the break room at 3:43 a.m. He left the break room at 4:05 a.m., returned to the desk at 4:07 a.m., then returned to the break room at 4:18 a.m. At 5:15 a.m., SCPO McDowell learned that Inmate Summerford was on the fire escape. He advised appellant, who left the break room to investigate.

Leitner did not conduct the inmate escape investigation but was at an SID interview regarding this issue. During the interview, appellant stated that he was to count living breathing bodies, and that he needed to physically see an inmate. Appellant stated that he did his tours/inmate counts on the night of the escape attempt, recording them in a logbook after he calls the counts in to Central Control. During the interview, he was shown the logbook for August 16, 2019, stating he returned from meal break at 1:26 a.m. and that he called in counts at 2:00 a.m., 2:30 a.m., 3:00 a.m., 3:30 a.m., 4:00 a.m. and 4:30 a.m. He stated he got a reaction from Inmate Summerford at approximately 4:05 a.m. when he shined a flashlight. But appellant was not seen doing his inmate counts on camera; it would not have been possible for appellant to leave the break room and do his inmate counts without being seen on camera. The surveillance footage covered appellant's shift, but he was not seen conducting his inmate counts. Rather, he was hanging out in the break room. Leitner's conclusion was that appellant did not conduct his inmate counts.

Other officers might have written in the logbook but Leitner did not investigate handwriting or other officers who might have written in appellant's logbook. But officers do not "cover" inmate counts for other officers. Appellant stated in his interviews that he conducted and reported his inmate counts.

There was a second issue regarding appellant, which Leitner also investigated. Some staff members told him that appellant made inappropriate comments and threats towards "various family members" and Officer Moretti during a shift lineup. Appellant denied these accusations, claiming he was only talking to himself.

Irving Gray worked as an officer on the third shift on August 16, 2019, that being 10:00 p.m. until 6:00 a.m., patrolling the ground's perimeter. Stowe was a two-tiered housing unit, with fifteen zones, each with an alarm; giving an example, Gray stated that alarms would be activated if an animal ran by. When alarms were set off, Gray would investigate then radio in a report to Central Control. At 3:38 a.m. on August 16, 2019, Gray investigated an alarm at Zone 9 and wrote a custody report. He did not see any inmates and never saw Inmate Summerford outdoors.

Thomas McDowell was an officer who worked the third shift from 10:00 p.m. until 6:00 a.m. on August 16, 2019, at Stowe 2 South. He would perform inmate counts at 10:00 p.m., 11:00 p.m. and 12:00 a.m., then every thirty minutes thereafter. He would do the count, call it in to Central Control, then log into his logbook. Inmates would be sleeping, but he made sure there was a live body in the bed. He would kick a bed to see if a sleeping inmate moved, as he was taught at the police academy and in Mahan training.

He saw appellant on August 16, 2019. They had a good relationship. There was a television/food preparation break room with chairs, and with doors leading in and out. Appellant was in the break room, sometimes with his eyes open, sometimes closed. They talked and watched television together. McDowell did not remember seeing appellant leave the break room, either to perform inmate counts or to go to the

bathroom. McDowell left the room to perform his counts. Officers were permitted to hang out in the break room as long as they were conducting their inmate counts.

At 5:15 a.m., McDowell saw Inmate Pierce, who told him there was someone on the fire escape. McDowell investigated and saw an inmate on the fire escape, and advised appellant. He instructed appellant to walk down to Wing One to get a better look. Appellant was then able to identify the inmate as Inmate Summerford. McDowell went to Wing Six to Inmate Summerford's room; he saw a made, empty bed where Inmate Summerford should have been. It was appellant who let Inmate Summerford back into the building. She claimed she had fallen out of the window.

McDowell did not know if appellant performed his inmate counts on August 16, 2019. It was appellant's responsibility to perform the counts on Stowe 2 North, Wing 6. McDowell never went to other wings unless specifically assigned to do so. An assignment officer could do an officer's counts, if necessary. Officer Minivich was the officer who covered inmate counts for all four officers on duty, but only when one of them was on a break. Minivich did not cover for McDowell that night because McDowell did not take a dinner break that evening. If Minivich had come in at the beginning of appellant's forty-minute meal break, he might have conducted two counts for Gales that evening.

Michael White had been with NJDOC for twenty-three years. He had been a "Regional Major," a custody officer, an institutional major, and had handled security audits. He was familiar with Housing Unit Officers (HUOs) as of August 16, 2019. An HUO enforced inmate rules and policies and ensured inmate safety. Inmate counts were conducted to ensure inmate safety and to prevent escapes. Inmate counts were performed at 10:00 p.m., 11:00 p.m., 12:00 a.m., and every half-hour after that. An HUO then immediately called their count in to Central Control, then entered the count into their logbook. An HUO needed to see "flesh and movement." If the inmate was sleeping or covered with a blanket, the HUO needed to do something to see movement. HUOs were trained at the Academy and at the institution, and needed to follow the Law Enforcement Personnel Rules and Regulations promulgated by NJDOC.

There were cameras all around Mahan, but Central Command did not monitor officers all the time. When not on break, officers were allowed to go into a break room while conducting tours, but were not permitted to stay in a break room; you were supposed to be working at your desk unless conducting tours/counts.

