



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 u. Public Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004). In this matter, the exceptions filed by the appointing authority 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.

Moreover, based on the sustained charges, the Commission agrees with a penalty short of removal. The ALJ’s recommended 90 working day suspension is appropriate given the circumstances presented and the fact that the appellant has been found guilty only of charges associated with the reporting of the incident. In its *de novo* review of the penalty, the Commission finds that the 90 working day suspension is sufficient to impress upon the appellant that such inaccurate reporting is unacceptable and that any further infractions may lead to disciplinary action up to and including removal.

Since the removal has been modified, the appellant is entitled to be reinstated with mitigated back pay, benefits, and seniority pursuant to *N.J.A.C. 4A:2-2.10* from 90 working days after the first date of separation until the date of actual reinstatement. However, he is not entitled to counsel fees. *N.J.A.C. 4A:2-2.12(a)* provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in the disciplinary appeal is the merits of the charges. *See Johnny Walcott v. City of Plainfield*, 282 N.J. Super. 121,128 (App. Div. 1995); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, charges were sustained, and major discipline was imposed. Consequently, as appellant has failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12*, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division’s decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission’s decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

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

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

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

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 23<sup>RD</sup> DAY OF NOVEMBER, 2022

*Deirdre' L. Webster Cobb*

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Deirdré L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
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Attachment



**State of New Jersey**  
**OFFICE OF ADMINISTRATIVE LAW**

**INITIAL DECISION**

OAL DKT. NO. CSR 04294-22

AGENCY DKT. NO. N/A

2022-2951

**IN THE MATTER OF GUSTAVO FRANCA,  
NORTHERN STATE PRISON, DEPARTMENT OF  
CORRECTIONS,**

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**Robert R. Cannan, Esq.**, for appellant Gustavo Franca (Markman & Cannan,  
attorneys)

**Eric A. Zimmerman**, Deputy Attorney General, for respondent Northern State  
Prison, Department of Corrections (Matthew J. Platkin, Attorney General  
of New Jersey, attorney)

Record Closed: October 11, 2022

Decided: October 18, 2022

BEFORE **NANCI G. STOKES**, ALJ:

**STATEMENT OF THE CASE**

Gustavo Franca, a senior correctional police officer at Northern State Prison (NSP), used physical force with an inmate he believed was attempting suicide by grabbing strings from his neck. However, Franca failed to document physical force and inaccurately described the reasons for force. Even though Franca's use of force was objectively reasonable under the circumstances, is discipline warranted? Yes. Under the

NSP and NJDOC use of force policies and procedures, personnel must correctly report all uses of force.

### **PROCEDURAL HISTORY**

On December 21, 2021, the New Jersey Department of Corrections (NJDOC) issued a Preliminary Notice of Disciplinary Action, charging Franca with violations of the Civil Service Code, including conduct unbecoming a public employee under N.J.A.C. 4A:2-2.3(a)(6), and other sufficient cause under N.J.A.C. 4A:2-2.3(a)(12). The NJDOC also charged Franca with violations of the Human Resources Bulletin of the NJDOC, HRB 84-17, as amended. These violations included: C-5, inappropriate physical contact or mistreatment of an inmate; C-5a, failure to report abuse of an inmate by an employee or other designated person; C-8, intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation, or other proceeding; D-7, administrative procedures and regulations involving safety and security; and E-1, covering violations of a rule, regulation, policy, procedure, order, or administrative decision.

The NJDOC specified that a Special Investigation Division (SID) investigation disclosed that on January 3, 2021, while assigned on the second shift as a general assignment (GA) officer, Franca utilized unlawful, excessive force on an inmate and falsified reports. The video footage from that day disclosed that Franca was involved in a Code 66 on the Stabilization Unit (SU) from which he submitted reports that included intentional factual misstatements of the incident, portraying that the inmate was being assaultive and self-injurious when he entered the unit. Principally, Franca's Use of Force CUS -102 (CUS - 102) report omitted that he used close-handed strikes to the inmate's head with his fists. Further, during the SID interview, Franca confirmed that the inmate was not displaying signs of assaultive behavior when he entered the cell and failed to report that he used closed-hand strikes. In addition, the Use of Force Review Committee's assessment of Franca's use of force concluded that it was excessive, in violation of the inmate's constitutional rights, and counterproductive to the orderly running of the institution. Finally, the NJDOC specified that Franca's unbecoming and

unacceptable conduct violated administrative policies and regulations. Thus, the NJDOC sought his removal.

