STATE OF NEW JERSEY

In the Matter of Larrick McElroy, Northern State Prison, Department of Corrections	**DECISION OF THE CIVIL SERVICE COMMISSION**
CSC Docket No. 2020-2486 OAL Docket No. CSR 06942-20	

ISSUED: JANUARY 17, 2024

The appeal of Larrick McElroy, Senior Correctional Police Officer, Northern State Prison, Department of Corrections, removal, effective April 1, 2020, on charges, was heard by Administrative Law Judge Elissa Mizzone Testa (ALJ), who rendered her initial decision on November 20, 2023. Exceptions were filed on behalf of both parties and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and reply, the Civil Service Commission (Commission), at its meeting on January 17, 2024 adopted the ALJ's Findings of Facts and Conclusions of Law. However, it did not adopt her recommendation to modify the removal to a six-month suspension. Rather, the Commission imposed a two-month suspension.

Upon its *de novo* review of the ALJ's thorough and well-reasoned initial decision as well as the entire record, including the exceptions and replies filed by the parties, which do not require extensive comment, the Commission agrees with the ALJ's determinations regarding the charges, where she recommended upholding the allegations regarding the appellant improperly allowing an inmate into his area without authorization, but dismissing the charges of sexual contact. This matter turns of the credibility determinations made by the ALJ regarding the testimony of the witnesses. In this regard, the ALJ specifically found the testimony of the inmate who made the allegations against the appellant not credible. In her detailed credibility determinations, the ALJ found:

> According to D.W., a sexual assault occurred in the area where McElroy works. To believe his allegation, one must almost suspend belief regarding the brief period in which multiple actions allegedly occurred.

Here, by his own admission, D.W. lied repeatedly before finally settling on the story in his third interview. He not only denied that the event occurred when first interviewed, he admitted he was high on a substance known as K-2 when he made it, blaming his intoxication on McElroy's pill, which D.W. alleges was given to him by McElroy, rather than the drugs found in his cell. McElroy testified that this pill is for his cholesterol. The latter conclusion bears the ring of truth, since the white powdery substance was found in his cell just prior to making the allegation. The next day, he was moved to another wing of the prison, presumably because of the discovery of drugs in his cell the day before. He admits that during the move to an undesirable housing location, he complained to Sergeant Hernandez about the alleged sexual encounter. But the second SID interview ended similarly, with a refusal to cooperate at all or support the allegation that he had made to Sergeant Hernandez. And, even when he was interviewed the third time - after several officers wrote reports confirming that inmate D.W. "back kicked" and injured one of them (J-21) and then "went limp" to avoid cooperating in the transport, he refused to cooperate with the only corroborative test which would have demonstrated whether there was any validity to the sexual allegation. That refusal to cooperate with a SANE test, when one claims to be a victim of a sexual assault, is telling.

D.W. also admitted to making false allegations in the past. Equally important, the inmate was no stranger to making false charges. He admitted that when he was incarcerated at Southern State Prison, prior to his transfer to Northern, he was engaged in a similar claim regarding an inmate with whom he was double bunked. Southern State found the PREA allegation to be false, subjected D.W. to significant punishment, and concluded that the claim was lodged for an ulterior motive. This is very similar to the current situation. To accept the testimony of D.W. would mean that McElroy is lying; the SID investigators are lying; Lieutenant Russo is lying (J-34); four officers who transported the inmate when he assaulted them are all lying (J-23; J-24).

D.W. demonstrated through his testimony and conduct that he had reason to lie. By his own admission, he was looking to avoid the substantial penalties associated with drugs being found in his cell. He was concerned as well obviously that he was being charged with assault upon officers when he was being transferred from one cell block to another. And he has a history of making similar false PREA claims in other settings.

McElroy testified forthrightly and vehemently denied that the alleged sexual act occurred. He did not deny speaking with the inmate

about porter responsibilities and noted that he often has four or five inmates working in the area with him when they are cleaning. He felt no concern or urgency in talking to D.W. about his request for employment and did not feel threatened in any way. He did not feel the need to call a supervisor because he felt the situation was totally controlled, and he was speaking with D.W. in a manner no different than D.W. would be talking with Officer Peterman on the medical line. He did not deny that he had D.W. in an unauthorized area and that he should have advised a supervisor of same, and therefore violated safety and security protocol. Thus, I **FIND** that the evidence necessary to sustain such a serious allegation against a veteran officer with nothing in his history to indicate such conduct must be far greater than what the DOC has produced. The incident was not captured on video, there is no one who witnessed the incident and it is a case of "he said she said". (Emphasis added.) In addition, by his own admission, D.W. recanted his story that the incident even happened on three (3) separate occasions. Further, as the trier of fact, I must also consider D.W.'s interest in the outcome, motive or bias. D.W. remains committed to justifying his past by continuing to allege a story he told, and repudiated, on three separate occasions. His admitted efforts to sell a book about the experience are the best evidence of his reasons for continuing this false narrative.

Therefore, in evaluating the testimony and evidence, I **FIND** all witnesses, except D.W., to be credible witnesses. I **CONCLUDE** that there has not been sufficient evidence presented to conclude a sexual incident occurred.

The Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.,* 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See also, In re Taylor,* 158 *N.J.* 644 (1999) (quoting *State v. Locurto,* 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra).* The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri u. Public Employees Retirement System,* 368 *N.J. Super.* 527 (App. Div. 2004). In this matter, the exceptions filed 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.

Similar to its review of the underlying charges, the Commission's review of the penalty is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). Even when a law enforcement officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense may nevertheless warrant the penalty of removal where it is likely to undermine the public trust. In this regard, the Commission emphasizes that a law enforcement officer, such as a Senior Correctional Police Officer, is held to a higher standard than a civilian public employee. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied,* 47 *N.J.* 80 (1966). *See also, In re Phillips*, 117 *N.J.* 567 (1990).

In this matter, the Commission agrees with the ALJ's recommendation to modify the removal to a lesser penalty. However, it disagrees that a six-month suspension is warranted. The upheld misconduct, which was admitted to by the appellant, is clearly serious and could serve to undermine or compromise the safety and security of the facility. In fact, had the appellant not violated policy by permitting the inmate into his area, he would likely not have been subject to the other allegations in this matter. This illustrates how important it is for officers to strictly adhere to the policies and procedures in a correctional setting and the ramifications that can occur when such policies are ignored. The Commission cannot condone such actions. Nevertheless, the appellant is a long-term employee, and the infraction, in and of itself, is not so serious as to support the imposition of a six-month suspension, which is the highest suspension permitted. As such, the Commission finds that a two-month suspension will suffice to send a clear message to the appellant as to the inappropriateness of his actions and signify that any future misconduct will likely result in more severe penalties up to or including removal from employment.[1]

In its exceptions, the appointing authority argues that back pay should be reduced for the period from when the record closed to the issuance of the initial decision since there was a long, unexplained delay by the ALJ and extensions for said

[1] The Commission notes that the penalty imposed is appropriate based on the misconduct and is not based on a progressive discipline analysis. In that regard, the appellant's disciplinary history in the record shows prior major discipline. However, the last such action was in 2010.

issuance were not promptly secured. The Commission rejects this contention. While the record does evidence such a delay, the remedy is not to reward the appointing authority and penalize the appellant where the delay cannot be attributed to him.

Since the removal has been modified, the appellant is entitled to be reinstated. Normally, the appellant would also be entitled to mitigated back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10 from two months after the first date of separation without pay until the date of actual reinstatement. However, there is information in the record indicating that the appellant was reinstated to pay status on April 2, 2020, pursuant to *N.J.S.A.* 40A:14-201. This presumes that he was previously immediately suspended without pay for 180 days based on this incident. Assuming the accuracy of this information, the appellant, therefore, will have already received any pay that he would be entitled to in this matter from April 2, 2020, until his reinstatement and should also receive any concomitant seniority and benefits for that time period. *See also*, *N.J.A.C.* 4A:2-2.10(d)5. Per *N.J.A.C.* 4A:2-2.10, the appellant is also entitled to mitigated back pay, benefits, and seniority pursuant from two months after the first date of separation without pay until April 2, 2020.

However, the appellant 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.

As the appellant is entitled to back pay per above from two months after the first date of separation without pay until April 2, 2020, pursuant to *N.J.A.C.* 4A:2-2.10, per 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, the appointing authority is required to 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 two-month suspension. The Commission further orders that the appellant be immediately reinstated to his permanent position. As the appellant has already served the two-month suspension without pay and has received pay since April 2, 2020, pursuant to *N.J.S.A.* 40A:14-201, no back pay is awarded from April 2, 2020, to

his actual reinstatement. *See also*, *N.J.A.C.* 4A:2-2.10(d)5. The Commission further orders that, pursuant to *N.J.A.C.* 4A:2-2.10, the appellant is entitled to back pay, benefits, and seniority from two months after the first date of separation without pay to April 2, 2020, as well as benefits and seniority from that date to his actual 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 17TH DAY OF JANUARY, 2024

Allison Chris Myers

Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 06942-20
AGENCY DKT. NO. N/A
2020-2486

IN THE MATTER OF LARRICK MCELROY,
NORTHERN STATE PRISON.