Igor Minivich has been a Senior Correctional Police Officer for the New Jersey Department of Corrections for twelve years at Mahan. In August 2019, Minivich was a Shift Officer at Mahan. He had known appellant for a while and they had a good relationship.

Minivich worked third shift on August 17, 2019. Lieutenant Nestor ran a lineup of officers at 10:00 p.m. He reminded HUOs to make sure they saw bodies in bed when conducting inmate counts. After the group started to leave the lineup, appellant indicated he had something to say. He said to Officer Moretti, "If you have something to say on Facebook, say it to my face." Then appellant began fuming and told the lined-up officers, "I am a different motherfucker. . .I'll fuck up your wife and kids." This was not directed towards any particular officer, and it appeared appellant was simply venting. Lieutenant Nestor then stated that his lineup was not the place for those comments.

Although not on Facebook himself, Minivich thought someone said something about appellant on Facebook. Minivich still did not know what had been said on Facebook. Minivich never felt threatened by appellant's statements.

Ricky Nester [1] had been at Mahan for five years. He was the Area Lieutenant, in charge of officers on the third shift on August 17, 2019. Nester conducted a lineup of officers in Thompson Hall, to take attendance, not to go over any special instructions. Appellant said he wanted to discuss social media posts and Nester said that was not the time or place; officers never addressed lineups. He did not hear appellant use any

[1] The witness's name has been presented as both "Nester" and "Nestor."

threatening language. Moretti and appellant were at opposite ends of the line during the lineup. There was no conspiracy to try to get appellant into trouble.

Roxanne Lemonies has been at Mahan for eight years, enforcing rules and ensuring inmate safety. She had a good working relationship with appellant. She worked third shift on August 17, 2019, and was at Nester's lineup. Nester reminded the officers to do their counts every half hour. At the end of the lineup, in the presence of Nester and the officers, appellant said, "Can I say something? Anyone with something to say on social media can say it to my face. I have the screen shots. I'll fuck up your family." Appellant then got out of line, turned towards Officer Moretti, and told him that they could take it outside. Nester then brought the lineup to a close. There was no conspiracy to try to get appellant into trouble.

Bruno DeAngelo has been a Senior Corrections Police Officer at Mahan for fifteen years, working in security. He had a good working relationship with appellant. DeAngelo worked the third shift on August 17, 2019. He attended Nester's lineup. At the end of the lineup, appellant said, "If anyone had something to say about the other night, do not do it on social media. Say it to me." Moretti, standing next to appellant, told him to calm down, and appellant told Moretti, "If you have something to say, say it to my face," before saying, "Meet me at the gate." There was no conspiracy to try to get appellant into trouble.

Cody DeBenedetto had been a Senior Corrections Police Officer at Mahan for five years, maintaining security and enforcing the rules. He had a good working relationship with appellant. On August 17, 2019, DeBenedetto worked the third shift, and attended Nester's 10:00 a.m. lineup. Nester read a memorandum reminding officers to see a physical body when they do their inmate counts, and reminded them to make sure that things were locked. As the lineup was being dismissed, appellant said he had something to add: "I'm a grown adult. If you have something to say, we can talk outside or talk to me about it, but don't do it on social media." DeBenedetto had never seen the alleged Facebook comments. Moretti then told appellant to calm down. Appellant responded by walking up to Moretti and saying, "Especially you. I'll fuck up

you and your cousins." There was no physical contact between appellant and Moretti. There was no conspiracy to have appellant terminated.

For appellant:

Carlos Velasco was employed at Mahan for three years, through November 2018, not at the same time as appellant. He performed inmate counts for first and third shifts, but could not say how often he worked third shift. When performing counts, one must be sure there is a living breathing body. There were times Velasco was instructed not to call in counts between 12:00 a.m. and 4:00 a.m., but he would always immediately enter counts in his logbook. Sometimes he would call in his inmate counts but on rare occasion he would not receive a response from the "blotter" at Central. IMPs—the rules and regulations for each unit—were available on the ground floor but he could not find a copy on the floors he worked. He had issues with a window not locking in 2016.

Matthew Moretti [2] had been a Senior Corrections Police Officer at Mahan for over eight years. He was present for Nester's lineup of August 17, 2019, in which he discussed checking windows and making sure there was a body in the bed when performing inmate counts.

As Nester was finishing the lineup, appellant asked if he could address the group, which Nester approved. Appellant told the group that if any of them had anything to say about him, they should say it directly to him, before telling them that there was plenty of green grass outside where they could handle things. Appellant told the lineup he would "fuck everybody up, their mother, their father, their kids."

Moretti attempted to calm appellant, but appellant got in his face and said it was Moretti that he had been referring to. Appellant pointed his finger at him. Nester sent the officers back to work as Moretti continued to de-escalate the situation. Moretti told appellant he had no problem with him, and they both agreed they were grown men.

[2] Mr. Moretti had been referred to by the parties and in the transcripts alternatively as Matthew Martti, Thomas Moretti and Thomas Martti.

Appellant appeared agitated and spoke with a raised voice. Moretti did not know what appellant had originally been referring to; he had never seen any social media posts regarding appellant. Appellant got close to Moretti but did not strike or touch him. Moretti did not report this incident; Nester did. There was no conspiracy to get appellant into trouble.

Appellant Gales did not testify at the hearing.

Credibility:

In evaluating evidence, it is necessary to assess the credibility of the witnesses. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness' story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950).