On May 10, 2022, the NJDOC issued a Final Notice of Disciplinary Action (FNDA) of sustaining all charges and specifications and adding HRB 84-17 C-11, conduct unbecoming. The NJDOC removed Franca from his position as a senior correctional police officer on that date.

On May 12, 2022, Franca appealed. On May 19, 2022, the Office of Administrative Law (OAL) filed his perfected appeal under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the office, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On May 31, 2022, the case was assigned to me for hearing. On June 13, 2022, I held an initial prehearing conference and scheduled the case for hearings via Zoom on August 16, 19, and 29, 2022. The NJDOC requested time to obtain expedited transcripts and submit written summations. Although Franca objected to this delay, I permitted the NJDOC's request. Notably, the NJDOC agreed to return Franca to pay status if 180 days expired before the Commission rendered its final decision.

On October 6, 2022, the NJDOC filed its post-hearing brief, and on October 11, 2022, Franca timely submitted his post-hearing statement.

### **FINDINGS OF FACT**

Given the testimony the parties provided, together with my assessment of its credibility, and the documents and recordings the parties submitted, together with my assessment of their sufficiency, I **FIND** as follows:

Franca graduated high school and completed one year of an associate degree. He attended the police academy and graduated from the academy on November 17, 2016, upon which the NJDOC hired him as a corrections officer. As a new hire, the

NJDOC's Human Resources office provided Franca with NJDOC's rules, policies, and procedures, including standards of conduct, use of force, and disciplinary penalties; he acknowledged receipt. See R-13.

Franca completed his working test period and became a senior corrections police officer (SCPO). Since being hired by the NJDOC, Franca has worked at Northern State Prison (NSP). Franca received no discipline from the NJDOC before the events on January 3, 2021.

Franca understands that physical contact with an inmate should be documented as physical force when used to protect a person or property or when an inmate resists. Franca underwent use of force training at the academy and his firearms range qualification annually. That training included completing a Special Custody Report, or CUS-100, and a CUS-102, or a Use of Force Report. Before the incident on January 3, 2021, Franca completed many CUS-102 forms.

On January 3, 2021, Franca served as a general assignment (GA) officer, going to prison locations wherever needed, on the second shift from 2:00 p.m. to 10:00 p.m. Before the events on this date, Franca received no prior discipline.

Before January 3, 2021, Franca was not involved in an incident with inmate B.D. B.D. was an inmate housed in a psychiatric unit, "Charlie Three East" or "C3E." However, Franca may have interacted with B.D. for routine tasks such as meal breaks or medication lines.

A little before 6 p.m. on January 3, 2021, Franca responded to a Code 33 involving B.D. in C3E. The NJDOC uses a "Code 33" for an emergency response to an inmate exhibiting assaultive behavior towards an inmate, a corrections officer, or property. Upon Franca's arrival to the Code 33, he observed B.D. handcuffed and lying on the floor. Notably, NJDOC supplies two use of force reports from custody staff documenting physical force used with B.D. "taking him to the ground" while still at C3E. See R-10,

DOC 88—91. Because B.D. stated an intent to commit suicide, Franca received an order to escort B.D. to the stabilization unit (SU). The NJDOC provides no documentation from Franca concerning B.D.'s Code 33. Still, Franca testified that he completed CUS -100 and CUS - 102, having witnessed B.D. on the floor with handcuffs.

The SU is within the medical unit and allows officers to place an inmate on "constant watch" or "closed watch" for more supervision. Constant watch requires an officer to stand at the cell door's window, observing the inmate. In contrast, a closed watch requires an officer to look at the inmate on a video monitor. Each cell in the SU has a camera to provide video feed for the monitor.

Franca assisted in placing B.D. in cell 223 in the SU, a "dry" cell with no water access and higher ceilings to prevent an inmate from reaching the sprinkler head. Before placement in the SU, inmates must be strip searched. Franca assisted with that process but did not provide a suicide gown to B.D. per usual protocol because B.D. was agitated. Instead, an officer pushed the gown through the cell door's food port. Notably, Franca was not the watch officer assigned to B.D.