Robert A. Fagella, Esq. for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Dipti Vaid Dedhia, Esq., for respondent (Matthew J. Platkin, Acting Attorney General of New Jersey, attorney)

Record Closed: January 18, 2022 Decided: November 20, 2023

BEFORE: **ELISSA MIZZONE TESTA,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Larrick McElroy ("McElroy" or "Petitioner"), a Senior Correctional Officer with the Department of Corrections, and employed by respondent, New Jersey Department of Corrections ("NJDOC"), Northern State Prison, ("NSP" or "Respondent" or "DOC") appeals his removal from employment. On February 11, 2020, he was served with Charges and Specifications ("Charges") in reference to a Special Investigations Division Investigation #2019-10-04-004-NSP. McElroy was charged with N.J.A.C. 4A:2-2.3(a)6, Conduct Unbecoming a Public Employee; N.J.A.C. 4A:2-2.3(a)12, Other Sufficient

Cause; HRB 84-17 as amended, C-3 Physical or Mental Abuse of an Inmate, Patient, Client, Resident; C-5 Inappropriate Physical Contact or Mistreatment of an Inmate; C-8 Falsification: Intentional Misstatement of Material Fact; C-11 Conduct Unbecoming an Employee; D-4 Improper or Unauthorized Contact with Inmate-Undue Familiarity with Inmates, Parolees, their Families or Friends, D-7 Violation of Administrative Procedures and/or Regulations Involving Safety and Security; E-1 Violation of a Rule, Regulation, Policy, Procedure, Order or Administrative Decision. An agency level hearing was held on March 12, 2020. As a result, McElroy was served with a Final Notice of Disciplinary Action on March 31, 2020, removing him from duty effective, April 1, 2020.

The appeal was received by the Civil Service Commission ("CSC") on April 16, 2020, and forwarded to the Office of Administrative Law ("OAL") as a contested case, where it was filed on August 5, 2020.[1] **It is important to note that petitioner was placed back on pay status on April 2, 2020**.[2] (Emphasis added). A hearing was held before the undersigned on December 1, 2020, January 7, 2021 and January 21, 2021. The record closed on January 18, 2022.[3] Extensions have been granted for filing of the Initial Decision.

FACTUAL DISCUSSION AND FINDINGS OF FACT

McElroy is a 22-year veteran of the Department of Corrections. Based on the allegations made against him by inmate, D.W., he has been charged with engaging in a sexual act in his work area with that inmate. McElroy has always denied the allegation and argues that nothing in his history would suggest that he would engage in such improper conduct with the inmate.

---

[1] This appeal was received by CSC on April 16, 2020. Due to COVID-19 State shutdown and extremely limited staffing, this appeal could not be located at the OAL until June 24, 2020. Thereafter, due to a mandatory furlough of State workers during the month of July, the matter could not be docketed until August 5, 2020.

[2] See, 1T:6 and confirming email from counsel.

[3] There was a delay in closing of the record due to a delay in the parties receiving the transcripts in conjunction with multiple substitution of counsel by the respondent and repeated attempts to settle the matter.

TESTIMONY

K.R., FORMERLY KNOWN AS INMATE, D.W.

Inmate D.W. testified that he's no longer incarcerated and currently on parole. He was released from the New Jersey State Prison ("NJSP") in Trenton, New Jersey, on November 4, 2020. He was transferred to NJSP from NSP. Since his release from prison, he has been working full-time and engaged in therapy, complying fully with parole. He testified that his initial date of incarceration was on November 25, 2016, convicted of robbery and second-degree robbery.

D.W. testified that he was familiar with McElroy from NSP. He testified that on Wednesday morning, October 2, 2019, he left the A100 East Unit at NSP's North Compound around 7:30 a.m. to go to the MAT Team, a Suboxone program inside the program. He had been on it since September 2018 and was offered this because he was an addict in recovery and the medication helps with cravings, etc.

D.W. testified that he was at the MAT line on the South Compound waiting for his medication when McElroy stepped out of the gym and talked about the job change form, then left. McElroy returned a few minutes later and left the gym door cracked open and went back into the gym while he remained in line. He further testified that while he was in line another inmate who was also in line got his attention and told him that the officer was calling him into the gym. He went through the open door and went all the way through to the "bubble area" and peeked around the corner where he saw McElroy. Officer McElroy called him in, and they discussed the job details. McElroy told him that a lot of guys would not want to work with him because of his status as a feminine gay person. McElroy asked if he ever had sex with any officers or inmates, which made him uncomfortable. D.W. stated that he dodged the question and did not understand why McElroy was asking him that.

Shortly after, McElroy got up and went to an area with a storage room and a bathroom, which had a latch. McElroy went inside, stood there for a minute and told him that the area was off camera and then went back to the area where all of the screens were. McElroy showed him all of the camera angles, and they continued talking. McElroy then got up and led him back into that same area. According to D.W., he tried to walk away but McElroy called him back, and at that point, McElroy went into the area again.

McElroy then went into the bathroom and led D.W. inside, leaving the door cracked open. McElroy then indicated that he wanted D.W. to give him oral sex. D.W. testified that when he was down on his knees, McElroy produced a blue pill from somewhere. D.W. testified he took the pill from McElroy. McElroy fumbled with his belt, which had a strange clasp on it. McElroy then pulled his penis through his boxers, which were a purple and green plaid pattern. D.W. stated that he did as directed. He testified further that he performed oral sex on McElory who then ejaculated down his throat. He quickly left in shock and could not believe what had happened. He further testified that he felt like he did not have a choice in the matter, and he was really afraid and anxious the entire time. D.W. went back and rejoined the MAT line.

D.W. testified that he was in the bathroom with McElroy for less than 90 seconds to two minutes but could not be sure of the actual time. He testified that he considers it rape. It was not consensual, but as an inmate, he felt like he had no choice. D.W. testified that after he returned to the MAT line, the officers working the MAT line asked him what was wrong and if he was okay, but he brushed it off and received his Suboxone. He then went back to his unit, A100 East.

D.W. stated that Suboxone is a medication for addicts which is an opiate blocker. His drug of choice was Percocet. When asked about his drug use prior to going to prison, D.W. testified that he was in a serious car accident in April 2009 with his father, himself and his dog and was injured as a result of that accident and that was his introduction to opiate pain killers. Not long after that, he got involved with the underworld of drugs and learned other ways of using Percocet, their street value and a whole new lifestyle. He

testified that his career in real estate was over before it began, and his whole life changed. D.W. did not get clean until he was incarcerated for his first felony conviction. He learned from reading the copy of the drug test report that he was given amphetamine. The following morning, although he was cleared to leave, he had to meet with someone from the Mental Health Department.

D.W. testified that when he returned to his cell, he felt really dirty and asked an officer if he could shower, which he did for a long time. He was locked back into his cell a little after count time, which is 11:00 p.m. He began to feel like he was intoxicated and got the attention of an officer and requested help. He was then moved to the infirmary because he asked for help, and they moved him to the medical unit. D.W. testified that upon his arrival at the medical unit, he was given a drug test, placed under observation and put in an infirmary cell. Genarelli asked him what's going on, and he told her everything that happened the previous day, and she advised him that she had to report it. D.W. testified that he specifically reported what happened with McElroy, although he did not have intentions of making a formal Prison Rape Elimination Act (PREA) complaint. He expected what he told Genarelli to be confidential. He repeatedly asked her not to make a report, but she told him she had to do it and it was her job.

It was after that when the Special Investigative Division (SID) came and spoke with him. The first time he spoke with SID, he told them in full detail everything that happened. D.W. testified that the people from SID were making light of what happened and laughing like it was funny and saying that it couldn't have been McElroy because they knew him.

D.W. testified that he made three complaints on separate occasions to Internal Affairs regarding the alleged sexual encounter with McElroy. The first one occurred in the morning of October 3, 2020. He stated to Genarelli that on the morning of October 2, 2020, he had a sexual encounter with McElroy in the officers' bathroom. He stated that it occurred while he was waiting to receive his Suboxone from the medical line, which he was prescribed in order to reduce his drug craving. Genarelli immediately notified SID, who came to interview D.W. later that day. At the time that D.W. made this allegation, his

cell had just been searched because of apparent drug usage with his cellmate. Officers located D.W. in his cell, who was alleged to be intoxicated, with slurred speech, and glazed eyes. DOC records confirmed that a white powdery substance, together with pink pills, were discovered in the cell for both D.W. and his cellmate (J-17). D.W. was served with charges for possession and intoxication in violation of prison regulations. Several reports were written by the officers who performed the search and were involved in the incident (J-17; J-18).