A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, at pages 521–22; See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may also reject testimony as "inherently incredible" when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Further, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super.

600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

Matthew Leitner had no personal knowledge of any of the facts in this particular case. He narrated video of the interior of Stowe 2 North, and had sat in on an interview of appellant. Because the video was played during the hearing, and the documents and video spoke for themselves, Leitner's testimony was essentially limited to discussing the layout of the floor, his interpretation of the videos, and his recollections from the interview of appellant. He was not permitted to testify as to the report of the claims against appellant because he did not prepare a report and any such report had not yet been admitted into evidence. Regarding the floor layout, videos and recollections from the interview, Leitner was a knowledgeable and credible witness, although the court will rely on its own interpretation of what was on the videos.

Irving Gray testified in a direct and honest manner and I found his testimony credible.

Thomas McDowell was a knowledgeable witness, who said what he knew and made it clear when he did not know something. He was a credible witness.

Michael White spoke calmly and displayed a great deal of knowledge of procedures. I found him to be a credible witness.

Igor Minivich answered clearly and in a seemingly honest and straightforward manner. He was a credible witness.

Ricky Nester spoke and answered in a forthright manner. But various statements of his did not jibe with statements made by other witnesses to the lineup incident. Also, at the end of cross-examination, appellant used a gesture to ask Nester to give him a phone call. I did not find his testimony to be credible.

Roxanne Lemonies spoke softly but answered directly. She did not seem to recall much that was said by Nester, but was able to expound on her responses during cross-examination. She was a credible witness.

Bruno DeAngelo testified to what he knew, responding in short, precise answers. He offered little detail. At times he seemed to contradict himself. I did not find him to be a credible witness.

Cody DeBenedetto spoke directly and seemed very sure of his answers, and thus appeared credible.

Carlos Velasco was not at Mahan the night of the attempted escape nor during the Nester lineup. He stopped working at Mahan in November 2018. While at Mahan he worked first shift, and only worked third shift on occasion. He also failed to display any knowledge about procedures at Mahan, seemingly unable to answer any questions with specificity. He contradicted himself as to the protocols of inmate counts: at one point he said the protocol is to perform the inmate count, enter it in your logbook, then call in the count, but he later said the order was count, call in, then enter in logbook. He was not a credible witness.

Matthew Moretti testified in a calm manner with no hesitation. He made clear what he knew and what he did not know. I found his testimony to be credible.

Therefore, after reviewing the testimony and the evidence, and based on my review of the documents and the videos, I **FIND,** by a preponderance of credible evidence, the following **FACTS**:

The Inmate Count Issue:

On August 16 and 17, 2019, appellant was a Senior Correctional Police Officer employed by the New Jersey Department of Corrections, working for respondent, Edna

Mahan Correctional Facility as the third shift housing unit officer (HUO) for Stowe Two North, Wing Six; third shift was 10:00 p.m. until 6:00 a.m. the following morning; Stowe Two North was a second floor housing unit, part of the Stowe Two Unit, which had six wings, approximately eight inmates per wing; third shift HUOs were required to perform security tours and inmate counts at 10:00 p.m., 11:00 p.m., 12:00 a.m., and then one every thirty minutes until 5:00 a.m.; inmate counts were conducted to ensure inmate safety and to prevent escapes; an HUO was to immediately call their count in to Central Control, then enter the count into their logbook; if an inmate was sleeping or covered with a blanket, the HUO needed to do something to see movement; HUOs were trained at the Academy and at the institution, and needed to follow the Law Enforcement Personnel Rules and Regulations promulgated by NJDOC.

When not on break, officers were allowed to go into the break room while conducting tours, but were not permitted to stay in a break room—an HUO was required to be working at his desk unless conducting tours/counts; on August 16, 2019, the Stowe Two North logbook showed appellant taking a meal break at 12:42 a.m., finishing at 1:26 a.m.; appellant entered inmate counts in his logbook for 2:00 a.m., 2:30 a.m., 3:00 a.m., 3:30 a.m., 4:00 a.m., and 4:30 a.m.

Appellant walked into the break room at 1:24 am, staying until 2:15 a.m., at which time he briefly returned to the officer's desk; appellant returned to the break room at 2:17 a.m., staying there until 3:41 a.m.; at 3:41 a.m. appellant walked towards the front door of the housing unit, before returning to the break room at 3:43 a.m.; appellant left the break room at 4:05 a.m., returned to the desk at 4:07 a.m., then returned to the break room at 4:18 a.m.; during the time periods appellant was to conduct inmate counts, he was seen on the camera, in the break room; appellant hung out with Officer McDowell in the break room, watching television, sometimes with his eyes open, sometimes closed; appellant never left the break room to conduct his inmate counts; appellant was not seen on camera conducting his inmate counts; appellant stated during his SID interview that he had conducted and reported all the inmates counts he was required to conduct, and that he conducted the inmate count of Inmate Summerford.

On August 16, 2019, Inmate Dawn Summerford was housed in Stowe Two North, Wing Six; at 3:16 a.m., Inmate Summerford exited Wing Six and went to Wing Three, where she attempted to escape by exiting the window, triggering a shaker alarm on the exterior fence behind the Stowe Housing Unit at 3:35 a.m.; Inmate Pierce advised Officer McDowell at 5:15 a.m. that there was someone on a fire escape; Officer McDowell investigated the Pierce reporting, and at 5:15 a.m. approached appellant in the break room and asked him to investigate further; appellant identified the inmate as Inmate Summerford; McDowell went to Wing Six to Inmate Summerford's room, where he saw a made, empty bed where Inmate Summerford should have been.

