



STATE OF NEW JERSEY

In the Matter of Augustin Alvarez,
Union County, Department of
Corrections

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

CSC DKT. NO. 2021-1692
OAL DKT. NO. CSV 04718-21

ISSUED: JUNE 20, 2022

The appeal of Augustin Alvarez, County Correctional Police Sergeant, Union County, Department of Corrections, 28 calendar day suspension, on charges, was heard by Administrative Law Judge Matthew G. Miller (ALJ), who rendered his initial decision on May 5, 2022. Exceptions and a reply were filed on behalf of the appellant and a reply to exceptions and subsequent reply 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 replies, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of June 15, 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 by the appellant in this matter. In that regard, the Commission finds them unpersuasive and mostly unworthy of comment as the ALJ's findings and conclusions in upholding the charges and the penalty imposed based on his thorough assessment of the record are not arbitrary, capricious or unreasonable. Nevertheless, the Commission makes the following comments. In his initial decision, and in the appellant's exceptions,¹ there is reference to alleged procedural violations that

¹ In the appellant's reply to the appointing authority's reply to exceptions, he argues that those submissions should not be considered as they are actually exceptions to the initial decision and not a reply, and as such, are untimely. It is noted that the Commission gives its staff great latitude in granting extensions to parties to file post-initial decision submissions. The Commission's ultimate goal is to have a complete record before it so it can make the most well-reasoned and supportable final decision. As such, the appointing authority's reply was submitted within the extended time period granted by staff. In this regard, the Commission considered those submissions, which, contrary to the appellant's argument, are best characterized as a reply to his exceptions. Regardless, neither the

occurred at the departmental level. The ALJ did not address those arguments in his initial decision. Regardless, the Commission notes that the appellant did not file a request for interim relief pursuant to *N.J.A.C. 4A:2-1.2* when the alleged violations occurred. It was at that time that the Commission could have properly dealt with such violations, if they actually occurred. However, once the appellant was granted a *de novo* hearing by the Commission on the underlying charges, any procedural violations that may have occurred at the departmental level are deemed cured. See *Ensslin v. Township of North Bergen*, 275 *N.J. Super.* 352, 361 (App. Div. 1994), *cert. denied*, 142 *N.J.* 446 (1995); *In re Darcy*, 114 *N.J. Super.* 454 (App. Div. 1971).

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Augustin Alvarez.

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 15TH DAY OF JUNE, 2022



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

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Attachment

appellant's exceptions/replies nor the appointing authority's replies were significant factors in the Commission's affirmance of the ALJ's well-reasoned decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 04718-2021

AGENCY DKT. NO. 2021-1692

**IN THE MATTER OF AUGUSTIN ALVAREZ,
UNION COUNTY DEPARTMENT OF
CORRECTIONS**

Lori A. Dvorak, Esq., for Petitioner (Dvorak & Associates, attorneys)

Brian M. Hak, Esq., for Respondent (Eric M. Bernstein & Associates, attorneys)

Record Closed: April 1, 2022

Decided: May 5, 2022

BEFORE **MATTHEW G. MILLER, ALJ**:

STATEMENT OF THE CASE

Petitioner, Agustin Alvarez, a sergeant employed at the Union County Jail (UCJ), appeals the twenty-eight day suspension imposed by Respondent, Union County Department of Corrections (UCDOC) arising out of an incident that occurred at the jail on October 16, 2018. This suspension was served by Sgt. Alvarez from October 22, 2018 through November 18, 2018. Respondent generally alleges that Sgt. Alvarez failed to properly supervise three corrections officers during a shift in which an inmate died by

suicide in the unit where all four were working. Sgt. Alvarez argues that he followed the applicable Post Orders and supervised the officers appropriately.¹

PROCEDURAL HISTORY

The record shows that on October 16, 2018, while an inmate in cell 5B-24 at the UCJ, I.M. hung himself and later died. On or about December 1, 2018, Respondent served Sgt. Alvarez with a Preliminary Notice of Disciplinary Action (PNDA) charging him with incompetency, inefficiency or failure to perform duties; conduct unbecoming a public employee; neglect of duty; and other sufficient cause. N.J.A.C. 4A:2-2.3(a)(1), (6), (7) and (12).

A departmental hearing was held on March 25, 2021 and on or about May 3, 2021, Respondent served a Sgt. Alvarez with an April 29, 2021 Final Notice of Disciplinary Action (FNDA), in which he was notified that all charges against him had been sustained and that he was being suspended for twenty-eight working days. That suspension had already been served from October 22, 2018 – November 18, 2018.

The petitioner timely requested a fair hearing, and the matter was transmitted to the Office of Administrative Law on May 25, 2021, for a hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to-15; N.J.S.A.52:14F-1 to -13. The matter was conferenced on June 28, 2021, August 19, 2021, October 7, 2021 and was heard on December 14, 2021 and December 15, 2021.

The record was held open until April 1, 2022 for the submission of closing arguments and closed that day.

¹ The sole issue before the court concerns the propriety of the twenty-eight day suspension issued to Sgt. Alvarez. While Petitioner's post-hearing brief raises an issue concerning possible violations of N.J.A.C.4A:2-2.5(b) and Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) in the issuance of immediate post-incident suspensions, that issue was neither mentioned in the transmittal from the Civil Service Commission nor was it the subject of the hearing. Given that, this issue will not be addressed. See generally, N.J.A.C. 1:1-3.2(a). e

FACTUAL DISCUSSION AND FINDINGS

Key Personnel (positions are at the time of the incident)

I.M. - Inmate whose suicide was the precipitating event to Sgt. Alvarez's discipline

Sgt. Augustin Alvarez – area supervisor of Units 4B and 5B

Lt. Noel Gonzalez – shift commander and supervisor of the Internal Affairs Unit of the Union County Department of Corrections

Lt. William Gargiles – supervising floor lieutenant

C.O. Jakari Lee – corrections officer assigned to Units 4B and 5B

C.O. Wesley Peters – corrections officer assigned to Units 4B and 5B

C.O. Antonio Melendez – corrections officer assigned to Units 4B and 5B

John G. Esmerado, Esq. – Special Deputy Attorney General/Acting Assistant Prosecutor, Union County Prosecutor's Office

TESTIMONY

For Respondent

Lt. Noel Gonzalez, Union County Department of Corrections (UCDOC). He is currently employed as a shift commander, but at the time, he was a sergeant and was the supervisor of Internal Affairs Department at the UCDOC.² He investigated the case beginning on December 1, 2018 and generated the Administrative Investigation report which was completed on February 18, 2019. (Exhibit R-11).

After an incident such as this, he would normally secure the logbook (although Lt. Gargiles did in this case) and also burn the video, which he reviewed.

The incident in question occurred between 1:03 p.m. – 1:05 p.m. on October 16, 2018. He saw that Sgt. Alvarez came into the unit at about 12:45 p.m. and conducted a

² For the sake of clarity, Lt. Gonzalez will be identified by his current rank throughout this decision.

tour of the bottom tier and he then saw him on the top tier. I.M. was removed from the unit at about 1:20 p.m. – 1:25 p.m. Once the unit was cleared, he took pictures and the logbook was secured. He opened a case file and the Union County Prosecutor's Office (UCPO) was notified. The UCPO usually takes over an investigation such as this one and once I.M. died, Lt. Gonzalez's immediate involvement ended. In December 2018, once the UCPO determined that it was not a criminal case, it was referred back to the UCDOC.