This was D.W.'s first PREA allegation to Genarelli. By that evening, he had been transported to a segregated area of the jail because of the drug allegations. When SID arrived for the interview and D.W. was requested to make his claims on camera, he admittedly declined. Instead, he admits he stated to SID that he had lied to Genarelli; that no sexual conduct had occurred; that he was "high" when he spoke to her; and that there was no basis to proceed with the allegation. D.W. testified that the SID investigators told him off camera that they would have the disciplinary charges dropped if he agreed to lie, and that is why he denied that any sexual assault occurred.[4]

D.W. admitted that he was involved in another incident shortly thereafter, in which he was being transferred from his current housing assignment to Delta unit. D.W. testified that he did not want to be housed in Delta Unit because it was a very undesirable location. During the course of that transport, he told Sergeant Hernandez that he had been involved in a sexual act with another officer (J10). That evening, SID again came to interview D.W., and he again denied the sexual allegations. He claimed that this was because he wanted to speak to the initial team of SID officers who allegedly promised a better "housing deal" if he dropped the allegations. (Emphasis added). D.W. testified that the original SID officers offered to move him into a specific unit. He wanted to go to C1 East, a safe unit for homosexual people.

[4] It is the assertion of the respondent that this claim was never made by D.W. previously, and that it has been denied by the SID Investigators themselves.

On October 4, 2020, D.W. once again, made the PREA complaint for a third time, and SID again appeared. D.W. testified that he had committed a sexual act upon McElroy. It should be noted that just prior to D.W. making this claim, he had been involved in a "Code 33" and assaulted an officer who was transporting him. He "back kicked" an officer, was belligerent and uncooperative (J-20; J-21). (Emphasis added). D.W. denied attacking the officers. He testified that officers threatened to spray him, called him names and assaulted him. When D.W. laid down, the officers started dragging him which caused abrasions. D.W. testified that officers beat him and called him gay slurs and a snitch.

When asked to submit to a "SANE" test, which would determine the presence of semen, he admittedly declined and then said he did not wish to cooperate any further with the investigation. D.W. testified that he told SID that he was done cooperating with them and asked the SID officers if they were personally going to escort him to the "SANE" test, and they assured him that they would. When it came time to leave, regular custody officers showed up, and D.W. refused to go with them. D.W. himself admitted that on three occasions he either lied about his PREA allegation of sexual activity with McElroy or refused to cooperate with efforts to corroborate his allegation.

D.W. testified that he had been a drug user most of his adult life, using cocaine, crack, amphetamines, cannabis and occasionally heroin and that he was a male prostitute at times and repeatedly arrested. He was sent to State prison for second degree armed robbery, moving from various New Jersey prisons over the course of the next several years. He also admitted that he has suffered from mental illness since he was a teenager.

D.W. further testified that he has been attempting to sell a book regarding his prison experience, including his alleged sexual encounter with McElroy and that he had an active social media presence, seeking funding to help publish his memoir.

LARRICK MCELROY

McElroy testified that he was the "LCP" officer on Mondays through Fridays. In that assignment, he was in charge of gym and recreation for Housing Unit inmates. The job involves arriving in the work area at approximately 8:45 a.m. His actual start time is earlier, but he has other duties to perform before arriving at his assigned post. The LCP is located off of the gymnasium, where his primary responsibility is to distribute athletic equipment such as basketballs, soccer balls, etc. to inmates as they arrive for recreation.

This was McElroy's assignment on October 2, 2019. He testified that he arrived at the gymnasium area at approximately 8:45 a.m. and entered the LCP area with his lunch. His practice of propping open the doors on that day was the same as most days and, indeed, was the same practice utilized by his predecessor for years. Just before the movement of inmates to the gymnasium was expected to occur, he would prop open the doors leading into the gym from his pod area. He also propped open the storeroom and bathroom doors as well. He testified that this was designed to make it easier to accommodate the inmates as they arrived for recreation approximately five – ten minutes later. In order to accommodate the recreation period, those doors would have to be opened to access and distribute the gym equipment. The alternative to this practice would have been to open the doors when the inmates arrived, with the result that the inmates would then be congregating around the area outside of the gymnasium, and where the medical line was in progress. McElroy stated that this usual practice was never concealed or hidden. It should be noted that McElroy admitted that all times relevant, he knew that this was not the safety protocol accepted by respondent. However, he testified that his actions were well known to supervisory officers who were periodically in the area and certainly not designed to deceive. McElroy also had his prescription medication with him, which is a blue "blood pressure" pill he identified as Caduet. His lunch and the pill were on his work desk when D.W. later came into his area.

On October 2, 2020, D.W. was waiting on the medical line to receive his daily regimen of Suboxone designed to reduce his drug cravings. Officer Peterman was in charge of the inmates in the medical line. McElroy stated that D.W. apparently wandered off from the medical line monitored by Officer Peterman and walked into McElroy's work area, indicating he wanted to speak with him. McElroy could see the inmate approaching through the window of his bubble. The bubble is a booth which is another area located inside the LCP. He thought the inmate wanted to talk with him and allowed D.W. to enter the LCP area. D.W. explained that he came seeking a job as a porter. Because McElroy was assigned several porters to clean his work area and the gymnasium, he decided to listen to D.W. McElroy testified that D.W. gave him a job request form for the assignment, and they spent a few minutes discussing what the job entailed. McElroy was interested in whether the inmate knew how to clean, scrub, buff floors and perform other related responsibilities like his other porters.

McElroy testified that D.W. acknowledged that he did not have this experience, but believed he had the ability to work productively. McElroy testified that D.W. stated that he wanted the job because it would get him out of his cell, allow him to do something constructive and even earn money. He then showed D.W. the areas that would have to be cleaned, and then walked the inmate into the storeroom area, describing the types of materials and products the inmate would be required to use in order to clean all the assigned areas.

McElroy testified that while showing D.W. various areas for cleaning, he went into the bathroom briefly to wash his hands because he was preparing to eat lunch. He exited without finishing because he thought the phone in his booth had rung. He then completed the discussion with the inmate and intended to return to the bathroom to wash his hands. He dismissed the inmate and watched him departing because their conversation had concluded. A video was shown to McElroy during his testimony which depicted that during this time D.W. was leaving towards the outside door which leads to the gym area, while McElroy entered the bathroom through the storage room. The video further

depicted D.W. returning to the threshold of the storage area. McElroy testified that he was unaware that D.W. had returned. (J-29).

McElroy testified that, based upon his observation that the inmate was leaving, he went into the bathroom to finish washing his hands in anticipation of the expected inmates who would be arriving for gymnasium activity. While there, he turned on the water, and waited for it to get warm. While the water was running, he performed some related tasks such as replacing the paper towel bin and filling the various soap sanitizers above the sinks while the water ran. As he was drying his hands, he heard the telephone ring in his work booth. The video next showed D.W., who was still lingering in the threshold of the storeroom, quickly exiting the area ahead of McElroy and then departing towards the door to the gymnasium. McElroy was shown hurrying towards the bubble where the ringing phone was located. He testified that he did not see the inmate leaving ahead of him because he was looking straight ahead while the inmate veered off to the left just ahead of him. According to McElroy, this was the critical ninety second period where the parties were off camera. (J-39). McElroy testified that he reviewed the video of his work area and his ninety seconds off camera. Preliminarily, he noted that the video does not completely and accurately capture the event or the area exactly as it occurred or appeared because of differences in the camera angle. In particular, he testified that when he left the bathroom to answer the phone, the inmate was further ahead of him and closer to the exit door, which would explain why he did not see him there.

McElroy was adamant that he never had a sexual encounter with the inmate in the bathroom or anyplace else during this time, nor that he had any interest in the inmate, and had never engaged in, or desired, any homosexual activity with D.W. Regarding the blue pill, McElroy testified that he had it next to his lunch tray, and it was clearly visible to the inmate when they spoke about possible porter responsibilities.

INVESTIGATOR BRYAN BOSTICK

Bostick has been an Investigator with the SID at Northern State Prison, since 2018. Bostick testified that he investigated a PREA allegation against McElroy. Bostick testified that PREA is an allegation that something sexual in nature occurred at the prison. Bostick testified that he drafted a report regarding his investigation into this matter.

Bostick testified that as part of his investigation into this matter, he reviewed and/or participated in the interview of the inmate involved in the incident. On October 4, 2019, D.W. notified SID that he performed oral sex on a custody staff member. Based on this allegation, the Sexual Assault Response Team or the Sexual Assault Nurse Examiner, ("SANE"), Christine Ruggerio, was notified. SID then contacted the Assistant Prosecutor, Joe Perez of the Essex County Prosecutor's Office. Bostick testified that later in the evening of October 4, 2019, SID was informed that Inmate D.W. refused the SANE exam.