The Lineup Issue:

Lieutenant Nester ran a lineup of officers at 10:00 p.m. on August 17, 2019, where he reminded HUOs to make sure they saw bodies in bed when conducting inmate counts; as the lineup was ending, appellant indicated he had something to say; appellant told the officers something akin to, "If you have something to say on social media, say it to my face"; appellant began venting and told all the lined-up officers, "I'll fuck up your wife and kids;" Moretti attempted to calm appellant, and appellant got in Moretti's face; Lieutenant Nester stated that his lineup was not the place for those comments and dismissed the lineup; appellant told Officer Moretti that they could take it outside, but the conversation ended; there was no conspiracy to get appellant into trouble.

LEGAL ARGUMENT AND CONCLUSION

The issue is whether the respondent, Edna Mahan Correctional Facility, had proven by a preponderance of the evidence that it acted properly in terminating appellant's employment as a Housing Unit Officer due to incompetency, inefficiency or failure to perform duties; neglect of duty; loafing, idleness or willful failure to devote attention to tasks which could result in danger to persons or property; sleeping while on

duty; falsification: intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation, or other proceeding; conduct unbecoming of an employee; negligence in performing duty resulting in injury to persons or damage to property; negligently contributing to an elopement or escape; violation of administrative procedures and/or regulations involving safety and security; threatening, intimidating, harassing, coercing, or interfering with fellow state employees on State Property; and violation of a rule, regulation, policy, procedure, order or administrative decision.

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

In a civil service disciplinary case, the employer bears the burden of providing sufficient, competent and credible evidence of facts essential to the charge. N.J.A.C. 4A:2-1.4. Thus, respondent had both the burden of persuasion and the burden of production, and was required to demonstrate by a preponderance of the competent, relevant and credible evidence that appellant committed the charged infractions listed in the Final Notices of Disciplinary Action. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). See generally Coleman v. E. Jersey State Prison, OAL Dkt. No. CSV 01571-03, Initial Decision (February 25, 2004); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550, 560 (1982); In re Darcy, 114 N.J.Super. 454, 458 (App.Div. 1971).

The Court in In re Polk, 90 N.J. 550, 560 (1982) held,

> This jurisdiction has long recognized that the usual burden of proof for establishing claims before state agencies in contested administrative adjudications is a fair preponderance of the evidence. In Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), we observed that: "In proceedings

> before an administrative agency, . . . it is only necessary to establish the truth of the charges by a preponderance of the believable evidence and not to prove guilt beyond a reasonable doubt." See In re Suspension or Revoc. License of Kerlin, 151 N.J. Super. 179, 184 n.2 (App. Div. 1977) ("Where disciplinary proceedings with respect to a profession or occupation are vested in an administrative agency in the first instance, the charges must be established by a fair preponderance of the believable evidence").

A preponderance of the evidence has been defined as that which "generates belief that the tendered hypothesis is in all human likelihood the fact." Martinez v. Jersey City Police Dept., CSV 7553-02, Initial Decision (October 27, 2003) (quoting Loew v. Union Beach, 56 N.J.Super. 93, 104 (App.Div. 1959)). "Fair preponderance of the evidence" means the greater weight of credible evidence in the case; it does not necessarily mean the evidence of the greater number of witnesses but means that evidence which carries the greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975) citing Model Jury Charge, Criminal, 3:180. See also, Zive v. Stanley Roberts, Inc., 182 N.J. 436, 457 (2005)(applying the standard to a wrongful termination).

The burden of proof cannot be accomplished only by introducing hearsay evidence. N.J.A.C. 1:1-15.1(b). In the Matter of Nathaniel Parker, Juvenile Justice Commission, 2009 N.J. AGEN LEXIS 250, *14-15, OAL Dkt.. No. CSV 02994-08 (April 15, 2009), the Court held, in relevant part,

> While hearsay evidence is admissible in administrative hearings, N.J.A.C. 1:1-15.5, in order to prove its case, the appointing authority must produce a residuum of competent evidence to prove any ultimate fact. Weston v. State, 60 N.J. 36 (1972). Although credible hearsay evidence may serve to

> buttress the foundation of credible competent evidence such as to provide a more satisfactory degree of proof of guilt, hearsay that is not otherwise admissible under the Rules of Evidence (thus competent) cannot by itself support an ultimate finding of fact.

Incompetency, inefficiency, or failure to perform duties, in violation of N.J.A.C. 4A:2-2.3(a)(1), and neglect of duty, in violation of N.J.A.C. 4A:2A-2.3(a)(7)

Respondent relied on caselaw to define "incompetence," stating it is "a lack of the ability or qualifications necessary to perform the duties required of an individual [and] a consistent failure by an individual to perform his/her prescribed duties in a manner that is minimally acceptable for his/her position." Sotomayer v. Plainfield Police Dep't, OAL Dkt. No. CSV 09921-98, Initial Decision (December 6, 1999) (citing Steinel v. City of Jersey City, 7 N.J.A.R. 91 (1983); Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980)), adopted, MSB (January 24, 2000), http://njlaw.rutgers.edu/collections/oal/.