Within minutes of placing B.D. in his cell, Franca heard a call for a Code 66 and returned to the entrance of B.D.'s cell where other officers were present. A "Code 66" represents an emergency code for suicide or a suicide attempt. During a Code 33 or Code 66, the jail shuts down to allow more officers to respond. Franca believes Sergeant Bellavance called the Code 66 for B.D.

Once in the SU, surveillance video depicts B.D. first attempting to lift a mat towards the ceiling, attempting to reach the sprinkler head unsuccessfully. Notably, the only cell camera is angled towards B.D., and no audio exists. See R-4, DOC1a, at 6:21:40 p.m.

At 6:22 p.m., the video footage depicts B.D. sitting down naked and pulling items from the suicide gown, which is green, although the video is muted in color, making it appear nearly black and white. B.D. places items on his right and his left, more to the left,



for the next several minutes. The NJDOC later determined that these items were strings or material ripped from the gown.

At 6:25:52 p.m., B.D. picks up the strings from his left side, and at 6:26:03 p.m. he places the strings around his neck and pulls them together in a tightening gesture. At 6:28:36 p.m. B.D. lays down, still holding the strings around his neck. At 6:28:58 p.m., B.D. sits up with the strings around his neck. At 6:29 p.m., B.D. appears to be talking to someone in the direction of the door, and at 6:29:05 p.m., B.D. drops the string on the floor in front of him and begins to lie down.

At 6:29:06 p.m., Franca is observed in the bottom of the video frame, having entered the cell through a sliding door containing a rectangular window the size of a small book, slightly larger and longer than a CD case. By 6:29:07 p.m., Franca reaches the side of B.D.'s bed, near B.D.'s head, and lifts his knee onto the raised platform where B.D. is lying down, appearing to stabilize himself. At this point, another officer is behind Franca, partially obscuring the camera's view of B.D. Significantly, the video only depicts the back of the officers.

At 6:29:08 p.m., Franca leans over B.D., and his right arm is raised and lowered towards the head region of B.D. Franca repeats this movement at 6:29:09 p.m., but the video does not clearly show contact with B.D.'s face. By this time, five officers can be seen on the video, and obscure a clear view of B.D. Still, no officer reacts to an assault or punches to B.D.

At 6:30:11 p.m., Franca begins assisting B.D. to a seated position. Franca handcuffs B.D., but this action also cannot be clearly seen on video.

At 6:32 p.m., Franca is seen leaving the cell and returns several seconds later, having removed his sweater, and picks something up off the floor at 6:32:15 p.m. The video ends several minutes later.

However, within a half hour of this incident, B.D. began banging his head on the door's glass window, requiring his placement in a Violent Prisoner Restraint Chair (VPRC) by a five-person team suited with protective gear in another cell within the SU. Notably, a physician directs the inmate's placement in a VPRC. See R-9, DOC 64. The VPRC team notes that B.D. was lying flat on his stomach on the floor upon entering cell 223. Each team member completed a CUS-100, describing the role taken in securing and removing B.D. from cell 223 and escorting B.D. to and placing him in the VPRC. See R-9, DOC 72-87. Although B.D. refused medical attention following the Code 33 and 66, a physician cleared B.D. medically after the team placed B.D. in the VPRC. See R-9, DOC 64.

SID investigated the case after B.D. complained that Franca punched him in the face. Senior Investigator Noreen McCallum issued a report after interviewing the other officers at the Code 66 scene, Franca, and B.D. She also compared the reports completed by Franca to the surveillance video of B.D.'s cell during the Code 66. See R-5.

B.D. did not testify at the hearing, but McCallum made an audio recording of his interview on January 5, 2021, and took photographs. See R-7, DOC 2a. The pictures reveal bruising to the left biceps and a swollen and bruised left eye. See R-3, DOC 2c, d, and e.

During his interview, B.D. states that he placed a string around his neck that he made from the suicide gown for approximately one to three minutes before officers entered the cell. Yet, B.D. denies telling anyone that he planned to commit suicide. B.D. also states he was turning purple but was unsure how he knew this, and the surveillance video does not reflect an evident skin color change. B.D. notes that Franca was an officer responding to his suicidal actions and a few others. Notably, B.D. asserts that Franca kicked him in the left arm, struck him twice in the face with his fist, and grabbed at his neck twice, leaving bruising. McCallum noted a red mark that appeared to be from the string around B.D.'s neck but saw no bruising in that area. My review of B.D.'s photo

similarly reveals no evident neck bruising. Besides B.D.'s report of Franca kicking him, McCallum does not identify that action in her report. Consistent with the video, B.D. states he was compliant, had dropped the string and was lying down when the officers entered the cell. Still, B.D. acknowledges that he resisted undressing, and officers had to disrobe him in connection with his SU placement forcibly. Further, B.D. also admits that he banged his head on the glass window after this event, resulting in his VPRC placement.