As part of his investigation, he personally interviewed Sgt. Alvarez and C.O.s Lee, Peters and Melendez. Lt. Gonzalez reviewed his report (Exhibit R-11) and noted that Officer Lee was not present for the 12:30 p.m. security check. All four were assigned to the unit that day. Officer Melendez was on the unit during the incident, while Officers Peters and Lee were on break.

In reviewing the logbook (Exhibit R-10), it was noted that at 12:53 p.m. Sgt. Alvarez signed in, Officer Melendez was on post and Officers Peters and Lee were off unit. He clarified the meaning of some of the abbreviations in the logbook; 4B is the lower tier of the unit, while 5B is the upper tier. A "PC" inmate is protective custody and "rec" is recreation time. After reviewing the logbook, he concluded that Sgt. Alvarez and Officers Lee and Petters all violated policy in how they completed it.

Lt. Gonzalez was the shift commander that day and at the beginning of the day there is a muster with supervisors and officers. He emphasized that there are cameras available for supervisors to review and "check in" on their officers. He acknowledged that these are real time only and cannot be rewound in the normal course of business and that reviewing the cameras is not in post orders, nor in any other policy. He reviewed the video and saw Sgt. Alvarez come into the unit at about 12:45 p.m., tour the bottom of the unit, go to the officer's station, speak to Officer Melendez for "a minute or two" and then sign the logbook. He then proceeded upstairs to the second floor at about 1:03 p.m. – 1:05 p.m. and once he got to the first cell, he saw I.M. hanging. Sgt. Alvarez then called a code, the door was opened and he ran in. I.M. was cut down and Sgt. Alvarez began cardiopulmonary resuscitation (CPR).

Lt. Gargiles secured the logbook and it was in Lt. Gonzalez's hands by 1:45 p.m. He took it back to the Internal Affairs office and opened a case file. As part of his investigation, he interviewed Officer Lee, who told him that he was on break at the time of the incident, but that he was the one recording the into the logbook with the term "All secure" (with his initials) on the half hour from 8:00 a.m. – 12:00 p.m. That was "usually" meant to denote that a tour of Unit 4B had been completed, but it did not mean that he was the one who completed the checks. He also questioned Officer Lee about Post Orders and his failure to sign out when required.

Lt. Gonzalez noted that the checks are supposed to be documented by the officer who performed them and that it did not appear that Officer Lee had advised Sgt. Alvarez that he was leaving the unit.

He also spoke with Officer Peters and largely asked him the same questions. He went into a little more detail with Officer Melendez, since he was on the unit when the incident occurred. Officer Melendez advised that when he came back from lunch, he asked Officer Peters if everything was secure and he answered in the affirmative. Officer Lee then told him to take an inmate who was in protective custody to recreation and while that was happening, he received a call from booking that some new prisoners were coming into the unit. Officer Peters then called Sgt. Alvarez to tell him he was leaving the unit. Sgt. Alvarez then came in for his tour. He toured 4B, came to the desk, signed the book and went up to tour 5B. He almost immediately called out that I.M. was hanging. Officer Melendez retrieved the key to the cell, ran upstairs and physically opened the cell door and I.M. was cut down and Sgt. Alvarez began CPR.

Officer Melendez noted that he wrote the "all secure" entry in the logbook at 12:00 p.m., but, against policy, neither initialed the entry nor did he personally make the security check. He made the entry because Officer Peters told him that everything was secure, but he did not initial it, but he did not perform it himself.

Again, referencing his administrative report, Lt. Gonzalez noted that Sgt. Alvarez was the supervisor of the unit on the day in question. This was a busy unit and they kept extra staffers there. Sgt. Alvarez was acting as the Area Supervisor and he was supposed

to do two tours during his shift, which he did. Lt. Gonzalez's primary criticism of Sgt. Alvarez was that when he signed the logbook, he "missed" the 12:30 p.m. security check being omitted. There is no dispute that Sgt. Alvarez conducted his checks, but Lt. Gonzalez claimed that he should have seen the missing check and immediately questioned that officer about it. He "should have been able to observe the discrepancies in the logbook prior to the incident."

Lt. Gonzalez emphasized that the 12:30 p.m. and 1:00 p.m. security checks were very important, since I.M. could have voiced some concerns that he may have been having. However, he also testified that the 1:00 p.m. check was satisfied by Sgt. Alvarez given the timing of his finding I.M. in his cell.

He argued that "neglect of duty" was Sgt. Alvarez's "failure to observe" and "failure to advise the shift commander" of the issues with the logbook. Sgt. Alvarez should have used every tool available, including the video and should have checked the logbook during each tour, looking for discrepancies. As for corrective action, he could have written them up, verbally warned them or gone to the shift commander. The discipline could have been on the spot, written/documented or noted on the tour report.

He testified that after reviewing the security tapes, eight of the ten scheduled checks from 8:00 a.m. – 12:30 p.m. had not been performed

Lt. Gonzalez then coordinated his report (Exhibit R-11) findings with the Sergeant's Post Orders (Exhibit R-3), noting that he checked off the violations on the Sergeant's Post Orders.

He also clarified that the accusation that Sgt. Alvarez failed to "check his/her UCDOC/UCNJ issued Email account at least twice during (his) tour of duty" and a failure to "coordinate staff meal and break reliefs" were checked in error. Since both Sgt. Alvarez and Officer Peters told him that Peters had told Alvarez he was leaving "that's the reason we didn't go any further with that one". As for the other officer(s) who went on break, since he/they never notified Sgt. Alvarez "I don't think I charged him with that one as well".

The two Sergeants Post Orders he felt had been violated were ensuring that all staff members comply with Post Orders and that “any unusual incidents” must be reported to the shift commander. Those were both “cut-and-pasted” into his report.

He then reviewed the General Post Orders (Exhibit R-2) and found that Officer Melendez had violated Paragraph 30, since he was the only one on the unit at the time.

On cross-examination, Lt. Gonzalez testified that he has been a sworn law enforcement officer since February, 2005. He was promoted to sergeant in 2013 and to lieutenant in 2019. He was a sergeant at the time of the incident and started in Internal Affairs in 2015. Staffing for Internal Affairs was a lieutenant, a sergeant and two officers. He was assigned by the Director and Assistant Director of the UCDOC and was effectively in charge of Internal Affairs at the time since the lieutenant had just retired. He completed his twenty weeks of internal affairs training in April, 2018. He had performed 20-30 investigations total at this time.

In 2018, the Union County Jail ran three shifts for officers; 8:00 a.m. – 4:00 p.m. (days), 4:00 p.m. -12:00 a.m. (afternoons) and 12:00 a.m. – 8:00 a.m. (night). There were three C.O.s assigned to days and afternoons and one at night during the week and 2-2-1 on weekends. These shifts are now different since the inmate population is significantly less. The command hierarchy was Officers – Area Sergeant – Floor Lieutenant– Shift Commander – Captain. The shift roster for October 16, 2018 was reviewed (Exhibit R-5). He was not limited in who he could investigate up the command chain, but he did not investigate Lt. Gargiles, but stopped at Sgt. Alvarez’s level.

He remembered hearing from the UCPO that none of the officers involved in the incident were being criminally charged and reviewed the November 13, 2018 letter from the UCRO confirming same. (Exhibit P-11). Despite the language in the letter, however, he noted that the UCPO has no authority to determine internal violations. He was advised that both the Director and Assistant Director of the UCJ spoke with the prosecutor, which led to the issuance of the November 16, 2018 letter confirming that the UCDOC retained authority to determine internal violations. (Exhibit R-15).