Respondent stated that "inefficiency" had been defined as the "quality of being incapable or indisposed to do the things required of an officer in a timely and satisfactory manner." Glenn v. Twp. Of Irvington, OAL Dkt. No. CSV 05051-03, Initial Decision (February 25, 2005), adopted MSB (May 23, 2005), http://njlaw. rutgers.edu/collections/oal/.

Respondent further asserted that "neglect of duty" meant that an employee "neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, OAL Dkt. No. CSV 05072-07, Initial Decision (February 5, 2009), adopted, Civil Service Commission (March 27, 2009), http://njlaw.rutgers.edu/collections/oal/. Respondent offered a definition for "neglect" to mean a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977), of "duty" to indicate conformance to the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J.

450, 461 (1957), and "neglect of duty" to include the omission of performing a required duty in addition to misconduct or misdoing. State v. Dunphy, 19 N.J. 531, 534 (1955).

Appellant failed to perform his inmate counts on August 16, 2019. Although he officially signed-out for his mid-shift meal break from 12:42 a.m. to 1:26 a.m., the surveillance video showed appellant in the break room almost continually from 1:24 a.m. through 4:18 a.m. He was initially in the break room from 1:24 a.m. until 2:15 a.m., when he briefly returned to the officer's desk. He returned to the break room at 2:17 a.m., remaining there until 3:41 a.m. At 3:41 a.m. appellant walked towards the front door of the housing unit, before returning to the break room at 3:43 a.m. Appellant then left the break room at 4:05 a.m., returned to the desk at 4:07 a.m., then returned to the break room at 4:18 a.m.

During none of these two-minute excursions from the break room was appellant seen conducting his inmate counts, nor were these two-minute excursions even at the same times that appellant was scheduled to perform his inmate counts. Appellant was in the break room at 2:00 a.m., not in Wing Six performing an inmate count. Appellant was in the break room at 2:30 a.m., at 3:00 a.m., at 3:30 a.m. and at 4:00 a.m., instead of being in Wing Six performing his inmate counts. The surveillance video would have shown appellant walking through the wings performing his counts, but the only time appellant walked towards Wing Six was at 4:05 a.m., and even then he only walked to the officers' desk.

Appellant admitted in his SID interview that he was trained on how to perform inmate counts, which included making sure there was a living breathing body in the bed. Because Inmate Summerford had exited Wing Six at 3:16 a.m., if appellant had conducted his count at 3:30 a.m., he would have seen that Inmate Summerford was not in the bed, because there would have been no living breathing body in the bed and because the bed was still made and appeared unslept-in. Appellant would then have been able to report the missing inmate two hours before when he finally became aware

that Summerford had attempted escape. Similarly, if appellant had conducted his count at 4:00 a.m., he would have seen that Inmate Summerford was not in the bed, because there was no body and the bed was still made and appeared unslept-in. As Inmate Summerford tripped an alarm on the exterior fence at 3:35 a.m., it is clear that Summerford was not in her bed either at 4:05 a.m. or 4:30 a.m., and that appellant would have discovered this fact if he had actually performed his inmate counts as he logged in that he had.

Appellant argued that much of the evidence proffered by respondent was hearsay. Hearsay, however, is admissible in the OAL, N.J.A.C. 1:1-15.5(a), subject to there being at least a residuum of supporting evidence. Here, the surveillance videos corroborated any potentially hearsay statements regarding appellant failing to conduct his inmate counts. Additionally, the logbook entries which did not match with what was seen on the surveillance video were business records, a hearsay exception, pursuant to N.J.R.E. 803(c)(6). The logbook entries were made by appellant, constituting statements by a party-opponent, which would not be excluded by the hearsay rule. N.J.R.E. 803(b)(1). Further, statements made by appellant in the SID interview would not be hearsay.

Appellant further argued that this court should take an adverse inference against respondent for failing to question Officer Minivich about the incident on August 16, 2018. Petitioner claims there was testimony that Minivich conducted at least one inmate count that evening, based on different handwriting in appellant's logbook, which

the investigators had not fully investigated. Petitioner went through a lengthy argument in its summation brief that there is caselaw setting forth a test for when a negative inference could be drawn from a failure to call a witness.

But appellant was wrong to state that there was evidence introduced that Minivich may have done an inmate count on behalf of appellant on August 16. Petitioner reiterated the testimony of Officer McDowall regarding Minivich filling in on inmate counts for officers on break, stating, "On redirect, McDowell said that Gales took

only one break on August 16, 2019, so Minivich would have only done one count for Gales that night. On re-cross, McDowell stated that if Minivich had come in at the beginning of Gales' forty-minute break, he might have conducted two counts for Gales that evening."