The NJDOC placed Franca on paid disciplinary leave on January 8, 2021.

SID referred the incident for review by the New Jersey Office of Public Integrity and Accountability and Essex County Prosecutor's Office. Neither office wished to pursue criminal charges and referred the case to NJDOC for administrative review and investigation. After the review by these offices, NJDOC began subject interviews. This process delayed the incident's investigation beyond the interview with B.D., watching the surveillance video, and reviewing staff member reports from the Code 66.

Franca underwent his SID interview on September 30, 2021, with McCallum and senior investigator Gary Rivera. Franca recalled the inmate when shown a picture of B.D., but he could not remember specifics about the events on January 3, 2021.

Franca initially thought that B.D. was standing up when he entered the cell. However, once reviewing the surveillance video, Franca confirms that B.D. was sitting and beginning to lie down when he entered the cell. Franca believed he was part of the "preservation of life" response when entering B.D.'s cell in the SU.

During Franca's testimony and at his SID interview, Franca reviewed his special custody report, or CUS -100, and use of force report, or CUS 102. See R-9, DOC 62-63; R-10, DOC 92-93. The CUS-102 requires the reporting officer to check off any physical force or mechanical force. Under mechanical force, the form provides several categories, including restraint services such as handcuffs or leg irons. Franca only checked restraint services and handcuffs. Yet, during the interview, Franca admits that he did not document

using “physical force” but should have because he had contact with B.D.’s neck in removing the string. Significantly, B.D. also stated that Franca grabbed at his neck. Such inmate contact would not be routine. Indeed, I **FIND** that Franca failed to check off physical force despite using such force during the Code 66.

Further, Franca believes that “subject demonstrating assaultive behavior” included B.D.’s actions in attempting suicide, and he checked that off as a reason for using force. Still, Franca acknowledges that B.D. was compliant when he entered the cell and not assaultive towards him. Notably, all but one officer responding to the Code 66 documented that B.D. was being assaultive. Still, I **FIND** that Franca’s notation that B.D. was “demonstrating assaultive behavior” was inaccurate per the video.

Yet, Franca’s CUS - 102 identified other reasons for using force in the situation:

- Subject displaying signs of imminent violence.
- Subject attempting suicide or suicide precaution.
- The immediate necessity to prevent injury to the subject or others.

The form instructs officers to “designate as many [reasons] as apply under the circumstances.” Indeed, those other reasons permit the use of force so long as it is objectively reasonable under the circumstances. Undeniably, the call involved B.D.’s attempt at suicide. Thus, I do **NOT FIND** that Franca’s inaccurate use of assaultive behavior was an intentional misstatement of fact.

The CUS-102’s second page provides instructions to officers to explain the incident, answering at least the following questions:

How was force used?

Who used force?

Who authorized the use of force?

What actions did you take during the incident?

What actions of others did you observe?

Franca's description of the use of force described his actions: "Upon entering cell 223, I witnessed [B.D.] with green rope material around his neck. I immediately removed the green rope from his neck. I secured [B.D.] with handcuffs." Franca also reported no injuries to B.D. or staff and that a nurse assessed B.D. Sgt. Bellavance and the shift commander reviewed Franca's CUS-102, and signed off on January 3, 2021.

The CUS-100 includes the same description as the CUS-102 but adds that Franca responded to a Code 66 in SU, B.D. refused medical attention, and Franca's actions were "under the supervision of Sgt. Bellavance."

On behalf of the NJDOC, Acting Assistant Commissioner David Scott testified to use of force training to NJDOC personnel and policies in place when NJDOC staff use force. Since May 2022, Scott has been acting Director of Training and Professional Development and has worked for the NJDOC for twenty-four years. NJDOC teaches custody staff to use constructive authority, such as verbal commands, before using physical or mechanical force. The use of force is not a routine matter, and NJDOC's policy confirms this view. However, when an officer uses force with an inmate, the NJDOC requires accurate explanations of why and what force the staff member uses. Any use of force must be objectively reasonable under the circumstances. Significantly, part of the NJDOC's use of force training includes instruction on completing forms documenting force employed.