He claimed to have no presuppositions going into the investigation, but admitted serving the PNDA on December 1, 2018 (Exhibit R-13), the same day that his investigation started. However, before the case had been turned over to the UCPO, he had already reviewed/viewed the evidence and had done prep work, since he knew that this was going to the UCPO. Further, Sgt. Alvarez had already been suspended.

As for the FNDA (Exhibit R-14) which detailed the twenty-eight day suspension to be served from October 22, 2018 – November 18, 2018, since the investigation did not begin until after the suspension had been served, the timing didn't make any difference. Lt. Gargiles was not investigated because there was no evidence of malfeasance and theoretically, he could go all the way up the chain, which he felt was non-sensical. Sgt. Alvarez was the direct supervisor of the three officers on the unit and that is why the investigation focused on him.

Lt. Gonzalez did concede that Sgt. Alvarez had until the end of the shift to make a tour report and he did not have the report and did not know its contents.

He also noted that there is also evidence of a conversation between Officer Melendez and Sgt. Alvarez on the video. There is no audio and he does not know the content of the conversation. He also testified that everything that Sgt. Alvarez did after finding the inmate was exemplary.

In reviewing the logbook (Exhibit P-7 at pg. 5), he also conceded that Sgt. Alvarez never would have seen it after he signed it at 12:53 p.m.

On redirect examination, Lt. Gonzalez again reviewed the November 13, 2018 letter and confirmed that the authority of the UCPO is limited to the General Post Order of March 19, 2012 and all other violations fall under the auspices of Internal Affairs. All of the violations alleged against Sgt. Alvarez concerned the Sergeant's Post Orders (Exhibit R-3).

Again referencing the PNDA, from the time of the incident until the case was turned over to the UCPO, he reviewed the video and logbook and "started gathering information

for the investigation". The 2nd page is a Loudermill notice and to serve that, you have to serve charges. He already knew what the issues were.

On re-cross examination, he was directed to the PNDA (Exhibit R-13) and testified that he did not prepare that document and the only input that he may have had was just with the "violations" page, but not the "specifications" page.

Lt. Gonzalez reiterated that Sgt. Alvarez had until the end of the shift and the tour report to take action, but that he "didn't notice anything on his tour report". He conceded, however, that his report did not reflect that he reviewed the tour report and he currently has no recollection of "what was on it".

Lt. Gonzalez also read aloud the October 19, 2021 letter to Sgt. Alvarez (Exhibit P-15), which placed him on leave without pay.

He again noted that failing to supervise is a serious matter and explained his feeling that the 'immediate supervisor' was the person which the facts suggested he should be reviewing the most closely. He agreed that Sgt. Alvarez was not being disciplined "for any substantive violation", but rather "for his failing to supervise" by "not knowing what his subordinates are doing". He confirmed that Sgt. Alvarez's assignment was essentially as a floater and the three officers involved are not people he consistently supervises.

He emphasized that "the camera is huge" and while it is not in the Post Orders, he would "use it the entire day" as "a tool to use to make sure that your officers are doing their job".

Cpt. Robert Cesaro, Captain, Union County Sheriff's Department, Division of Corrections. He has been a captain since in the Division since July, 2021. Previously, from Summer, 2018 until the closure of the jail, he had been the Assistant Director of the Department, which is the position he held at the time of the incident.

He was aware of the incident and testified that Sgt. Alvarez failed to properly supervise Officers Melendez, Lee and Peters and further failed to uphold policy and procedures during this incident. He was aware of the incident and its general nature.

He reviewed the Sergeant's post orders (Exhibit R-3), and both the Preliminary Notice of Disciplinary Action (PNDA) (Exhibit R-13) and the Final Notice of Disciplinary Action (FNDA) issued to Sgt. Alvarez (Exhibit R-14).

Post Orders for sergeants are important since they ensure the sergeants are making sure that their officers are performing their duties and that inmates are being treated fairly and consistently. They also provide guidelines for a supervising lieutenant to review the actions of the sergeant.

He alleged that Sgt. Alvarez failed to supervise his unit properly, but in testifying, he merely cited to the malfeasance of Officers Lee, Peters and Melendez and the severity of the charge/incident. He confirm that all three officers received six month unpaid suspensions and executed "last chance" agreements (Exhibit R-16), which he reviewed and explained.³

He felt that the 28 days for AA was "adequate" for a "serious charge" and that others had received much greater discipline for the same "failure to supervise" charge.

On cross-examination, Caption Cesaro acknowledged that he was not involved in those "other" disciplinary hearings or privy to the investigations surrounding same. He did not recall if he was involved in preparing the PNDA (Exhibit R-13), but probably was. He was not involved in determining the recommendation for termination that was made. This was the only time during his tenure that someone was charged with failure to supervise.

³ A last chance agreement is an acknowledgement that if the signee receives another significant violation or write-up, they would be terminated from their employment.

He was also directed to the logbook entry (Exhibit P-7) for 16:00 later that day, He testified that despite the entry of "Security Check" having not been initialed, no investigation into the duty sergeant was initiated.

For Petitioner

Det. Dennis Donovan, Sergeant, Special Prosecutor's Unit, Union County Prosecutor's Office testified on behalf of Respondent. He began his law enforcement career in 1985 as a New Jersey State Trooper. He had an extensive career in investigations with the State Police before joining the Union County Prosecutor's Office in 2010 and has been in the Special Prosecutor's Unit for more than eight years.

He was involved in the investigation of this incident, having been advised of same by a lieutenant in the internal affairs department. Generally if internal affairs is "swamped", he would be assigned to do the investigation himself, which he had done before. He began by pulling the video and reviewing it. He knew that this was going to be, at least in part, an administrative internal affairs investigation as well as in-custody death investigation.

He prepared a November 26, 2018 summary report (Exhibit P-1) and concluded that Sgt. Alvarez "did his job the way he was required to do it that day and that (he) found no violations of any policy and...considered him to be exonerated of any...wrongdoing in this."

He also reviewed the report of Lt. Gargiles (Exhibit P-3) and noted his praise of Sgt. Alvarez contained within same. He then reviewed the Evidence/Property Receipt (Exhibit P-8) and confirmed that on October 19, 2018, he was provided with the video from the pod from the beginning of the shift, copies of the logbook and the automatic external defibrillator (AED) that was used on I.M.

As for the logbook (Exhibit P-7), he noted the page that started with an entry at 2:10 p.m. He also confirmed that he was told that Sgt. Alvarez had received a twenty-eight day suspension. As for the November 13, 2018 letter from the Prosecutor's Office

(Exhibit P-11) which exonerated Sgt. Alvarez both of any criminal or administrative liability, Det. Donovan testified that he discussed same with Mr. Esmerado and they agreed that they wanted to advise the jail as quickly as possible concerning their findings "to do whatever they could do to get him back to duty".

He also reviewed the Sergeant Post Orders (Exhibit R-3) as part of his investigation and determined that Sgt. Alvarez was in compliance with same and he continues to stand by his investigatory findings.

On cross-examination, Det. Donovan reiterated his conclusion that Sgt. Alvarez had complied with the Post Orders. He also noted that he had conducted both of his required security checks and that while it may not be explicitly stated in the report that he had complied with the Post Orders (he only specifically listed the General Post Orders – Exhibit R-2), he believed that the report demonstrated that Sgt. Alvarez had complied with all applicable Post Orders. He also noted that he referenced it when concerning the responsibility of the sergeant to conduct two tours and quoted directly from it.