Because they had a date and timeframe of the incident, SID was able to go back and watch surveillance cameras within the gymnasium and review video footage. (J-9-through J-32). Upon finding the correct timeframe, video surveillance showed the first individual to walk through the door was McElroy. Bostick testified that the individual in the tan clothing was inmate D.W. He testified that McElroy walked inside the area where there was another door, which was propped open by a weight. This is an area that controls the doors and has a surveillance monitoring system. It is McElroy's assigned area and the actual local control point booth that he is assigned to. Bostick testified that the door openings on the left when looking at the screen, where the door was hinged open, was the supply room and inside the supply room is a bathroom and another room where he believes inmates clean mop buckets.

Videos 2, 3 and 4 showed Officer McElroy and inmate D.W. (J-29 through J-32. Bostick testified that it is his understanding that video surveillance works on motion and

that if you get some motion, it will record for a set amount of time and then turn off until it reads the motion again.

Bostick testified that, based on the time stamps present on the screen, not the recordings as a whole, he was able to deduce that McElroy and Inmate D.W. were in the supply room for 1 minute and 40 seconds. First, he saw McElroy walk in with his food tray, he went into the LCP, and D.W. went in behind him. Inmate D.W. did not seem to have anything in his hands and seemed to be in conversation with McElroy. Bostick testified that when McElroy was seen going into the supply room the second time, the lights turned out and it seemed that inmate D.W. followed him into the supply room. As they were leaving the supply room, McElroy moved out quickly right after D.W. walked out, and D.W. appeared to wipe his mouth as he walked out.

Bostick testified that after his review of the surveillance footage, he re-interviewed D.W. on October 10, 2019, to get more details. He wanted to find out what the conversation between himself and McElroy was about, why he was in the gym that day, a description of McElroy's boxers, what his penis looked like, and if he told anyone else about what happened.

D.W. explained in his recorded interview that the conversation first started off with McElroy talking about D.W. working in the gym. (J-29 through J-32). McElroy then started asking D.W. about his sexuality and whether he performed sexual acts on officers or inmates. McElroy told D.W. that where they were standing was off camera. D.W. explained to Bostick that he followed McElroy into the bathroom at McElroy's direction. Once in the bathroom, McElroy leaned against the wall, and offered D.W. a pill, to make him "feel better." He then told D.W. to perform oral sex on him. D.W. got down on his knees and unbuckled McElroy's belt, which was a thick leather. He couldn't undue his pants clasp, so McElroy assisted by pulling out his genitalia from the zipper of his pants. D.W. then performed oral sex on McElroy. After it was done, McElroy said to D.W. something along the lines of "I'm going to get in trouble," or "we're going to get in trouble."

(Emphasis added). D.W. then left and rejoined the MAT. D.W. told Bostick that the entire incident couldn't have been more than three minutes long. (J-29 through J-32).

After the October 10, 2019, interview with D.W., (J-29 through J-32). Bostick interviewed Officer Connie Peterman ("Peterman"), the MAT Line Officer. The MAT is a medically assisted treatment line, where inmates go to get their prescribed medication. He interviewed Peterman to ask if she noticed anything odd that day with D.W., which she stated that she did not. Bostick testified that the case was forwarded to the Division of Criminal Justice ("DOJ") for review, and on November 15, 2019, he received a Declination letter that stated to proceed administratively. He testified that he also contacted the Essex County Prosecutor's Office which also advised him to proceed administratively.

Bostick conducted a video interview of McElroy on December 19, 2019. (J-29 through J-32). He stated that he was assigned to the LCP Gym on October 2, 2019. McElroy told Bostick that at times, when porters come to clean the booth, he will prop the door open with something and then secure it once the porters leave. McElroy usually has four or five inmates in his detail, who clean and sweep the gym area. According to McElroy, those are the only inmates who should be inside the gym. If an inmate was not assigned to that area and was present, McElroy stated that he would report it to a supervisor. However, he's never had to do that. He also told Bostick that he has no say over who works that detail.

Bostick asked McElroy about his prescribed medications to which McElroy stated that he does take a blue pill prior to coming to work every day.

McElroy then explained how D.W. entered the gym on October 2, 2019. He explained that D.W. was in the MAP line and then came to the gym, where McElroy had the door propped open for the gym movement. He stated that he normally keeps the doors propped open when there is no one around. He sometimes uses a fire extinguisher to keep the door open.

McElroy stated that D.W. came in through the propped open door, to request a job. McElroy stated that D.W. had a job change form, which he handed to McElroy and McElroy then put it in the footlocker. It should be noted that the video shows that D.W. had nothing in his hands and never showed McElroy putting anything in the footlocker. (J-29 through J-32). They spoke about what a porter does, and McElroy showed him the different areas. McElroy stated that D.W. never crossed through the door between the booth and the supply room, and never used the staff bathroom there. While it is not common for inmates to come to the LCP with a job request form, McElroy still did not feel the need to report this to a supervisor.

McElroy stated that after D.W. came off the MAP line, he had a conversation with D.W., which lasted about three minutes. He then asked D.W. to leave, which D.W. did not do, unbeknownst to McElroy. McElroy then stated that as he was showing D.W. the area, McElroy went into the bathroom to wash his hands, not knowing that D.W. was following behind him and standing in the room outside the bathroom. McElroy was finished talking to D.W., so he turned off the lights in the area and went back to the bathroom to finish washing his hands. McElroy then appears behind D.W. as they walk out of the back room.

Bostick testified that after the interview with McElroy, he went down to his work area which was the LCP and obtained the job change form. At this point, a video of the search of McElroy's locker was played. (J-29 through J-32). Bostick testified that he was the one doing the search of McElroy's locker. He continued to testify that he conducted a search of the footlocker to recover the job change form that he indicated. He testified that the search was conducted on the same day as the interview. He testified that he had a partner with him for the search and that they had to cut the lock off because McElroy was the only one that had a key to the footlocker, the custody staff did not have a key. He testified that they recorded it in order to show that nobody else altered in any way that footlocker and there was only one way into it and that was through McElroy's key. He testified that using bolt cutters to cut the lock off on video showed that that was the only

other option to get into the footlocker to recover the job change form that was dated August 26, 2019. (J-12).

Bostick testified that the form as presented on the screen for everyone to see was the Job Change form that was found inside the footlocker inside the LCP gym booth. (J-12). He testified that the Job Change form was for D.W. He further testified that the significance of the Job Change form was that it was dated August 26, 2019, and the incident occurred on October 2, 2019. Bostick testified that he recorded his findings of the search on the footlocker in his report. (J-29 through J-32).

Bostick testified that this case was unsubstantiated as far as the PREA allegation. He continued to testify that at the conclusion of an investigation it is either unsubstantiated, which is not enough evidence to disprove the allegation, unfounded which there is evidence to disprove the allegation, which could lead to a charge, and substantiated, which means there is enough evidence to move forward with the allegation. He testified that if an inmate makes an allegation that was disproved or substantiated where there was enough evidence to move forward with the allegation, which means sending it to the prosecutor's office, but in this case, the PREA allegation was unsubstantiated.

Bostick testified that once he was done with his reports on this matter, it went to Administration so they could make a determination. After his original report was turned in, his principal investigator advised him that in inmate D.W.'s statement there was an allegation of a threat and derogatory names by the lieutenant who actually took the statement from the inmate. He testified that when this all first started, the main concern was the PREA allegation and after they realized they still needed to address the name calling. He stated that there was no link to McElroy in any way in the supplemental report because that was the statement that inmate D.W. provided, however it was separate from the PREA allegation. Bostick testified that he does not have any say in any discipline that an officer or staff member receives as a result of his investigative findings.

On cross examination, Bostick stated that his investigation into the October 2, 2019 incident was not geared toward security or other administrative allegations. As an investigator, Bostick knew that the inmate was on the MAT line, taking his prescribed medication, whatever it is, but he does not ask the inmates what prescriptions they are on because he treats every person fairly. It would not matter what drugs an inmate was addicted to because every person is treated fairly and as far as what their charge is on the street, he does not go into that because what they do in here is not necessarily what they are going to do on the street. Bostick testified that the DCJ course taught that none of those kinds of issues were important in judging the credibility of a complainant under a PREA charge and that it has nothing to do with a PREA complaint.

Bostick testified that yes, D.W. was charged a couple of hours after the alleged PREA event with possession of prohibited substance such as drugs, intoxicants or related paraphernalia.