Further, the NJDOC documents each time an employee undergoes use of force training. Indeed, after the academy's training, Franca underwent use of force training at firearms requalification at the range four times before the January 3, 2021, incident with B.D. See R-11. On February 13, 2020, Franca also completed a course on use of force report writing. Id.

Upon reviewing the surveillance video, Scott highlights that any force was inappropriate because B.D. was compliant, not posing a threat, and was lying in a position ready for handcuffing. Further, Scott confirmed that striking an inmate would require a use of force and a special custody report identifying those actions. Still, Scott acknowledges that although the video shows that B.D. dropped something on the floor, he could not see if B.D. removed all strings from his neck. Still further, Scott concedes that Franca responded to a suicide attempt when he entered the cell.

Assistant Commissioner Willie Bonds has worked for the NJDOC for more than twenty-four years, serves as the Director of Operations, and is a voting member of the NJDOC Use of Force Review Committee (UFRC). Bonds explains that the use of force policies and procedures protect officers and inmates, reducing dangerous situations and discord in the inmate population. Further, when staff members fail to follow use of force procedures and policies, those actions can expose the NJDOC to unnecessary liability.

The UFRC considers violations of the use of force policy after the facility-level committee assesses the staff member's use of force. The UFRC met on December 10, 2021, and SID presented its case regarding Franca and B.D. See R-12. Specifically, the UFRC reviewed video footage, the SID report, Franca's reports, and reports from other staff members responding to the Code 66. Following the SID presentation and discussion of the incident, the UFRC voted unanimously that Franca used excessive force and referred the case for disciplinary action. Id. The UFRC also noted that Franca's report and interview were inconsistent with the video footage of the response. Id.

However, Bonds agrees that physical force would be appropriate and reasonable to stop self-injurious behavior. Yet, Bonds also notes that B.D. dropped the string before Franca entered the cell. Bonds similarly observed that strikes to B.D.'s head area would be excessive given B.D.'s compliancy and prone position when Franca entered the cell. Further, because Franca did not identify any strikes to B.D.'s head in his reports regarding the incident, Bond maintains that Franca's reports were inconsistent with the video.

Bonds also confirmed that if Franca removed material from B.D.'s neck, he employed physical force that Franca should have documented but did not. Bonds did not recall seeing pictures of string as depicted in DOC 104.

Major Bradford Engelberger explained that a range of penalties could apply to the NJDOC's charges against Franca, even if sustained. See R-18. Conduct unbecoming of an employee has a minimum penalty of three suspension days for the first infraction. The other charges permit an official written reprimand (OWR) for the first offense. However, removal is available for all charges, even if a first infraction. Notably, discipline for failing to report an inmate's abuse also carries a mandatory fine not to exceed \$5,000. See R-19. Yet, Engelberger clarifies that even if the NJDOC sustains more than one infraction from the same event, the multiple offenses still qualify as a first infraction. In other words, the NJDOC would not view the violations separately for progressive discipline. Still, discipline could be more severe for multiple sustained charges.

Engelberger was not part of the Franca investigation and was not present at NSP on January 3, 2021. Still, Engelberger is familiar with the NJDOC's and NSP's policies concerning a staff member's use of force and special custody reports. Here, Engelberger does not believe that Franca's "special" or use of force report were completed per reporting requirements because they were inaccurate and omitted information about the force Franca used and because Franca's removal of rope was not straightforward on the video.

Although McCallum maintains that Franca agreed that he hit B.D., the SID interview does not reveal this. When first shown the video of his contact with B.D., Franca immediately responds that "those are not punches" and that he was "getting down to B.D.'s level." However, Franca admitted that he had physical contact with B.D. that he did not report, which he termed a "critical error." Still, the investigators call them "punches" or closed-hand strikes in their questions, not Franca. At best, when further pressed if the "video perspective" showed closed fist strikes to B.D., Franca responded, "I guess." However, this response is not an admission but an acknowledgment that a viewer might

interpret his actions as showing strikes. Still, Franca consistently maintained that his actions showed his removing or grabbing string from B.D.'s neck. The surveillance video reveals that B.D. dropped something on the floor as Franca entered the cell, but the camera was too far away to show whether B.D. removed all string material from his neck. Significantly, the cell video depicts B.D. placing what appears to be string material on both his left and right. B.D. uses the strings to his left to tie around his neck, but the video is unclear whether he tied them all in one knot. Further, the video does not show what happened to the removed items on B.D.'s right.