As for the missing logbook entry, he testified that he felt that "there was no way that I could determine that Sergeant Alvarez could have immediately just looked at the logbook and know it was filled out incorrectly."

He summarized that he "was looking at the actions of the officers and the sergeant related to their attention to that cell block. Did – did their actions in anyway contribute to the fact that (I.M.) attempted to take his own life." Anything that did not impact that situation was not within the scope of his investigation.

Concerning Officers Lee, Peters and Melendez, he found that all three had committed violations and that the failure to conduct the thirty minutes checks was a real problem, particularly when they were documented as having been done.

He explained that while he found that the officers that Sgt. Alvarez was supervising had made errors, he also felt that he did what he would have expected a sergeant would do. He entered the tier, engaged with the officer who was present, signed the logbook

and then continued checking the tier. He then put himself "in the place of Sergeant Alvarez and I'm thinking 'how could he possibly have known that the logbook wasn't accurate at the time'. He also noted that there was no policy requiring him to check the video when he gets on the pod and there is no way he could have known that those checks had not been made.

Ultimately, he felt that Sgt. Alvarez "did all that he could at the time to make sure they were in compliance...it would have been impossible for him to know that one of those entries was inaccurate at time." He conceded, however, that when he signed the logbook at 12:53 p.m., he would have been able to see that the 12:30 p.m. had not been performed.

As for the November 16, 2018 letter from the Union County Prosecutor's Office to the UCDOC (Exhibit R-15), he had never reviewed same before. He agreed however, that the language of the letter exonerated Sgt. Alvarez only from a violation of the General Post Order (Exhibit R-2). However, this letter did nothing to change his perspective concerning the scope of his investigation and his report covered more than just the single post order.

Concerning the Union County Prosecutor's Office's authority to perform internal affairs types of investigation, he is unaware of same. He was just told by Mr. Esmerado to perform the investigation, so he did. This was not unusual.

On re-direct examination, Det. Donovan confirmed that he reviewed the Sergeant's Post Orders (Exhibit R-3) as part of his investigation and that he stands by his determination that Sgt. Alvarez "did not violate any aspect of the post orders for the Union County Jail".

Lt. William Gargiles, Lieutenant (ret.), Union County Department of Corrections. Lt. Gargiles worked twenty-seven years in corrections, including twelve as either a sergeant (four years) or lieutenant (eight years), the vast majority of which was with the Union County Department of Corrections. As a sergeant, he did have the opportunity to work Pod 4B.

He generally remembered the events of October, 16, 2018. He was the floor lieutenant that day and was in charge of all the floors of the jail. He responded to the code call with Sgt. Alvarez and specifically recalls speaking to Officers Melendez and Lee that day. They were both shaken up, but he asked them if they "did your checks" and they told him that they had.

He had viewed the logbook when he made his initial tour in the morning and did not notice any irregularities in it. He was never advised that he was the subject of an investigation into the events of the day and was not disciplined.

Lt. Gargiles authored an operations report that day (Exhibit P-3) and commended Sgt. Alvarez and four other staff members (including Office Melendez) for their actions that day. With respect to logbook irregularities, Lt. Gargiles testified that a sergeant can take a number of corrective actions. They can make a verbal on-the-spot correction, they can verbally reprimand the violator, they can list it in the tour report or, if it was egregious, their immediate supervisor could be notified.

The tour report is submitted to the shift commander. The lieutenant would not see it, although the shift commander is a lieutenant. There is no specific timeframe required for the filing of an operations report. If the sergeant was having an issue that he felt need to be attended to, he can always bring it to his immediate supervisor; the floor lieutenant.

Lt. Gargiles knew Sgt. Alvarez for fifteen years and was unaware of any disciplinary history for him.

Cross-examination was limited to a single question where Lt. Gargiles confirmed that under Sergeants Post Orders, an area supervisor is responsible for ensuring compliance with same by the officers he supervises.

Sgt. Antonio Alvarez, Sergeant, Union County Department of Corrections. He has been involved in law enforcement for approximately 15½ years, the last thirteen with Union County. He has also been an emergency medical technician (EMT) for eighteen

years and is a CPR instructor and teaches combat casualty care to both civilians and the military.

At the time of the incident, he was working as a pool sergeant and had been for five years, so he would rotate throughout the jail. Every Wednesday, he picked his schedule for the following week and would fill in for any vacancies or just split a floor with another supervisor. He had worked Pod 4B previously and was familiar with the Post Orders and testified that he was fully compliant with them.

At the jail, he had an office and had access to live video cameras during his shift. However, he had no ability to rewind or review footage.

On October 16, 2018, he was an extra, so he did not have responsibilities on the sixth floor of the jail, only for Pods 4A and 4B and as a rover. His job was to respond to any emergencies or disciplinary issues throughout the jail, assist other supervisors and handle inmate inquiries. He would act as an advocate for his officers as well as for the inmates, helping them with medical issues, court issues, etc. He would regularly go downstairs to booking and releasing and would be "putting out fires". This was a very busy area of the jail and he would not routinely have downtime.

On the day in question, he did not recall having any downtime. He was in the unit first thing in the morning and performed his own check and then came back to the unit later in the day at about 12:41 p.m. – 12:42 p.m. He immediately started his tour and handled inmate complaints and concerns. He eventually came to the desk where the logbook is kept and signed in that he was on post and spoke with Officer Melendez and had a general conversation about how the day was going and was told that everything was "good".

Sgt. Alvarez then continued his tour and made his way up to 5B and he noticed I.M. in the first cell (5B-24) and that he was in distress and began the process to enter the cell.

After seeing the logbook at 12:53 p.m., he never saw it again. He was trained that if he saw discrepancy in the logbook, he would generally follow up with the officer. If there was a missing check, which he testified was "not out of the ordinary", he would ask for their justification (such as a medical emergency, maintenance issue, etc.). If the miss was justified, then there would be no issues. If there was a problem, however, he could give the officer an immediate verbal warning, give them a written warning or refer it to the floor lieutenant. If it was egregious, he could go to internal affairs if he felt that the lieutenant was not taking in seriously enough. He could also go to the shift commander.

As for timing, he could do it immediately, the next day or the next few days. He had never received any discipline for handling these types of matters over the next few days rather than immediately.

After the incident happened, he spoke with Officers Lee, Melendez and Peters multiple times. The first time, they were looking for a missing syringe in I.M.'s cell, but then was advised that the EMT had found it. While they were searching, he asked them multiple times if they had done their jobs and told them that if they had, they would be fine. They all said that they had. At this point, he thought I.M. would recover, because he was able to restore a pulse.

He was then assisting the officers log in their reports with his computer. They were still very nervous and he testified that he told them that if they did not do the checks, they should tell him now, since it would be easier if that is what happened. He would simply discipline them now. They insisted that they had done the checks and he was aware that Officer Melendez told Sgt. Reilly and Lt. Gargiles the same thing.

Sgt. Alvarez had never been disciplined and he was unaware of any member of the Union County Jail staff who had ever been suspended for failing to supervise. As to the issue that Cpt. Cesaro had testified about, he advised that occurred in or about 2007 and involved an escape where supervisors had not performed their tours and had falsified the logbook. Those supervisors were suspended.

On cross-examination, Sgt. Alvarez agreed that it was his responsibility to review the logbook and ensure its accuracy. While he agreed that he was not a member of the internal affairs unit, he was aware of disciplinary actions at the jail because he had been a union official for four years and had been on union committees since he started.