Bostick testified that the allegation of the sexual assault occurred before D.W. was brought up on other disciplinary charges regarding intoxication,. He continued to testify that it had not occurred to him that the inmate was intoxicated when he was in the area with the officer because when he spoke with the inmate during the interview and spoke to the officer who was on the MAT line there was no indication he was intoxicated during that time. He further testified that the inmate never indicated to him during the interview that he was facing disciplinary charges. He further testified that the only time he spoke to him about anything was as he mentioned on page two of his report, after the interview concluded, that he said he took Suboxone and it says that he smoked K2. Bostick testified that K2 is a synthetic drug. He testified that he believed that it was some type of marijuana but that he was not too familiar with it. He further testified that it was possible that it affected a person's recollection of events, but he did not know what it actually does to you. He also testified that D.W. did not tell him that he was high that morning, but that Bostick did ask. Bostick testified that he stated the information when the camera was already off. Bostick further testified that he did not memorialize it in video because he was being interviewed that he cannot force or coerce an inmate to tell him more when the

camera is on, the only thing he can do is take their statement. He testified that the inmate made the statement off camera which is why it is in his report. (J-10 and J-11).

Bostick testified that the first incident occurred on October 2nd and the first PREA complaint was made October 3, 2019. He testified and confirmed that when the inmate was videoed, he completely denied it. He testified that he just said that he smoked K2, and he received that charge. Bostick testified that the first interview was October 3rd, but he was not involved in that one. Investigators Fiore and Bray conducted a video recorded interview of the inmate in Infirmary Cell 104 the day after he received the charges. D.W. did state that he was high and intoxicated and wanted to speak to SID on video. When asked if on October 3, 2019 when he actually made the complaint and said "I'm high" he was saying he was high right now, Bostick testified that he believed that was what it indicated.

Bostick stated that on October 3, 2019, D.W. made an allegation of being sexually assaulted the prior day. Bostick testified that he said he lied about the allegation because he wanted to speak with SID because he was unhappy with his housing unit. D.W. then told Bostick that he told him on October 4th after the interview that after he went to the Suboxone line, he smoked K2 and received an Administrative Sanction. When asked if D.W. made allegations that Bostick or the staff made promises to him that he would get more favorable housing if he said that these events never occurred, Bostick testified that he was not aware of that. When asked if D.W. ever alleged that he was promised by SID Investigators before the cameras were on that if he denied the allegations about the PREA event that his discipline charges would be dropped, Bostick testified that he was not aware of that.

Bostick testified that later in the day on October 3, 2019, D.W. reiterated the PREA complaint. He testified that it was a separate incident later that day and that the exact time was in the video recorded interview. Bostick stated that he was aware that on October 4, 2019, D.W. was involved in a Code 33, which is assaulting officers but that was investigated in a separate investigation. When it comes to an assault, it is a totally

separate investigation from PREA, however it does get investigated but not in his report. He further testified that just because the inmate gets charges, does not mean the PREA incident did not happen and that everything is taken into consideration, but it is his job to get the facts and move forward with the PREA allegation and not to discredit any parties involved.

Bostick testified that prior to him offering that the inmate go to a SANE exam, the inmate first named the officer in this matter and went into detail letting them know what happened and it was after that they offered him a SANE exam, which he agreed to. At that point, Bostick testified that he notified the Essex County Prosecutor's office that the inmate was willing to submit to a SANE exam, which they in turn set up. He testified that the inmate later refused because custody staff was going to transport him. He testified that because SID does not have caged vehicles they cannot conduct any escort of inmates off grounds, so custody does the escort, and they follow behind.

LAUREN GENARELLI

Lauren Genarelli ("Genarelli") works at Northern State Prison as a Mental Health Clinician. She is not employed by the Department of Corrections but by Rutgers University. She provides Mental Health Services to the inmates and has been there for six years. Genarelli provides individual therapy, group therapy and crisis intervention on two different units. One is a treatment unit where they provide more intensive care daily and the other is a crisis unit where they come for crisis situations such as suicidal, homicidal etc. Genarelli knows D.W. because he was on a watch status, which was because something was going on with him at the time that caused concern for his mental status. They put inmates on either a constant watch, which is 24/7, or a close watch, which means they are watched in increments of 15 minutes.

Genarelli testified that inmate D.W. told her that he was involved in sexual acts with an officer. She testified that the inmate told her he had been considering getting a job in the gym and that the officer in the gym saw him in the line to get medications and

called him in and said he wanted to show him what he would be doing if he took the position in the gym. D.W. told her that the McElroy showed him around and then took him into a back area where he commented that there were no cameras there and started to ask the inmate about his sexual encounters with other people and then he engaged in a sexual act with the officer. D.W. told her that he performed fellatio on the officer.

On cross examination, Genarelli testified that she knew McElroy in passing but not well and that she did know him before D.W. came to her. She testified that prior to October 3, 2019, she had never met with D.W. She testified that he had been in the infirmary for some reason, and they were concerned with his mental state and put him on a watch and that she had to see him as per her job description. Genarelli testified that anyone who is put on a watch whether it is a close watch or constant watch has to be seen by a psychiatrist, a psychologist and a social worker. She testified that she is the Mental Health Social Worker and on that particular day, he was on a list to be seen because he was on a watch. Genarelli testified that she did not know when he was put on the watch and did not know if he had any drug issues. She reviewed his records before she spoke with him and did not recall if he was taking any medications. She did not remember how long she had seen him, but it was long enough for him to tell her about the sexual assault with McElroy. Genarelli probably counseled him for a couple of minutes and then went and wrote her report. (J-13).

Genarelli testified that she did not recall D.W. telling her that he was charged with possession of drugs earlier as that is DOC's part. He had told her that he had taken something and that they found it, but he did not say that he was charged. She testified that he said the officer gave him something that he took. He recalled it was a blue pill that the officer told him to take after the sexual encounter and he went back to his cell and took it. She testified that she does not remember him telling her he had a reaction to the pill.

Genarelli saw him one time after that, and it was maybe a week later. She testified that he told her that he saw SID and that he had talked to them and they had decided to

get rid of his charges. She understood that to mean that he was implying that he was going to get something from SID for the charges that were pending against him if he spoke.

Genarelli testified that D.W. was in crisis the second time she saw him. She did not remember what the crisis was the second time but that it would be in the records. She believed he was on the special needs roster so he would have seen a therapist. She does not know who his therapist was. Genarelli testified that the second time she saw him was the last time she ever saw him.

BRUCE KERNER

Kerner works at Northern State Prison as an Administrative Major. He has held this position for approximately six years and his duties are to oversee internal management procedures, IMPs and post orders. He also deals with discipline of staff and does the operation activities of the institution. At the jail level, they handle any minor disciplines which are five days or less and administrative investigations which they submit to OER for their recommendation to see if any major discipline is warranted. He started in 1997 as a Correctional Officer Recruit, went to Senior Correctional Officer, then he became Sergeant, then Lieutenant at Northern State, went to central operations desk in Trenton and then back to Northern State as Administrative Major. He testified that everybody in custody works for him. He testified that the Special Investigation Division works under the Commissioner.

Kerner knows McElroy because McElroy worked with him when he was a Sergeant and under his supervision when he was a Lieutenant and as a Major and that they have worked together for many years. He has a supervisory role over McElroy. Kerner testified that he is familiar with the facts surrounding this case because he represented management at the institutional hearing level. The preliminary disciplinary report was issued to McElroy on February 11, 2020. The charges were Conduct Unbecoming a Public Employee, Physical and Mental Abuse of an Inmate, Improper Contact with an

Inmate, Violation of Policies and Procedures of the institution and Violation of Rules and Regulations of Administrative Decision and Falsification. The disciplinary action proposed to be taken against McElroy was removal. According to the Final Notice of Disciplinary Action (J-1), which states that a hearing was held on March 12, 2020, the charges were sustained. Kerner testified that HRB 84-17 is a table of the offenses of penalties that any custody officer may face due to a disciplinary action. (J-3). He testified that the purpose of this document is to give a guideline of how many days or from what level from minimum to maximum type of penalty they can receive for different infractions.

Infraction C3, which is "physical or mental abuse of an inmate, patient, client, resident, or employee' has a penalty of removal on the first infraction. Physical or mental abuse may be defined as a malicious act directed toward an inmate, patient, resident, client or an employee with the intent to cause pain, injury, suffering or anguish. Kerner testified that C3 was one of the charges McElroy received. Under personal conduct, C5 is 'inappropriate physical contact or mistreatment of an inmate, patient, client, resident, or employee. Under the first infraction, the penalty ranges from a minimum of an Official Written Reprimand ("OWR") up to removal. He confirmed that McElroy was charged with a C5 offense as well. A C8 charge is "falsification, intentional misstatement of material face in connection with work, employment, application, attendance or in any record, report, investigation or other proceeding". The first offense is an OWR up to a removal. He testified that C8 was included in Officer McElroy's charges. Kerner testified that C11 is "conduct unbecoming an employee" and the range of discipline is from three-day suspension up to removal. He testified that the range depends on the severity of what would be considered conduct unbecoming, some are just being disrespectful in public which is something that may be a little lesser and goes all the way up to what some of the charges against McElroy are. Violation of D4 is under safety and security precautions and states "improper or unauthorized contact with inmate, undue familiarity with inmates, parolees, their families or their friends' and ranges from written reprimand to removal. McElroy was charged with this offense. D7 is "a violation of administrative procedures and/or regulations involving safety and security" and the infraction ranges from written reprimand up to removal. McElroy was charged with this violation. E1 is "a violation of a

rule, regulation, policy, procedure, order or administrative decision", and the range is from written reprimand to removal. (J-1).