Franca has no explanation for why NJDOC staff only recovered one set of strings from the incident, and Franca acknowledges that the video shows that he picked something up from the floor. Franca states that he gave the strings he retrieved to his supervisor as evidence, but he does not know what happened to them afterwards. Franca provides two pictures he received from the NJDOC in discovery, noting nearly identical depictions of twisted strings. See P1a and P1b, DOC 104 and 106. Franca believes what he picked up was somewhat different and more twisted. McCallum reviewed only pictures of the suicide gown and string material recovered and held in custody.

Franca also testified that he did not see B.D. drop the string because the cell door was sliding open, obscuring the window and his view, and he had to pass Officer Baltimore to enter the cell. Indeed, only one second passes between B.D. dropping the string and Franca's entrance into the cell. Thus, I **FIND** Franca's testimony credible that he did not see B.D. drop the strings as he entered the cell. Further, I **FIND** Franca reasonably believed that a previously assaultive inmate was attempting suicide given the call's designation as a Code 66 and his brief observation of B.D. with green material around his neck.

During the hearing, Franca explained that he was securing B.D. and grabbing at B.D.'s neck to remove the string. In other words, he used his hands or physical force to pull the strings off B.D. without a cutting tool, such as a "911" device. Still, Franca denies hitting B.D. in the face. I **FIND** that the surveillance video, Franca's testimony, and B.D.'s



audio interview support that Franca reached down towards B.D.'s neck and grabbed at it by a preponderance of the evidence. However, I do **NOT FIND** that a preponderance of the evidence demonstrates that Franca punched B.D. in the face with a closed fist. While there is no question that Franca raised his arm twice and then moved his arm towards inmate's head region, the brief video does not clearly show physical contact with the inmate's face. Similarly, the video does not show Franca kicked B.D. Notably, B.D. was involved in three known incidents requiring officer response, including an earlier assaultive incident during the Code 33 and placement in the VPRC after striking his head against the cell door and window following the Code 66 response. Thus, I further **FIND** that a preponderance of the evidence does not support that Franca caused the injuries depicted in the photographs of B.D. taken by McCallum on January 5, 2021. See R-7. In other words, I **FIND** that Franca's explanation of the incident is credible and that it was objectively reasonable to grab at B.D.'s neck under the circumstances.

### **CONCLUSIONS OF LAW**

A civil service employee who commits a wrongful act related to their duties, or provides other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2.

In appeals concerning major disciplinary action, the appointing authority bears the burden of proof. N.J.A.C. 4A:2-1.4(a). The burden of proof is by a preponderance of the evidence, In re Phillips, 117 N.J. 567, 575 (1990), and the hearing is de novo, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). One can describe preponderance as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

Significantly, police officers and correction officers are held to a higher standard of conduct than other citizens due to their roles in the community. In re Phillips, 117 N.J. at

576-77. 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), certif. denied, 47 N.J. 80 (1966).

Conduct unbecoming a public employee has been interpreted broadly as conduct that adversely affects the morale or efficiency of a governmental unit or that tends to destroy public respect for governmental employees and confidence in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 398 Pa. 35, 43 (1959)). Such misconduct 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." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

The NJDOC also charged Franca with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." This charge often addresses violations of policies or procedures established by the employer, such as those in HRB 84-17, as amended. Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye.

Internal Management Procedure (IMP) NSP.CUS.101, Use of Force and Security Equipment<sup>1</sup>, contains the policy and procedure for the use of force at the Northern State Prison. The IMP defines "physical contact" as "contact that involves routine or procedural contact with an individual necessary" to accomplish "a legitimate law enforcement objective" effectively."

Yet, the IMP defines "physical force" as "contact with an individual beyond that which is generally utilized to effect a law enforcement objective." Notably, "reasonable belief" means an objective assessment of how a similarly situated officer "would react to,

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<sup>1</sup>The NJDOC IMP, CUS.001.UOF.001, covers all correctional facilities and is essentially identical to NSP CUS. 101. The NJDOC IMP is a "Level I" policy, while NSP's is a "Level III" one covering that facility.

or draw inferences from, the facts and circumstances confronted and known by the staff member at the scene.”