He was familiar with the Sergeant Post Orders (Exhibit R-3) and acknowledged again that it was a requirement for him to ensure that all staff members are in compliance with all post orders, policies, procedures, rules and regulations and that he should take corrective action when necessary. He acknowledged that Officers Peters, Melendez and Lee had not been performing all the security checks, nor properly recording the information in the logbook.

He did not notice any discrepancies in the logbook when he returned to the desk area at about 12:45 p.m. and did not notice that the 12:30 p.m. check had not been performed.

On redirect examination, Sgt. Alvarez testified that in the past when he noticed a missing check, he would ask the officer why it was not there. He also noted that a logbook is not a live recording and that it is completed "whenever they can get to it". He would ask for a justification as to why the check was not there. There are routinely five or ten minute delays in documenting the logbook because the officers are performing multiple tasks.

If a check was missing, the priority would be to confirm that the unit was in order and he confirmed that even though he had not noticed that the 12:30 p.m. check had not been performed, he was literally performing his check at the same time.

Finally, Sgt. Alvarez confirmed the timeline of events. He was supervising at that time. There had been an issue with inmates being transferred to the courthouse. He had to call an officer and then go to that officer's post. He then called Officer Melendez to assist and he then waited in the hallway with those inmates for the other officer to return. After that, he went into his unit to begin his tour. This was at approximately 12:41 p.m. – 12:43 p.m. He completed his tour of the lower unit and came to the book and signed it at 12:53 p.m. Officer Melendez was there and "after a few minutes", he proceeded upstairs.

The timing of exactly what he did was unclear because he testified that there was “no way” it took him eight minutes to get to the upper unit.

CHARGES AND SPECIFICATIONS

Respondent sustained all of the charges listed in the PNDA (Exhibit R-13) in the FNDA (Exhibit R-14). Those are violations of N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency, or failure to perform duties; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause. He was also found to have violated “(UCDOC) Rules & Regulations and Post Orders, including without limitation, Post 4B Male Reception Unit Orders, Post Sergeant Orders and Population Count Orders.”⁴

The relevant specifications listed in the FNDA were;

4. On or about October 16, 2018 between the hours of 9:00AM and 1:15PM, you failed to insure compliance with Post Orders, Policies, Procedures, Rules and/or Regulations of the Department when you allowed three Corrections Officers J.L., A.M. and W.P. (all of whom you know by name (“CO’s”) to fail to do their jobs and/or fail to conduct tours of the inmates in the Pod you/they were assigned during the period above.
5. You further failed to ensure that walking/visual security checks in the areas to which the CO’s were assigned were conducted every thirty (30) minutes and to ensure that all inmates were living and breathing. Such became specifically apparent when you personally found an inmate hanging from his cell shortly after 1:00PM on October 16, 2018 in an unconscious, non-breathing state who had apparently not been checked on for over ninety (90) minutes.
6. You also failed to have the CO’s conduct their appropriate duties, you allowed on or more CO’s leave the assigned post during this period on October 16, 2018 either without permission and/or backup and/or being properly relieved. The CO’s also failed to appropriately fill out the logbook as to cell searches and/or relief from duty, which is also under your jurisdiction.

⁴ N.J.S.A. 30:8-18.2 was also noted to have been “sustained”. This statute concerns time limits for filing charges against a corrections officer for violations of internal rules and regulations and does not speak to the officer’s conduct. Any violation of same would be by the Respondent, not Petitioner.

7. You permitted CO W.P. to leave his post on or about 12:30PM on October 16, 2018 leaving only one (1) officer instead of two (2) officers to cover W.P.'s absence between 12:30PM and :00P< on October 16, 2018, putting those under your supervision and the inmates under your control at risk.

8. The logbook, which is under your control, did not contain proper and/or appropriate entries in violation of Department Post Orders/Policies and you apparently took no action to correct/resolve same.

9. You did not properly authorize/relieve one or more CO's during the 1:30AM through 1:15PM period on October 16, 2018 in violation of Depart Post Orders/Policies nor provide for/insure there was relief for same, though you were aware of such.

10. Your actions and/or inactions on October 16, 2018 contributed to the incident in which an inmate was left unchecked for over ninety (90) minutes during which time he hung himself in his cell and ultimately passed away.

APPLICABLE LAW

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his duties. N.J.S.A. 11A:1-2(a).

A civil service employee who commits a wrongful act related to his or her duties, or gives 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; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant, and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given pconclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the tribunal must "decide in favor of the party on whose side the weight of the evidence

preponderates, and according to the reasonable probability of truth.” Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable probability to exist, the evidence must be such as to “generate belief that the tendered hypothesis is in all human likelihood the fact.” Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959). Preponderance may also be described 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).

In appeals concerning major disciplinary actions brought against classified employees, the burden of proof is on the appointing authority. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is a preponderance of the credible evidence. In re Polk License Revocation, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958). The preponderance may also be described as the greater weight of credible evidence in a case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

Where facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is defined as: “The quality that makes something (as a witness or some evidence) worthy of belief.” *Credibility*, Black’s Law Dictionary (10th ed. 2014).

Credibility is the value that a finder of the facts gives to a witness' testimony. It requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it “hangs together” with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963).

Accordingly, credibility does not mean determining who is telling the truth, but rather requires a determination of whose testimony is “worthy of belief” based upon numerous factors. Credibility is not based on who presented the most witnesses. Instead, it is “the interest, motive, bias, or prejudice of a witness [that] 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. 1952), certif. denied, 10 N.J. 316 (1952) (citation omitted). The process entails

observing the witnesses' demeanor, evaluating their ability to recall specific details, evaluating the consistency of their testimony under direct and cross-examination, determining the significance of any inconsistent statements and otherwise gathering a sense of their candor with the court. Thus, "[c]redibility involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963).

When determining the appropriate penalty to be imposed, the Board must consider an employee's past record, including reasonably recent commendations and prior disciplinary actions. Bock, 38 N.J. 500 (1962). Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522–24. Major discipline may include removal, disciplinary demotion, suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a); N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.4.

A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions evaluated by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential. See generally, In re Stallworth, 208 N.J. 182 (2011).

The concepts of progressive and major discipline have no fixed definitions and are case specific, but in Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966), the court declared that;

It must be recognized that a police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. . . . He represents 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

Id. at 566.

These issues were also addressed in In re Carter, 191 N.J. 474 (2007);

Even so, we have not regarded the theory of progressive discipline as a fixed and immutable rule to be followed without question. Instead, we have recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. See Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197-98, 627 A.2d 602 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense). In doing so, we have referred to analogous decisions to discern the test to be applied. See id. at 197, 627 A.2d 602. Thus, we have noted that the question for the courts 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 Polk License Revocation, 90 N.J. 550, 578, 449 A.2d 7 (1982) (considering punishment in license revocation proceeding) (quoting Pell v. Bd. of Educ., 34 N.Y.2d 222, 313 N.E.2d 321, 327, 356 N.Y.S.2d 833 (1974)).

Id. at 484-85.

Further, in matters involving the discipline of police and corrections officers, issues of public safety should be considered. Id. at 485. Officers are also held to higher duty than a "normal" public employee given their duty to uphold and enforce the law. In re Disciplinary Procedures of Phillips, 117 N.J. 567, 576-77. See also, In re Emmons, 63 N.J. Super. at 142.