That testimony, however, did not establish that Minivich had in fact conducted any inmate counts on behalf of appellant that evening. The testimony was only that when Minivich conducted substitute inmate counts, he only performed these when the responsible officer was on a break. Based on the allowed forty-minute break time compared to thirty-minute inmate count requirements, McDowall's testimony only established that, at a maximum, Minivich might have only done one or two of appellant's counts that shift. Appellant was required to perform counts every half-hour from midnight till end of shift at 6:00 a.m., meaning he was to perform twelve counts during that time frame. It is irrelevant whether Minivich might have performed counts during appellant's official break, and irrelevant whether Minivich was questioned as to whether he performed counts on behalf of appellant. The issue is whether appellant actually conducted the counts he wrote in his logbook for 2:00 a.m., 2:30 a.m., 3:00 a.m., 3:30 a.m., 4:00 a.m., and 4:30 a.m. Appellant misconstrued the testimony and attempted to obfuscate the issue of appellant's culpability by introducing an issue of negative inferences. Further, appellant himself did not testify, and could have himself addressed whether he actually performed those counts between 2:00 a.m. and 5:00 a.m., when it was clear that he had not left the break room to conduct his counts.

Accordingly, I **FIND** that appellant did not conduct his inmate counts between 2:00 a.m. and 5:00 a.m., and **CONCLUDE** that such failure constituted a failure to perform his duties as set forth in N.J.A.C. 4A:2-2.3(a)(1) as well as a neglect of duty as set forth in N.J.A.C. 4A:2A-2.3(a)(7).

N.J.A.C. 4A:2A-2.3(a)(12) other sufficient causes; Human Resources Bulletin ("HRB") HRB 84-17, Section B2 neglect of duty, loafing, idleness or willful failure

to devote attention to tasks which could result in danger to persons or property; HRB 84-17, Section B4 sleeping while on duty

Based on the testimony and a review of the surveillance footage, it was clear that appellant falsified records regarding his meal break. Appellant entered that he was taking his meal break from 12:42 a.m. to 1:26 a.m. However, he actually entered the meal room at 1:24 a.m., and remained in the meal room, except for three two-minute intervals when he stepped away, from 1:24 a.m. through 4:18 a.m. That indicated an almost three-hour meal break. At times he had his eyes closed while in the meal room, which supported the allegation that appellant had been asleep while he was supposed to be actively on-duty. He had been chatting with Officer McDowall and watching television, which supported the allegation that appellant had been loafing, idle and/or willfully failing to devote his attention to his tasks while he was supposed to be actively on-duty. Nothing had been offered by appellant to contravene the evidence provided by respondent that appellant had been in a break room for three hours, and not conducting his inmate counts.

During appellant's extended meal break in the break room and failure to conduct inmate counts, Inmate Summerford was able to begin her escape attempt without being caught by appellant, the HUO assigned to her wing. Further, Inmate Summerford injured herself while exiting the second story window during her escape attempt and had to receive medical attention.

Accordingly, **I CONCLUDE** that appellant's extended meal breaks and failure to conduct his inmate counts constituted neglect of duty, loafing, idleness and a willful failure to devote attention to tasks which could result in danger to persons or property, and that such behavior by appellant constituted negligence in performing one's duty resulting in injury to persons or damage to property and negligently contributing to elopement or escape.

HRB 84-17, Section C8 falsification: Intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation, or other proceeding

The logbook for Stowe Two North indicated that appellant entered inmate counts into the logbook for 2:00 a.m., 2:30 a.m., 3:00 a.m., 3:30 a.m., 4:00 a.m., and 4:30 a.m. However, appellant was actually in the break room from 1:24 a.m. through 4:18 a.m. Therefore, any information entered into the logbook represented falsified information, as appellant had not actually conducted the inmate counts at those time periods. Any statements provided by appellant during the investigation asserting that he had in fact conducted those inmate counts were therefore false statements. Aside from testimony and video evidence, the proof that appellant failed to conduct all of the counts entered in his logbook was that Inmate Summerford had already started her escape attempt by leaving her room at 3:16 a.m., and remaining away from her room until being caught at 5:15 a.m. Therefore, she was not physically in her bed at 3:30 a.m., 4:00 a.m., 4:30 a.m. and 5:00 a.m.; if appellant had conducted proper inmate counts as he was trained, he would have seen nobody in Summerford's bed and would have immediately reported the missing inmate, which he did not do.

Accordingly, I **CONCLUDE** that appellant had violated HRB 84-17, Section C8 falsification: Intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation, or other proceeding.

HRB 84-17, Section C11 conduct unbecoming of an employee; HRB 84-17, Section D7 Violation of administrative procedures and/or regulations involving safety and security; and HRB 84-17, Section E1 violation of a rule, regulation, policy, procedure, order, or administrative decision; Human Resource Bulletin 84-17, C. personal conduct 24. threatening, intimidating, harassing, coercing, or interfering with fellow state employees on State Property

Regarding violations of administrative procedures and/or regulations involving safety and security and violations of a rule, regulation, policy, procedure, order or administrative decision, it was documented that IMP Custody Directives #1 and #2 addressed HUO procedures and responsibilities. They required that officers conduct frequent, irregularly timed tours of all areas under their control, as well as inmate counts at set times. Respondent cited to Department of Corrections Rules and Regulations state that, "Officers shall devote their full attention to their assignments to ensure that all duties are performed in accordance with current rules and regulations. Lack of diligence on the part of the officer will not be tolerated." These protocols also stated that no officers should make false or misleading statements or reports nor enter any false or misleading statements in any official book or record.

In the instant matter, the evidence showed that appellant remained in the break room for a nearly three-hour period without leaving to conduct inmate counts or even perform any walking tour of his assigned wing. Appellant remained in a meal/television room, often with eyes closed, or chatting with his co-worker or watching television. This evidenced a lack of diligence on appellant's part, and a failure to devote his full attention to his duties. Appellant made things worse for himself by falsely reporting his meal break time, entering false information regarding inmate counts, then lying about his violations in the SID investigation. Appellant chose not to testify at the within hearing, where he could have offered testimony contradicting the evidence presented against him.