More significantly, the IMP states that custody staff members may use physical force “when necessary to overcome an individual’s physical resistance to the exertion of the custody staff member’s authority or to protect persons or property.” Examples include “wrestling an individual to the ground, using wrist or arm locks, striking with the hands or feet, or similar methods of hand-to-hand confrontation.” Further, mechanical force means the “use of some device or substance other than a firearm to overcome” resistance to custody staff.

Under the IMP, the NJDOC and NSP justify the use of non-deadly force, whether mechanical or physical, to protect self or others against unlawful force:

#### **A. Use of Force**

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

#### **B. Use of Non-Deadly Force**

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

above believes that the inmate's failure to comply constitutes an immediate threat to correctional facility security or personal safety.

[R-16, DOC 161-62.]

An officer must document any use of force under the IMP with a CUS -100 and a CUS- 102 form:

#### **J. Reporting the Use of Force**

Immediately following all instances in which a firearm splayed or discharge outside of firing range and/or physical, mechanical, or deadly force has been used each staff member who participated in or witnessed the event shall write a Special Custody Report (CUS -100) to the area Supervisor or Shift Commander as applicable. Additionally, it shall be the responsibility of the ranking custody supervisor on the scene to ensure that a Use of Force Report (CUS -102) is completed and submitted as appropriate.

The report shall contain the following:

1. A description of the events leading up to the use of force;
2. A description of the incident, type of force used, and reasons for employing force;
3. A list of participants and witnesses to the incident;
4. The reasons for employing force;
5. A description of the injury sustained, if any, and medical treatment given; and
6. Other relevant facts or comments about the incident for conduct of employees for inmates

[R-16, DOC 172]

Similarly, IMP NSP.CUS.114, Special Custody Reports, contains the policy for reporting "unusual incidents" at NSP. The policy specifies that the use of force, suicide attempts, and emergency codes are such incidents or events. Further, a staff member witnessing or involved in such an incident must write a "Special Custody Report," including the event's specifics or the "who, what, where, when, and how." R-17, DOC 155.

Undeniably, on January, 3, 2021, Franca used “physical force” or non-routine contact with B.D. but failed to identify this on his use of force report, CUS 102, and “special” or CUS-100. Franca’s notation that he removed string from the inmate’s neck in his description does not alleviate the reporting error because Franca did not describe this action as “force.” Thus, I **CONCLUDE** that preponderance of the evidence exists that Franca violated NJDOC procedures and policies concerning “safety” and use of force reporting, or HRB 84-17 D-7 and E-1, as amended, and N.J.A.C. 4a:2-2.3(a)(12).

Further, Franca’s assertion that B.D. was exhibiting assaultive behavior was also inaccurate. Still, I found that Franca did not intentionally misstate this fact. Notably, I found that Franca reasonably believed that B.D. was attempting suicide; Franca acted to remove the string he observed on B.D.’s neck, and he did not punch B.D. In other words, grabbing at B.D.’s neck to remove string used during a suicide attempt was an appropriate use of force under the circumstances, effectuating a law enforcement objective. Indisputably, B.D. was the subject of a prior Code 33, suggestive of assaultive behavior, and banged his head on the door after Franca left and the Code 66 ended. That self-injurious behavior resulted in B.D.’s placement in a restraint chair, a VPRC, under the direction of the prison’s physician. Thus, while the NJDOC suggests that Franca caused the injuries depicted in pictures of B.D., I found that this is far from clear. Therefore, I **CONCLUDE** that a preponderance of the evidence does **NOT** exist to support that Franca had inappropriate contact, mistreated an inmate, failed to report inmate abuse, or intentionally misstated a material fact in violation of C-5, C-5a, or C-8 under HRB 84-17, as amended.

Regardless, I **CONCLUDE** that Franca’s reporting errors are severe and represent conduct unbecoming an NJDOC employee in violation of HRB 84-17, C11, as amended, and N.J.A.C. 4A:2-2.3(a)(6). Franca’s documentation failures represent conduct unbecoming a public employee because such inaccuracies tend to “destroy public respect for governmental employees.” Karins, 152 N.J. at 554. Following procedures regarding any use of force with inmates is critical to the safety and operations of a corrections facility.