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

Respondent Position

Respondent argues that it is undisputed the Officers Melendez, Lee, and Peters, all of whom were working under the direction supervision of Sgt. Melendez, "failed to comply with various Post Orders, Policies, Procedures, Rules and/or Regulations issued by the UCDOC". These violations included failing to perform required security checks, sign out for lunch break and to record all required information in the logbook. As a result of these violations, all three officers received six month suspension.

By failing to address these issues, it was argued that the suicide may have been prevented and that Sgt. Alvarez;

(h)ad an obligation to ensure that all information was properly recorded in the logbook and that all security checks were performed as per the Post Orders, but did not. Alvarez had a fundamental obligation to ensure that appropriate corrective action was taken against the other officers but, again, he did not carry out his duties and responsibilities.

Respondent brief at 3.

Respondent now seeks that "at a minimum, Alvarez be given a six (6) month suspension without pay, like the other officers who were involved accepted".

Petitioner Position

Petitioner argues very simply that Sgt. Alvarez fully complied with all applicable Post Orders and that even if it were possible for him to have become aware of the officers' malfeasance, there is no requirement that any corrective action be taken immediately. In fact, if he had paused to address any discrepancies in the logbook, it would have served only to delay the already overdue unit tour.

Petitioner also questioned why the investigation stopped with him and did not proceed further up the chain of command, noting that following Respondent's logic, then Lt. Gargiles should have been investigated for failing to properly supervise Sgt. Alvarez.

Petitioner also points out the irony of the fact that errors in the logbook continued even on the afternoon of the event, with the 4:00 p.m. security check not being initialed by the officer performing it. Multiple other logbook issues that day were also noted, but it was only Sgt. Alvarez who "has been investigated, disciplined, improperly placed on administrative leave without pay (and) termination sought". It is also argued that it is particularly outrageous that Respondent is now seeking a six month suspension, when both the appointing authority and Cpt. Cesaro both opined that a twenty-eight day suspension was adequate.

With the Union County Prosecutor's Office totally exonerating Sgt. Alvarez (both through its investigator and the supervising prosecutor), the witness testimony and the evidence submitted, it is argued that he must be exonerated of all charges and, if found

guilty of a technical violation, “should be afforded the benefits of progressive discipline and receive a retraining for his first ever violation of any rule, regulation, policy or procedure as a respected sergeant of the Union County Department of Corrections.”

FINDINGS OF FACT

Timeline

A timeline is particularly helpful in this case in order to place the case against Sgt. Alvarez into proper context

08:00 a.m. – Sgt. Alvarez comes on duty

11:31 a.m. – last security check of I.M.’s cell

12:00 p.m. – scheduled security check (not performed)

12:30 p.m. – scheduled security check (not performed or documented)

12:41 p.m. –

12:42 p.m. – Sgt. Alvarez returns to the unit

12:45 p.m. – Sgt. Alvarez speaks to Officer Melendez near the logbook

12:53 p.m. – Sgt. Alvarez signs logbook at the unit desk

01:00 p.m. – next scheduled security check

01:03 p.m. - Sgt. Alvarez finds I.M. hanging in his cell

01:05 p.m. – emergency personnel arrive at I.M.’s cell

01:27 p.m. – I.M. removed from the unit by EMS

01:45 p.m. – N.G. takes possession of the logbook by from the shift commander’s office.

There are at least a few facts that the parties agree on or are uncontested and I **FIND** the following;

1. Officers Lee, Peters and Melendez (the officers) all failed to adequately perform their duties and both actively and passively misled their supervisors concerning those actions/inactions.

2. The officers failed to perform eight of the ten scheduled security checks from 8:00 a.m. – 12:30 p.m. on the day in question.
3. The scheduled 12:00 p.m. security check was not performed by the officers.
4. The scheduled 12:30 p.m. security check was neither performed nor documented by the officers.
5. Sgt. Alvarez performed the two security checks required by him during his shift.
6. Sgt. Alvarez spoke to Officer Melendez near the desk at about 12:45 p.m. having already performed his check of Unit 4B.
7. Sgt. Alvarez signed the logbook at 12:53 p.m.
8. By 1:03 p.m., Sgt. Alvarez had proceeded to Unit 5B and discovered I.M. hanging in his cell.
9. Sgt. Alvarez was actively involved in the performance of CPR and searching I.M.'s cell even after his body was removed at 1:27 p.m.
10. Sgt. Alvarez spoke with all three officers while searching the cell and all three told him that the checks had been performed.
11. By 1:45 p.m., the logbook had already been retrieved by Lt. Gargiles and was in the possession of Lt. Gonzales.
12. The entire chain-of-command present in the jail was already aware [Alvarez (sergeant) to Gargiles (floor lieutenant) to Gonzalez (shift commander/head of internal affairs)] of the incident by, at the very latest, 1:45 p.m.

To reiterate, Respondent alleges that Petitioner violated these two Sergeants Post Orders;

1. **“Supervisory” Post Order** - “[t]he Area Supervisor will ensure that all staff members are in compliance with all Post Orders, Policies, Procedures, Rules and/or Regulations issued by the Union County Department of Corrections”
2. **“Corrective Action” Post Order** - “[t]he Area Supervisor will ensure that corrective action is taken when staff is not in compliance with orders. All corrective action will be recorded on his/her tour report and the Shift Commander will be advised.”

I will address these allegations in reverse order.

“Corrective Action” Post Order

Concerning the “corrective action” Post Order, there are both literal and practical reasons why I **FIND** that same was not violated.

First, the tour report was never supplied and Lt. Gonzalez testified that he has no recollection of its contents. Second, the Shift Commander was certainly aware that there was an issue, since an investigation into I.M.'s suicide had already begun within minutes of its occurrence. Third, while there was discussion as to UCJ practices concerning the types of corrective action that may be taken (verbal, written, escalation, etc.), there is no dispute that corrective action had not been taken by the end of Sgt. Alvarez's shift.

While there is obviously an allegation that the logbook anomalies should have been noticed and addressed, that issue concerns the "failure to supervise" Post Order, not the "corrective action" Post Order. Since no corrective action had been taken, obviously Sgt. Alvarez was not obligated to report something that literally had not occurred.

As to the practical aspects of the corrective action allegation, Respondent infers that in the ten minutes from the time that he signed the logbook until he discovered I.M., he should have;

1. Noticed the logbook discrepancies.
2. Questioned Officer Melendez about those discrepancies (after already speaking with him and being advised by him that everything on the unit was in order).
3. Taken whatever information Officer Melendez had given him, located and questioned Officers Lee and Peters about same.
4. Determined what discipline was appropriate.
5. Taken corrective action against the officers.
6. Reported same to the shift commander.
7. Comply with his personal job requirement that a second security check be performed.
8. Ensure that the 1:00 p.m. security check was performed, be it by him or someone else.
9. Deal with ongoing personnel/staffing issues, including prisoner movement.

This was to occur in ten minutes.

In addition to the timing issues, there was also another practicality issue. This was not a static situation, but rather was a dynamic one. From the time that Sgt. Alvarez should, arguably, have noticed that the 12:30 p.m. check was missing and that there were

potential issues with the logbook until the jail was beginning the process of investigating I.M.'s suicide, a total of fifty-two minutes elapsed.

In essence, Respondent is charging Sgt. Alvarez with failing to not only detect the problem with the logbook, but also failing to determine who failed to document the check (which could have been one of three different officers) and initiate a disciplinary process against the yet unknown perpetrator(s), all while performing his normal duties, including performing the security check that literally discovered the inmate suicide.