Kerner testified about the "personnel rules and regulations" which applied to all custody officers in the Department of Corrections. (J-4). The officers receive a copy of this during the orientation process. These are the rules that all have to follow as law enforcement officers. McElroy was a law enforcement officer and was to abide by these rules and regulations and some of the charges against him are directly mentioned in this. He testified to specific areas of rules and regulations that McElroy violated. He further testified that this policy was implicated because there was an inmate who was in an area that he was not authorized to be and at that time it should have been reported and the D.W. should actually have been charged. He testified that it was not reported. He testified that section three "no officer shall act or behave either in official or private capacity to the officer's discredit or to discredit the department. Officers are public servants twenty-four hours of the day and will be held to law enforcement higher standards both on and off duty". He testified that his understanding of that rule is that as a law enforcement officer, they are expected to follow the rules that they are enforcing. He testified that this document is substantially similar to the one he refers to in the normal course of his duties.

Kerner testified that the standards of Professional Conduct: Staff/Inmate Over Familiarity is an IMP Administrative Policy for standard professional conduct for staff involving inmate overfamiliarity. (J-5). IMP stands for Internal Management Procedures, which means it is standard for the whole state, all departments. Kerner testified that this is a rule of what you're not supposed to do when it involves inmates, for instance, do not have association with them until they have been released for a year, no contact with their family, etc. Kerner testified that under number one "both custody and civilian shall not engage in sexual conduct of any type with an inmate or any offender under the supervision of NJDOE." He testified that the document says "this policy is intended to supplement existing administrative orders and pertinent special code of ethics. Violation of this policy shall subject staff members to disciplinary action which may include immediate dismissal for a first offense. (J-3 through J-9).

Kerner testified to the Administrative Specifications Law Enforcement Code of Ethics, which he said is the Code of Ethics of the department, a level III IMP. (J-6). This policy applies to all employees of the department. Under section two under Roman numeral IV under A, "No officer shall knowingly act in any way that might be a violation of public trust. . .and under Section 3A "Officers shall be held responsible for improper performance of duty and for strict adherence to these rules and regulations." Section 56A states "officers on duty shall promptly report incidents in progress, failure to take actions and neglect of duty' and 'all officers shall promptly report in writing to the chain of command all crimes, misconduct or unusual incidents which come to the officers' attention during performance of their duties". Under the policy, "no officers shall become unduly familiar with inmates who are incarcerated, on community release or parole status or with inmates' families.

Kerner testified that DOE-150 Conflicts of Interest states officers shall refrain from personal relationship which reasonable tends to create the appearance that such relationship would interfere with the proper performance of duty'. Undue familiarity is mentioned in so many policies because it affects the security of the institution. If an officer has a relationship with an inmate, you lose the authority you have over them.

Kerner testified that Post Order 315 is the Local Control Point/Gym, LCP/G policy that only applies to Northern State Prison gym officers who are assigned to that post. (J-7). This policy states the rules and regulations that the officer must follow while at this post. He testified that the gym is about the size of two basketball courts put together and stretches from the North Compound to the South Compound. The area has ingress, egress doors on both sides to allow staff and inmates to enter from either the north or the south and the LCP is the Local Control Point where the officer is stationed when the gym is active, and inmates are present. The LCP controls the bathroom doors where the inmates use the facilities during their recreation time, and it controls the doors that go to an outside court area outside of the gym. The officer on this post has remote controls

over two of the doors and keys controlling all the other doors. The two doors that are remotely controlled are the doors going into the LCP area and the control booth.

Kerner testified that this policy was implicated in this case because McElroy was assigned as the gym officer which is first-shift Monday through Friday from 7:30a.m. to 3:30p.m. and that was his assigned bid for this day. The policy states, 'access to the local control point is limited to administrative custody supervisors . . ." and "the Local Control Point door is not to be opened if inmate and/or visitors could gain access to the Local Control Point'. When asked if the officer is permitted to leave a door propped open when they leave the area, Kerner testified that they are not. It becomes a security issue, doors are meant to be closed in jail, especially if the door is left unattended. An inmate having access to a control booth that may control doors is not permissible. If an inmate entered the gymnasium unauthorized the officer assigned should first challenge the inmate to find out why he's there, contact his supervisor to inform him there is an unauthorized inmate in the area.

Kerner stated that he believes that there are eight screens in the gymnasium control booth that the officer watches. The monitors show the majority of the gym but there are some areas where the cameras do not pick up. Any LCP must be secured, and inmates are not allowed in for security reasons because if they knew where the cameras were, they could do illegal activities in the gym without them knowing it or being able to review it. There are dark areas that are not under camera surveillance.

Kerner reviewed McElroy's individual Training Summary Report and all the training he had received within the Department of Corrections from 2000 to 2019. During the course of his employment with DOC, McElroy received training in PREA. PREA training is listed as ISO-800.161 and McElroy received training on October 29, 2019. McElroy also received PREA training on 1/12/17, 3/25/14 and 2/12/14 and 1/13/10. McElroy received ethics training on 10/29/19, 4/11/18, 1/12/17 etc.

According to his work history, McElroy had received a suspension for an arrest by Newark Police Department on 8/25/2000. He testified that he received the suspension on 7/1/06 for leaving his post and on 6/6/10, he allowed an inmate to pass officers. (J-2). He testified that he does review documents like this in his normal course of his duties.

When asked if in this instance the inmate wandered in for the sake of discussion and the officer wanted to talk to the inmate does that require calling a supervisor, Kerner testified that it does because they need to know why the inmate was there because the inmate does not have freedom to run around the jail like that.

If the inmate is in an unauthorized area, then the officer should report the incident or write the inmate up for being in an unauthorized area. He testified that he would assume that a similar incident would result in the same charges for any individual. He continued to testify that if a supervisor becomes aware of an infraction by a subordinate, then he would write a report and it would be investigated. If a supervisor sees any violation, it depends on the severity of the violation, if it can be handled with verbal counseling or he could give a letter of counseling to an officer or he could choose to bump it up to Kerner's desk where he looks at it to see if it goes for Administrative Investigation. He continued that if a supervisor walked into an incident that McElroy was charged with then he would expect him to write a report, it would have gone to SID and the investigation would have gone the same way. (J-3 through J-9).

ANTHONY GANGI

Gangi works at Northern State Prison as the Assistant Superintendent and has had this position since 2015. He started his career at Edna Mahan as custody in 2002, became Sergeant at Rahway in 2011 and from Sergeant to Superintendent. His current duties include overseeing programs, being the EED Coordinator and the PREA Compliance Manager. As a PREA Compliance Manager, he makes sure the facility is in compliance with the Federal PREA or Prison Rape Elimination Act guidelines. He makes sure that he does whatever he can to protect the inmate population from sexual assault

or sexual harassment as well as make sure he protects the transgender inmates as set forth in the Federal PREA guidelines.

As a Superintendent in the Administrative Level and as the Objective Agency, Gangi oversees each department head. However, he has no supervisory function in the Special Investigation Division. Gangi is familiar with McElroy. However, he is not familiar with the facts surrounding McElroy's removal because it was handled by the Professional Standards Unit – his involvement is usually inmate on inmate.

Gangi testified to the Zero Tolerance Policy: Prison Sexual Assault – their policy regarding zero tolerance which relates to PREA and used to protect the inmate population. (J-9). He testified that zero tolerance means they do not allow any type of sexual harassment or abuse, his job is to make sure that he protects the integrity of the complaint and protect the inmate from retaliation and make sure that he forwards everything that is done to the investigative authorities to make sure they collect the evidence and that there is a party that is going to be held responsible. He testified that because they are staff in authoritative positions, inmates cannot consent to sex with staff members.

Gangi explained that staff on inmate sexual abuse includes "contact between the penis and vulva or the penis and the anus including penetration however slight, contact between the mouth and the penis, vulva or anus, penetration of the annual or genital opening or another person however slight by hand, finger, object or other instruction and any other intentional touching either directly or through the clothing of the genitalia, anus, groin, breast, inner thigh or the buttocks of another person excluding contact incidental to a physical altercation." Staff on inmate abuse is with or without consent of the inmate which stresses the fact that an inmate cannot consent to any sexual relationship with a staff member because staff is in the position of authority. He further testified that because they are in an authoritative role it is emphasized that staff cannot coerce or threaten because even if inmate consents it is prohibited.