"Conduct unbecoming a public employee" is one of the grounds for discipline of public employees. N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); See also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of-conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, at 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of

any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Conduct unbecoming is a fact sensitive determination rather than one based on a legal formula. In the Matter of Craig Venson, City of Plainfield, OAL Dkt. No. CSV 07545-07, Initial Decision (June 9, 2009), affirmed, Civil Service Commission (August 6, 2009).

Respondent argued that appellant's failure to conduct counts and falsifying of records constituted "unbecoming conduct." Entering inmate counts in a logbook that had not been actually performed would be akin to filing a false report, which would constitute conduct unbecoming. Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980); Palladino v. Twp. Of Waterford, 227 N.J. 114 (2016). The finding that a police officer submitted a false report or committed some level of untruthfulness would constitute conduct unbecoming of a public employee, because such conduct created "issues whereby [the officer] cannot testify in any criminal court without a prosecutorial disclosure of [the officer's] 'Brady Issue,' thereby, reducing [the] ability to serve as a police officer." In the Matter of Edmund Ansara, City of Millville, Police Dept., OAL Dkt. No. CSR 08490-16 (November 28, 2016). The filing of a false police report was conduct that would serve to irreparably undermine the public's confidence in the police. Cosme v. E. Newark Twp. Comm., 304 N.J.Super. 191, 206 (App.Div. 1997), cert. denied 156 N.J. 381 (1998).

Additionally, any discussion of unbecoming conduct must also include appellant's behavior during the incident making up the violation set forth in the second FNDA, the lineup incident. The evidence proffered by respondent showed that appellant made threatening comments at the end of an officers lineup on August 17, 2019. Lieutenant Nester ran a lineup of officers at 10 p.m., where he reminded HUOs to make sure they saw bodies in bed when conducting inmate counts. As the lineup was ending, appellant

indicated he had something to say, then proceeded to tell his fellow officers that if they had something to say about him on social media, they should say it directly to him. He then stated something approximating, "I'll fuck up your wife and kids." When Officer Moretti attempted to calm appellant, the appellant got in Moretti's face. Even after Lieutenant Nester told appellant that a lineup was not the place for those types of comments, and after Nester dismissed the lineup, appellant continued to offer threats to Moretti, by saying they could take their discussion outside, a commonly used threat that in this situation indicated that appellant was prepared to engage in a physical fight with Moretti. This language from appellant clearly met the prohibition of threatening, intimidating, harassing, coercing, or interfering with fellow state employees on State Property, as set forth in Human Resource Bulletin 84-17, C. personal conduct 24.

Accordingly, I **CONCLUDE** that appellant violated HRB 84-17, Section C11 conduct unbecoming of an employee; HRB 84-17, Section D7 violation of administrative procedures and/or regulations involving safety and security; and HRB 84-17, Section E1 violation of a rule, regulation, policy, procedure, order, or administrative decision; and Human Resource Bulletin 84-17, C. personal conduct 24. threatening, intimidating, harassing, coercing, or interfering with fellow state employees on State Property.

PENALTY

As stated above, an appellant's rights and duties are governed by the Civil Service Act and accompanying regulations. Further, a civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.

In assessing the propriety of a penalty in a civil disciplinary action, the primary concern is the public good; factors to be considered are the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. North Princeton Development Center, 96 N.J.A.R. 2d 465 (CSV)(1996).

Progressive discipline is required in those cases where an employee is guilty of a series of offenses, none of which is sufficient to justify removal. Harris v. North Jersey Developmental Center, 94 N.J.A.R. 2d (CSV)(1994); West New York v. Bock, 38 N.J. 500, at 522. Although an employee's past record may not be considered for purposes of proving the present charge, past misconduct can be a factor in determining the appropriate penalty for the current misconduct. In re Herrmann, 192 N.J. 19, 29 (2007); In re Carter, 191 N.J. 474, 484 (2007); Bock, 38 N.J. at 522-23. The seriousness of appellant's infraction must also be balanced in the equation of whether removal or something less is appropriate under the circumstances. Henry, 81 N.J. at 580. However, it is well established that when the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of the 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).

Furthermore, a law-enforcement officer is held to a higher standard of conduct than other employees, and is expected to act in a responsible manner, with honesty, integrity, fidelity, and good faith. In re Phillips, 117 N.J 567, 576 (1990); Reinhardt v. E. Jersey State Prison, 97 N.J.A.R.2d (CSV) 166. They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), cert. denied, 47 N.J. 80 (1966).

Maintenance of strict discipline is important in military-like settings such as police departments, prisons, and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority are not to be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

The within matter is not one of progressive discipline. Appellant's only past discipline consisted of attending counseling and an official reprimand. The issue here is whether appellant's violations as stated above were so egregious as to warrant removal. Appellant did not address in his summation brief whether removal was warranted if the charges against him were upheld.