Sgt. Alvarez did not have time to review the logbook after the shift. Rather, a full-blown investigation was underway within fifty minutes of his signing the logbook and he never had another opportunity to review it and other than some brief questioning of the officers in I.M.'s cell, he was, understandably, not in the position to research any possible violations by his supervisees.

For all practical purposes, from the minute Sgt. Alvarez, in the performance of his duties, found and attempted to revive I.M., he no longer had any control of the situation. As Lt. Gonzalez testified, this matter was almost assuredly going to be referred to the Union County Prosecutor's Office and, at the very least to the UCDOC Internal Affairs Division. With Sgt. Alvarez being the supervisor on duty at the time of the incident, he was going to be investigated and to charge him with a violation of this Sergeant Post Order is both legally and practically flawed.

Based upon the above, I therefore **FIND** that Sgt. Alvarez did not violate the "corrective action" Sergeants Post Order.

"Failure to Supervise" Post Order

In reviewing the documentary and testimonial evidence and further considering the arguments of counsel, I **FIND** that Respondent has proven by a preponderance of the credible evidence that Sgt. Alvarez failed to properly supervise the Officers Lee, Peters and Melendez on October 16, 2018, in violation of the relevant Sergeants Post Order.

In doing so, I find that the primary issue was not with the logbook and the manner in which it was filled out or the omission of the 12:30 p.m. check. Rather, I find that despite the activity on the unit, Sgt. Alvarez should have noticed during the course of the shift that the security checks were being missed.

This is true despite the actions of Officers Lee, Peters and Melendez, all of whom clearly committed (and ultimately admitted to⁵) committing malfeasance during the shift. While a good deal of time was spent detailing the issues with the logbook, it is the failure to view (not review) the video system where Sgt. Alvarez's actions were problematic.

In a case such as this, where he is acting as a "rover" and is not the regular supervisor of the three officers on the unit, I agree with Lt. Gonzalez that the utilization of the video system is an excellent supervisory tool. While the use of the system is not specified in the Post Order, the order calls for a sergeant to "ensure all staff member are in compliance". It does not dictate how to do that.

In this case, Sgt. Alvarez failed to notice that officers under his direct supervision neglected to conduct 80% of the scheduled security checks in the 4½ hours of his shift. This was not one or two anomalous missed shifts, but rather multiple ones in a short time period. Whether it was via the video surveillance system or personal observation and particularly given the prisoner movement issues that he was aware of, I **CONCLUDE** that he should have been aware of the possibility of missed security checks and have taken some sort of action to ensure that this was not occurring.

Given the above, I **FIND** that Sgt. Alvarez failed to properly supervise the Officers Lee, Peters and Melendez on October 16, 2018.

Additional Allegations

The specifications in the FNDA (Exhibit R-14), listed two staffing issues. (§s 7 and 9) in addition to the allegations detailed above. One concerned permitting Officer Peters to leave his post at or about 12:30 p.m. without coverage and the other specified similar coverage issues in the 11:30 a.m. through 1:15 p.m. time frames.

During the hearing, there was very limited testimony concerning these issues, with Lt. Gonzalez being the only witness to testify specifically regarding same. In reviewing the Sergeants Post Orders, he noted that with regards to the coordination of staff breaks, since both Sgt. Alvarez and Officer Peters told him that Officer Peters was leaving "that's the reason we didn't go any further with that one".

⁵ Per the last chance agreements, Officers Lee, Peters and Melendez pled guilty to violation of N.J.A.C. 4A:2-2.3(a)(12)(other sufficient cause) and of Post Orders. (Exhibit R-16)

He also noted that in the other instance of the alleged lack of coordination, Sgt. Alvarez was never notified that the officer was leaving the floor, so "I don't think I charged him with that one as well..."

He then answered affirmatively on cross-examination to Petitioner's assertion that the "paragraph about coordinating staff meal breaks is not part of this case".

Given the lack of evidence from Respondent concerning these specifications and Lt. Gonzalez's testimony, I **FIND** that same have not been proven by a preponderance of the credible evidence and that the analysis below will focus on the issues detailed below.

Charges

As detailed above, Sgt. Alvarez was found to have committed four separate violations; incompetency, inefficiency, or failure to perform duties; conduct unbecoming a public employee; neglect of duty; and other sufficient cause. N.J.A.C. 4A:2-2.3(a)(1), (6), (7) and (12).

Incompetence

In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Once again, the Administrative Code provides no specific definition of these terms. N.J.A.C. 4A:2-2.3(a) However;

(C)ase law has determined incompetence 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 CSV9921-98, Initial Decision (December 6, 1999), adopted, Merit Sys. Bd. (January 24, 2000), <http://njlaw.rutgers.edu/collections/oal/final/csv09921-98.pdf> (citing Steinel v. City of Jersey City, 7 N.J.A.R. 91 (1983); Clark v. New Jersey Dep't of Ag., 1 N.J.A.R. 315 (1980).)

In the Matter of Ciuppa, 2014 N.J. Agen LEXIS 106.

Conduct Unbecoming a Public Employee

Under N.J.A.C. 4A:2-2.3(a)(6), an employee may be subject to major discipline for conduct unbecoming a public employee. Although not strictly defined by the Administrative Code, “conduct unbecoming” has been described as an “elastic” phrase that defines conduct “which adversely affects the morale or efficiency” of the public entity or tends “to destroy public respect for . . . [public] employees and confidence in the operation of . . . [public] services.” Karins v. City of Atlantic City, 152 N.J. 532 at 554, quot. Emmons, 63 N.J. Super. 136 at 140 See also, In re Teel, 2012 N.J. Super. Unpub. LEXIS 667.

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 Zeber Appeal, 156 A.2d 821, 825 (1959)].

Neglect of Duty

Neglect of duty is one of the grounds for disciplinary action in a civil service matter under N.J.A.C. 4A:2-2.3(7). Although not defined by the regulation, it generally means that a person is not performing their job. The person may have failed to perform an act that the job requires or may have been negligent in the discharge of a duty. The duty may arise by specific statute, Post Orders, policies or from the very nature of the job itself. See generally, In re Calio, 2018 N.J. Super. Unpub. LEXIS 2706; West New York v. Bock, 38 N.J. 500 (1962).

Other sufficient cause

N.J.A.C. 4A:2-2.3(a)(12) does not define “other sufficient cause”, but this phrase is generally interpreted to mean violations of rules, regulations, policies and procedures such as Post Orders. In re Calio, 2018 N.J. Super. Unpub. LEXIS 2706.

FINDINGS

In reviewing the evidence, I **FIND** that Respondent has proven by a preponderance of the credible evidence that Sgt. Alvarez neglected his duty by failing to properly supervise the three officers on duty on October 16, 2018.

It was his job to ensure that his staff complied with policies, procedures, Post Orders, etc. and he did not. The problem, however, was not so much the missing 12:30 p.m. logbook entry that was the focus of so much discussion. Rather, the problem was the failure to detect that his officers failed to conduct 80% of the security checks that they were supposed to perform. Not only did he fail to utilize the one extrinsic tool available to him (the video system), but he failed to visually notice that these checks were not being performed. This is notable too, since there was testimony that the unit was busy, with prisoner movement, lunch breaks, staffers off site, etc.

Rather than an excuse for the checks not having been performed, these issues were all the more reason for him to have ensured that they were being performed. I therefore **CONCLUDE** that he neglected his duties on October 16, 2018.