Gangi testified that all PREA allegations are taken seriously no matter how many times an inmate made an allegation that was false in the past, it does not matter. He testified that if an inmate wishes to report a PREA allegation against custody they could use JPay, an electronic grievance system which is private, they could write anybody, including the ombudsman, they can write to the investigative authority and directly to administration. He testified that they could also report the allegation to family and the family can call them and they will have the matter investigated.

Once an allegation of sexual assault is made, they first want to separate the inmate from the person they are making the allegation against. If it is against an officer, the officer would be banned from post and any inmate contact, which is a universal precaution until they find out the results of the investigation and make sure the officer does not present a threat to the population. If there was a sexual assault, they preserve the evidence, limit traffic going to the area and do a logbook. That evidence gets collected on the person, and the inmate is automatically seen through the medical and mental health provider to make a determination if a SANE exam is required. Gangi testified that the whole time this is being done, it is a confidential route and if the inmate does have evidence, they may be put in a dry cell. It should be noted that D.W. refused the SANE exam.

Gangi stated that he has encountered inmates that were hesitant to make a report. But there are penalties for inmates who make a false report. If the investigation is substantiated, it means there was enough evidence to prove something happened. There is also unsubstantiated which is not enough evidence either way so they can't disprove it, but they can't prove it either. Unfounded is that there is enough evidence to prove the allegation false and once they prove beyond reasonable doubt that the inmate made a false allegation, the inmate can be charged for a fraudulent act. Gangi testified that if a staff member is found to be in violation of this policy, it is zero tolerance by nature and potential for removal.

Gangi further explained that when the investigators are investigating the PREA component of a case, it is not the only thing they are investigating, there could be other things that come up. He further testified that when it is substantiated there may be a PREA element but cannot prove it either way, however there could still be other components of misconduct that don't fall under PREA so if someone is unsubstantiated that does not clear them, it is not unfounded. If someone has an unsubstantiated case, it does not mean they are innocent, it means there is evidence that can go either way but there could be other things in the case they could lean on. It is not unfounded where the person was found to be innocent, unsubstantiated means there could still be a threat and they have to protect the inmate.

When asked if the PREA charges in this case were unsubstantiated and why a PREA violation was still brought, Gangi testified that first off if it is unsubstantiated, it is still not clear yet and there is something else they need to look into. Secondly, if the PREA part is unsubstantiated, it does not mean that there are no other elements of misconduct and unsubstantiated to him is not enough evidence where they will want to put that officer next to that inmate because it was not proven unfounded. Even though it was found to be unsubstantiated and there was not enough evidence to demonstrate that the charge is valid it also could not be proven that it didn't happen, and they have to protect the inmate population. It could lead to discipline and the person could be removed with pay until it is determined if the person is a threat to the facility, safety and well-being of the inmates. When an inmate brings a PREA allegation, it one hundred percent authorized the removal of the officer not from employment but from his or her assignment because every allegation is taken seriously.

Gangi testified that they do contact employee relations because they make sure that every time they charge a person that they balance the right of the person being accused and talk to them for guidance in the matter because they do not want to jeopardize the right of the person being accused. He further testified that they have to balance the protection of the person making the allegation and the protection of the person being accused so they do confer.

LIEUTENANT FRED O'CALLAGHAN

O'Callaghan, from the Northern State Prison testified that he is currently the first shift South Compound Lieutenant. He has been a Lieutenant for eight years and has been at Northern State since January 5, 2019. He started with the Department in March 2000, in September 2007, he was promoted to the rank of Sergeant and in July 2012, he was promoted to Lieutenant at East Jersey State Prison. In his current job, he has to tour the entire South Compound which is Delta, Echo Unit, Fox Unit and the main units.

O'Callaghan knows the name D.W. but does not know the inmate that well. He testified that D.W. did not make any PREA allegations to him personally but testified that D.W. did make PREA allegations that he became aware of. O'Callaghan stated that it was Sergeant Hernandez that took the report from D.W. Once he got the report from Hernandez he contacted his on-call administrator. He testified that the inmate was making an allegation but would not give up any names, at that time. He did not have any involvement in this investigation once he informed his superior of the report.

SERGEANT ERNESTO HERNANDEZ

Hernandez is a sergeant for the New Jersey Department of Corrections, Northern State Prison. Hernandez's duties are to supervise custody staff officers along with the inmate population, and provide safety and security for the institution, in addition to other duties. He is familiar with D.W. as being one of the inmates he supervised on many of the units that he supervised and worked on. D.W. made a PREA allegation to him once and in that allegation, D.W. did not mention any names but said that he had sexual relations with an officer.

Hernandez testified that after D.W. reported this information, he immediately notified his chain of command shift commander, the lieutenant on duty. Because of his complaint, Hernandez placed D.W. in mechanical restraints (handcuffs) and followed the

procedure placing him under temporary close custody per the advice of the lieutenant shift commander. Hernandez testified that he did not recall whether D.W. was unhappy with being moved to the Delta Unit, which is a lockup unit and different from a general population unit, a segregated area. He then prepared a written report. (J-14).

Hernandez testified that his custody staff report, dated October 3, 2019, accurately described the incident as it was relayed to him. He further testified that after preparing his report, he submitted it to Center Control and had no further involvement.

ASSESSING CREDIBILITY

It is necessary for me to assess and weigh the credibility of the witnesses for the purpose of making factual findings as to the disputed facts. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness' story in light of its rationality, internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. Unites States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A trier of fact may reject testimony as "inherently incredible," and may also reject testimony when "it is inconsistent with other testimony or with common experience" or it is "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "[t]he interest, motive, bias or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts, and must simply be a reasonable one. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

The conflicting testimony of D.W. and McElroy make it clear that the court must make crucial credibility determinations. According to D.W., a sexual assault occurred in the area where McElroy works. To believe his allegation, one must almost suspend belief regarding the brief period in which multiple actions allegedly occurred. Here, by his own admission, D.W. lied repeatedly before finally settling on the story in his third interview. He not only denied that the event occurred when first interviewed, he admitted he was high on a substance known as K-2 when he made it, blaming his intoxication on McElroy's pill, which D.W. alleges was given to him by McElroy, rather than the drugs found in his cell. McElroy testified that this pill is for his cholesterol. The latter conclusion bears the ring of truth, since the white powdery substance was found in his cell just prior to making the allegation. The next day, he was moved to another wing of the prison, presumably because of the discovery of drugs in his cell the day before. He admits that during the move to an undesirable housing location, he complained to Sergeant Hernandez about the alleged sexual encounter. But the second SID interview ended similarly, with a refusal to cooperate at all or support the allegation that he had made to Sergeant Hernandez. And, even when he was interviewed the third time - after several officers wrote reports confirming that inmate D.W. "back kicked" and injured one of them (J-21) and then "went limp" to avoid cooperating in the transport, he refused to cooperate with the only corroborative test which would have demonstrated whether there was any validity to the sexual allegation. That refusal to cooperate with a SANE test, when one claims to be a victim of a sexual assault, is telling.

D.W. also admitted to making false allegations in the past. Equally important, the inmate was no stranger to making false charges. He admitted that when he was incarcerated at Southern State Prison, prior to his transfer to Northern, he was engaged in a similar claim regarding an inmate with whom he was double bunked. Southern State found the PREA allegation to be false, subjected D.W. to significant punishment, and concluded that the claim was lodged for an ulterior motive. This is very similar to the current situation. To accept the testimony of D.W. would mean that McElroy is lying; the SID investigators are lying; Lieutenant Russo is lying (J-34); four officers who transported the inmate when he assaulted them are all lying (J-23; J-24).

D.W. demonstrated through his testimony and conduct that he had reason to lie. By his own admission, he was looking to avoid the substantial penalties associated with drugs being found in his cell. He was concerned as well obviously that he was being charged with assault upon officers when he was being transferred from one cell block to another. And he has a history of making similar false PREA claims in other settings.

McElroy testified forthrightly and vehemently denied that the alleged sexual act occurred. He did not deny speaking with the inmate about porter responsibilities and noted that he often has four or five inmates working in the area with him when they are cleaning. He felt no concern or urgency in talking to D.W. about his request for employment and did not feel threatened in any way. He did not feel the need to call a supervisor because he felt the situation was totally controlled, and he was speaking with D.W. in a manner no different than D.W. would be talking with Officer Peterman on the medical line. He did not deny that he had D.W. in an unauthorized area and that he should have advised a supervisor of same, and therefore violated safety and security protocol. Thus, I **FIND** that the evidence necessary to sustain such a serious allegation against a veteran officer with nothing in his history to indicate such conduct must be far greater than what the DOC has produced. The incident was not captured on video, there is no one who witnessed the incident and it is a case of "he said she said". (Emphasis added.) In addition, by his own admission, D.W. recanted his story that the incident even happened on three (3) separate occasions. Further, as the trier of fact, I must also consider D.W.'s interest in the outcome, motive or bias. D.W. remains committed to justifying his past by continuing to allege a story he told, and repudiated, on three separate occasions. His admitted efforts to sell a book about the experience are the best evidence of his reasons for continuing this false narrative.