Appellant took a nearly three-hour meal break on the date in question. During that time, he hung out in a television room, chatting with a fellow officer and allowing himself to shut his eyes for a while. He failed to conduct his inmate counts, yet he falsely wrote in his logbook that he had. Appellant's neglect and failure to perform his duties gave opportunity to an inmate to escape out a second-floor window and remain on the loose for approximately two hours before she was caught. The inmate was injured during her attempted escape. Appellant's failure to conduct his official duties left a wing of a correctional facility unsecured. Further, appellant falsified his timesheets and logbook entries, then lied about his entries during the official investigation. Finally, in an apparent reaction to other officers talking about his failures leading to an escape attempt, appellant made threats of physical violence against his fellow officers.

The public good would be affected by returning an officer to a position where he previously failed to perform his official duties then falsified records to cover up his violations. Appellant Gales was assigned the job of monitoring the security of a wing of a correctional institution. He allowed an escape attempt to take place on his watch. Although thwarted, an escaped convict would pose a security threat to other inmates, other prison officials, and the public at large. Prison safety was of paramount concern, and the failure to follow official protocols was an egregious offense. Appellant Gales

was held to a higher standard of conduct than other State employees, and was expected to act in a responsible manner, with honesty, integrity, and good faith. He failed to meet these standards. Appellant was expected to follow designed protocols to ensure safety, and his failure to do so presented the public with the image of an undependable officer. There was a reason that strict discipline was important in settings such as police departments and correctional facilities, and why the failure to obey orders could not be tolerated: failure to adhere to guidelines and protocols could cause a direct threat of harm to the general public.

Therefore, I **CONCLUDE** that respondent met its burden of proof and burden of production, by showing that appellant's actions related to the incidences on August 16 and August 17, 2019, were violations of N.J.A.C. 4A:2A-2.3(a)(1) incompetency, inefficiency or failure to perform duties; N.J.A.C. 4A:2A-2.3(a)(7) neglect of duty; N.J.A.C. 4A:2A-2.3(a)(12) other sufficient causes; Human Resources Bulletin (HRB) HRB 84-17, Section B2 neglect of duty, loafing, idleness or willful failure to devote attention to tasks which could result in danger to persons or property; HRB 84-17, Section B4 sleeping while on duty; HRB 84-17, Section C8 falsification: Intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation, or other proceeding; HRB 84-17, Section C11 conduct unbecoming of an employee; HRB 84-17, Section D1 negligence in performing duty resulting in injury to persons or damage to property; HRB 84-17, Section D2 negligently contributing to an elopement or escape; HRB 84-17, Section D7 Violation of administrative procedures and/or regulations involving safety and security; and HRB 84-17, Section E1 violation of a rule, regulation, policy, procedure, order, or administrative decision; N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause; and section C,. personal conduct 24: threatening, intimidating, harassing, coercing, or interfering with fellow state employees on State Property.

I further **CONCLUDE** that the respondent, Edna Mahan Correctional Facility, had proven by a preponderance of the evidence that it acted properly in terminating appellant's employment as a Housing Unit Officer.

ORDER

I **ORDER** that the disciplinary action of the respondent, Edna Mahan Correctional Facility, in removing appellant Gales from his position as a Housing Unit Officer at Edna Mahan Correctional Facility, is **AFFIRMED**, and that the within appeal is hereby **DISMISSED**.

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** pursuant to N.J.A.C. 1:1-18.6., by which law it is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

October 5, 2022
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: October 5, 2022

Date Mailed to Parties: October 5, 2022

JNR/dw

APPENDIX

WITNESSES

For appellant:

Matthew Leitner
Irving Gray
Thomas McDowell
Michael White
Igor Minivich
Ricky Nester
Roxanne Lemonies
Bruno DeAngelo
Cody DeBenedetto

For respondent:

Carlos Velasco
Matthew Moretti

EXHIBITS

For appellant:

Summationbrief, dated April 4, 2022
Responsive brief, dated April 18, 2022
P-2 Civil Service Commission Decision
P-4 Surveillance ootage
P-5 Surveillance footage
P-6 Window photoP-7 Photo of inmate room
P-8 Inmate audio interview

For respondent:

Summation brief, delivered April 4, 2022

Responsive brief, delivered April 19, 2022

R-1 Video of nterior of Stowe Two North

R-2 Video of exterior of Stowe Two North

R-3 Copy of third shift logbook entries, for August 16, 2019

R-4 Surveillance footage (same as P-4)

R-5 Surveillance footage on Inmate Summerford

R-6 Alarm Log, dated August 16, 2019

R-7 Recorded SID interview of appellant, dated September 11, 2019

R-8 Special Custody Report, from August 16, 2019

R-9 Summary of Lieutenant Arrington interview with appellant, dated August 21, 2019

R-10 Recorded SID interview of appellant, dated September 30, 2019

R-11 Leitner Investigation Report

R-12 Department of Corrections Personnel Rules and Regulations

R-13 Special Custody report, dated August 20, 2019

R-14 IMP Custody Directive #2

R-15 IMP Custody Directive #1

R-17 Minivich Supplemental Answers regarding August 17, 2019

R-18 Nester Special Custody report

R-19 Nester Supplemental Answers

R-20 Lemonies Supplemental Answers

R-21 Arrington Supplemental Answers

R-22 Final Notice of Disciplinary Action, dated October 25, 2019

R-23 Final Disciplinary Action with PNDA, dated January 14, 2020

R-24 Appellant Disciplinary Work History

R-25 Officer Moretti Supplemental Answers