Concomitantly, as to the charge of "other sufficient cause", I also **FIND** that same has been proven by a preponderance of the credible evidence. In reality, while a separate charge, it clearly falls under the auspices of the "neglect of duty" charge and given the basis for that finding, I am compelled to **CONCLUDE** that Sgt. Alvarez violated the Sergeant Post Orders by failing to ensure that Officers Lee, Peters and Melendez complied with all applicable rules and regulations during their shift.

As for the charges of conduct unbecoming and incompetence, however, I **FIND** that Respondent has failed to prove Sgt. Alvarez guilty of same by a preponderance of the credible evidence.

While those under his purview may have done so, there was no credible evidence that Sgt. Alvarez acted in any way that could be considered "unbecoming" as defined in Karins. He did nothing that would "offend publicly accepted standards of decency" or would "adversely affect() the morale or efficiency" of the entity. I therefore **CONCLUDE** that Sgt. Alvarez did not act in a manner that was unbecoming of a public employee.

Similarly, as to the charge of incompetence, the evidence simply does not support a conclusion that Sgt. Alvarez was unable or unwilling to perform his duties as a supervisor and he was clearly qualified for his position. In fact, there was not even an

inference from the witnesses that there was a belief that he was incompetent or was a "bad" supervisor in the macro sense of the term. I therefore **CONCLUDE** that Sgt. Alvarez did not perform his duties incompetently.

PENALTY

Often in cases such as these, what tends to get lost in the minutiae is that there is an underlying tragedy which led us here. What cannot be forgotten is that no matter the violations, actions or inactions of the people and institutions involved, the precipitating event was I.M.'s death.

However, in determining the appropriate penalty for Sgt. Alvarez, the fact that I.M. ultimately died is not the primary factor to be considered.

While Petitioner claims that he is being scapegoated by Respondent (or is falling "prey to the illogical belief of group punishment") in this case, I **FIND** that he is not. While one can argue the merits and severity of the punishment received by the clearly more culpable officers in this incident, in viewing the totality of the circumstances, despite the determinations of the UCPO (even with the walk-back letter issued a few days later), I **FIND** that both the investigation and institution of disciplinary charges against Sgt. Alvarez were warranted.

I further **FIND** that whether the investigation was limited to Sgt. Alvarez or proceeded up the chain-of-command is largely irrelevant. As argued by Respondent, technically one could initiate investigations all the way up to the Director of the UCJ. However, logically, I **FIND** that limiting same to Sgt. Alvarez, when there was no evidence of or allegation of malfeasance by Cpt. Cesaro or Lt. Gonzalez, was the correct decision.

As noted, Sgt. Alvarez received a twenty-eight working day suspension after being found guilty of all four charges. My review has reversed that finding on two of the charges, leaving findings that he neglected his duty and that there was other sufficient cause for his discipline.

In weighing the penalty for same, it must first be noted that Sgt. Alvarez has an unblemished record over a 15+ year career in law enforcement. No evidence of even the most minor of reprimands has been provided. Second, while he may be guilty of neglect of duty on that day, there are clearly mitigating factors. He performed his personal job

duties (as opposed to his supervisory duties) properly and without his intervention and actions, I.M. never would have had a chance of survival.

There is no indication that he ever committed any overt act of malfeasance and I found his testimony to be both sincere and credible. There was nothing purposeful about his acts/omissions and, frankly, his guilt seems more premised on an unwarranted faith in his subordinates to correctly perform their duties than an overall *laissez-faire* attitude.

While the above certainly lends itself to the potential of applying the progressive disciplinary scale to this case, the problem is that the area where Sgt. Alvarez neglected his duty goes to the core of his job responsibilities. This is not a "failure to check e-mail", turning in a tour report late or delaying a response to a staff request. Rather, this is monitoring the most basic and important responsibilities of the parties under his direct supervision and for those four – five hours, he largely failed to do that.

While I do not necessarily agree with the inference of cause-and-effect concerning the missed checks and I.M.'s suicide, there is no denying that the possibility of something "bad" happening (be it a suicide or other event) is enhanced when those checks are not performed. Further, the detection of the officers' malfeasance might have provided a hint to a more systemic issue of employee discipline above and beyond the missed checks, that could have been addressed.

I therefore **CONCLUDE** that the imposition of major discipline in the form of a suspension was warranted and that the use of progressive discipline in this circumstance would be inappropriate.

However, I also **CONCLUDE** that the imposition of the twenty-eight day suspension was appropriate. I **FIND** that this duration takes into consideration both the relative severity of the offense, Petitioner's years of unblemished employment as well as the overall performance of his duties that day. While there was obviously a tragic backdrop to these charges, I **FIND** that this was not an outcome based suspension, but rather one where the neglect, which otherwise may have been overlooked without the harsh spotlight of I.M.'s death illuminating it, was recognized, but was also placed in its proper context.

I therefore **CONCLUDE** that the twenty-eight day suspension strikes a proper balance between Sgt. Alvarez's unblemished record and the unquestionably meritorious

actions he took that day, but also the unfortunate failure to properly supervise Officers Lee, Peters and Melendez.

ORDER

Based on the foregoing, I hereby **ORDER** that Petitioner, Agustin Alvarez, be hereby suspended for twenty-eight days.

I further **ORDER** that Sgt. Alvarez be given credit for the twenty-eight day suspension that he served from October 22, 2018 – November 18, 2018 and that he not be required to serve any additional suspension.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

May 5, 2022

DATE

Date Received at Agency:

Date Mailed to Parties:

MGM/mm

A handwritten signature in black ink, appearing to read "Matthew G. Miller", written over a horizontal line.

Matthew G. Miller, ALJ

May 5, 2022

May 5, 2022

APPENDIX

WITNESSES

For petitioner:

Sgt. Augustin Alvarez
Det. Dennis Donovan
Lt. William Gargiles

For respondent:

Lt. Noel Gonzalez
Cpt. Robert Cesaro

EXHIBITS

For petitioner:

- P-1 November 26, 2018 Det. Dennis Donovan Internal Affairs Report
- P-3 October 16, 2018 Lt. William Gargiles Operations Report
- P-7 Logbook entries
- P-8 October 19, 2018 Evidence/Property Receipt
- P-11 November 13, 2018 letter from the Union County Prosecutor's Office to Ronald L. Charles, Director, Union County Department of Corrections

- P-15 October 19, 2018 letter from Ronald L. Charles to Sgt. Alvarez placing him on leave without pay

For respondent:

- R-1 Union County Department of Corrections Post Order, Post 4B, Effective Date February 1, 2013
- R-2 Union County Department of Corrections Post Order, General Post Orders, Effective Date March 19, 2012
- R-3 Union County Department of Corrections Post Order, Post Sergeant #3 & #9, 4th and 6th Floor, Effective Date January 4, 2013
- R-5 Daily roster, 8-4 shift, Tuesday, October 16, 2018
- R-10 Logbook entries for October 16, 2018
- R-11 Administrative Investigation Report by Lt. Gonzalez, dated December 1, 2018, updated to include Sgt. Alvarez statement, executed February 18, 2019
- R-13 Preliminary Notice of Disciplinary Action with Attachments, served December 1, 2018
- R-14 Final Notice of Disciplinary Action, served on or about April 29, 2021.
- R-15 November 16, 2018 letter from John G. Esmerado, Esq., Acting Assistant Prosecutor, Union County Prosecutor's Office to Ronald L. Charles
- R-16 Executed Last Chance Agreements for Officers Melendez, Lee and Peters