## Penalty

The next question is the appropriate level of discipline. A progressive discipline system has evolved in New Jersey to provide job security and protect employees from arbitrary employment decisions. Progressive discipline is an appropriate analysis for determining the reasonableness of the penalty. See West New York v. Bock, 38 N.J. 500, 523–24 (1962). The question upon appellate review is whether such punishment is “so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one’s sense of fairness. In re Carter, 191 N.J. 474, 484 (2007) (quoting In re Polk, 90 N.J. 550, 578, (1982) (internal quotes omitted)). Indeed, bypassing progressive discipline occurs only when the misconduct is severe, rendering the employee unsuitable for continuation in the position or when the application of progressive discipline would be contrary to the public interest. In re Herrmann, 192 N.J. 19, 33 (2007). For example, when the work involves public safety, and the misconduct causes a risk of harm to persons or property. Id.

The NJDOC removed Franca from employment, but I **CONCLUDE** that Franca should receive a lesser penalty under progressive discipline. Franca had no other sustained discipline until the events of January 3, 2021, during the Code 66. More importantly, I concluded that the NJDOC’s did not sustain charges against Franca for violations under HRB 84-17, C-5, C-5a, and C-8. Further, I did not find that a preponderance of the evidence existed that Franca’s force under the circumstances was excessive or that Franca struck B.D. in the face. Still, Franca’s misconduct warrants more than the written reprimand he suggests, given the importance of adhering to the use of force policy and reporting procedures. I **CONCLUDE** that a ninety-day suspension strikes a balance between Franca’s misconduct, the NJDOC’s need to ensure compliance with its safety and use of force policies, and the public interest.

**ORDER**

Given my findings of fact and conclusions of law, I **ORDER** that Franca be **SUSPENDED** for ninety days.<sup>2</sup>

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 is authorized by law to make a final decision in this case. If the Civil Service Commission does not adopt, modify, or reject this decision within forty-five days, and unless such time limit is otherwise extended, this recommended decision shall become a final decision under N.J.S.A. 40A:14-204.

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

October 18, 2022



\_\_\_\_\_  
DATE

\_\_\_\_\_  
**NANCI G. STOKES, ALJ**

Date Received at Agency:

\_\_\_\_\_  
October 18, 2022

Date Mailed to Parties:

\_\_\_\_\_  
October 18, 2022

ljb

<sup>2</sup> A separate Order addresses Franca's pay status.

**APPENDIX**

Witnesses

For Appellant:

Gustavo Franca

For Respondent:

Senior Investigator Noreen McCallum  
Assistant Commissioner David Scott  
Assistant Commissioner Willie Bonds  
Major Bradford Engelberger

Documents

For Appellant:

P-1a DOC 104, copy of picture  
P-1b DOC 106, copy of picture

For Respondent:

R-1 Preliminary Notice of Disciplinary Action dated December 10, 2021  
R-2 Final Notice of Disciplinary Action dated May 10, 2022  
R-3 Inmate B.D. photos  
R-4 Video Surveillance dated January 3, 2021  
R-5 SID Investigation Report by McCallum  
R-6 Franca's Weingarten notice  
R-7 SID Interview of B.D. dated January 5, 2021  
R-8 SID Interview of Franca dated September 30, 2021  
R-9 Special Custody Reports, CUS-100, from January 3, 2021



- R-10 Use of Force reports, CUS-102, from January 3, 2021
- R-11 Franca's Training Summary Report
- R-12 NJDOC UFRC determination form dated December 13, 2021
- R-13 Franca's New-Hire Orientation Checklist
- R-14 Law Enforcement Personnel Rules and Regulations
- R-15 NJDOC, Level I, Internal Management Procedure, CUS.001.UOF.001, Use of Force and Security Equipment, Revised February 29, 2016
- R-16 NSP, Level III Internal Management Procedure, NSP. CUS.101, Use of Force and Security Equipment, Revised April 21, 2020
- R-17 NSP.CUS.114, Special Custody Reports, Revised June 12, 2017
- R-18 NJDOC Human Resources Bulletin 84-17, as amended, Disciplinary Action Policy
- R-19 NJDOC Human Resources Bulletin 84-17, as amended, Disciplinary Action Policy, change to C-5a, dated September 8, 2020