Therefore, in evaluating the testimony and evidence, I **FIND** all witnesses, except D.W., to be credible witnesses. I **CONCLUDE** that there has not been sufficient evidence presented to conclude a sexual incident occurred.

Further there is no video which captured the alleged sexual assault. The SID investigators admitted that the video camera in McElroy's work area was not functioning properly. It recorded the wrong date and the wrong time. While the video still captures certain essential elements of events, there was certainly no testimony by the DOC that the camera had been examined, tested, and otherwise recorded time properly, accurately "stopped and started" with movement, or whether camera angles were distorted. While the DOC claimed that the period McElroy and the inmate were off camera was a ninety second period when it did not record movement, SID could not assure the undersigned that the recording actually only stopped due to lack of movement, or that the period of no movement was precisely calibrated.

But even assuming the video timer is accurate, and properly calibrated to movement, it shows that McElroy was off camera for at most approximately ninety seconds. Within that time, the inmate contends that he walked through the supply room; entered the bathroom; got on his knees; ingested a "blue pill" without water; fumbled with the officer's uniform buckle; helped remove the officer's penis through the zipper; performed oral sex until the officer ejaculated into his mouth; got up from his knees, fixed himself, and then exited the bathroom through the storeroom area. A ninety-second period is hardly supportive of such an extraordinary number of events occurring in such an abbreviated period of time. I **FIND** that the ninety-second period does not afford enough time for all of alleged events by D.W. to have occurred.

D.W. always had an explanation as to why there was no video coverage of the events that he testified to. For example, he explained to Bostick during his videotape interview that the conversation he had with McElroy about his sexuality was had when they were standing where the camera could not see. Therefore, in evaluating the video evidence, I **FIND** that there has not been sufficient evidence presented to conclude a sexual incident occurred.

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a civil service employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2 2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies 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 conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the judge 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., 111 N.J.L. 487, 490 (E. & A. 1933). This burden of proof falls on the agency in enforcement proceedings to prove violations of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987).

This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, in accordance with a reasonable probability of truth. Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" 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). 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, 275 (1958). The burden of proof falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The respondent must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson, supra, 37N.J. 143. The evidence needed to satisfy the standard must be decided on a case-by-case basis.

An appeal to the Merit System Board requires the Office of Administrative Law to conduct a de novo hearing and to determine appellant's guilt or innocence as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987).

There is no constitutional or statutory right to a government job. State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, which should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, the City of Newark bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

The FNDA dated March 31, 2020, has sustained charges of N.J.A.C. 4A:2-2.3(a)(6), Conduct Unbecoming a Public Employee; and N.J.A.C. 4A:2-2.3(a)(12), Other

Sufficient Cause. The Rules and Regulations found to be violated are HRB 84-17, as Amended: C-3 Physical or Mental Abuse of an Inmate, Patient, Client, Resident; C-5 Inappropriate Physical Contact or Mistreatment of an Inmate; C-8 Falsification: Intentional Misstatement of Material Fact; C-11 Conduct Unbecoming an Employee; D-4 Improper or Unauthorized Contact with Inmate—Undue Familiarity with Inmates, Parolees, their Families and Friends; D-7 Violation of Administrative Procedures and/or Regulations Involving Safety and Security; E-1 Violation of a Rule Regulation, Policy Procedure, Order, or Administrative Decision. (J-1).

"Conduct unbecoming a public employee" encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for government employees and confidence in the operation of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Id. at 555 (citation omitted). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (citation omitted).

As to the Rules and Regulations found to be violated with regards to the HRB 84-17, they are a table of the offenses of the penalties that any custody officer may face due to a disciplinary action. (J-3). Bruce Kerner, an Administrative Major at the NSP, clearly set forth, through testimony, the HRB-84-17 table and offenses as they relate to the charges against McElroy. This testimony can be found on pages 21 through 22. Therefore, there is no need to repeat same.

Police officers are held to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). 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). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

As to Other Sufficient Cause, N.J.A.C. 4A:3(a)(12). There is no definition in the New Jersey Administrative Code for other sufficient cause. Other sufficient cause is generally defined in the charges against respondent as all other offense caused and derived as a result of all other charges against appellant. There have been cases when the charge of other sufficient cause has been dismissed when "respondent has not given any substance to the allegation." Simmons v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm'r (April 26, 2006), <http://njlaw.rutgers.edu/collections/oal/final/csv9122-99.pdf>.

The specifications of the DOC charges in the FNDA are directed at the sexual allegation. The specifications are based explicitly upon the alleged sexual act; the claim that he gave the inmate a "blue pill"; and making misleading statements about D.W. and the sexual allegation. As previously stated, I **CONCLUDE** that there is not sufficient testimony or evidence to conclude that McElroy committed a sexual assault against D.W.

The specifications of the DOC charges in the FNDA are also directed at violation of administrative procedures and/or regulations involving safety and security. (J-1).

McElroy has candidly conceded that some security rules and regulations introduced by the prison were not followed precisely on the day of the alleged incident. McElroy testified that the longstanding practice in his assignment was to prop open the doors to his area just prior to inmate recreation in order to facilitate a smooth movement. He admitted it was his practice virtually every day, and that this was the usual practice by

his predecessors in the job for many years. It is undisputed that the doors must be opened when the movement occurs in order to accommodate gym recreation. As he testified, propping them open was the best method to be utilized. His practice to open those doors a few minutes before the inmate movement – a practice that was done not only by him but his predecessor repeatedly for years – was needed to expedite and facilitate the movement. Indeed, DOC does not dispute that the security doors must be opened in order to conduct recreation period efficiently. Gym and recreation simply cannot occur unless the doors to the gym and the storeroom are open and easily accessible. McElroy did not feel that this practice triggered any security concerns, since he was present. However, he testified that he was aware that he was not to have inmates in an unauthorized area and if he did he was to notify a supervisor. While the DOC now contends it was not in accordance with best practices, it was open and observable by any supervisors. Indeed, McElroy testified that supervisory officers often were in the area and never objected to how he operated the recreation period. However, just because other security officers and his supervisors overlooked such conduct and allowed it to occur, does not make it right. It does not alleviate the reason why there are safety rules and regulations in place. I **CONCLUDE** that McElroy violated administrative procedures and/or regulations involving safety and security.

The issue of the footlocker search will not be addressed by the undersigned because there is sufficient evidence to warrant that McElroy violated administrative procedures and/or regulations involving safety and security on the above conduct alone.

I **CONCLUDE** that the removal of McElroy as a security officer is not appropriate. Rather, the DOC has only proven by a preponderance of the credible evidence that McElroy violated administrative procedures and/or regulations involving safety and security, and the appropriate penalty to be served by McElroy is suspension without pay for six months.

ORDER

It is hereby **ORDERED** that disciplinary action entered in the Final Notice of Disciplinary Action of the New Jersey Department of Corrections removing petitioner Larrick McElroy from his position of Correction Officer is hereby **MODIFIED**. The penalty to be served is suspension without pay for six months.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. 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.

November 20, 2023
DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency: November 20, 2023

Date Mailed to Parties: November 20, 2023

sej

APPENDIX

WITNESSES:

For Petitioner

Larrick McElroy

For Respondent

Brian Bostick

Ernesto Hernandez

D.R.

Lauren Genarelli

Bruce Kerner

Anthony Gangi

Fred O'Callaghan

EXHIBITS:

J-1 Preliminary and Final Notices of Disciplinary Action

J-2 Officer McElroy's Work History

J-3 HRB 84-17

J-4 Law Enforcement Rules and Regulations

J-5 Standards of Professional Conduct: Staff/Inmate Over Familiarity

J-6 Administrative Specifications Law Enforcement Code of Ethics

J-7 LCP/G Officer Policy

J-8 State of New Jersey Individual Training Summary Report

J-9 Zero Tolerance Policy: Prison Sexual Assault

J-10 Bostick SID Report dated 1/30/20

J-11 Bostick SID Report dated 5/22/20

J-12 Job Change Form Dated 8/26/19

J-13 Genarelli's Statement dated 10/3/19

J-14 O'Callaghan Special Custody Report dated 10/3/19

J-15 D.W. Statement dated 10/4/19

J-16 D.W. Statement dated 10/8/19
J-17 Disciplinary Report of D.W. dated 10/3/19
J-18 Bostick Criminal Investigative Report dated 10/11/19
J-19 Bostick email to Chiefs dated 10/4/19
J-20 O'Callaghan email dated 10/4/19
J-21 Preliminary Incident Report Susan Moore, QAHS dated 10/4/19
J-22 Special Custody Report dated 10/4/19
J-23 Special Custody Report dated 10/4/19
J-24 Special Custody Report dated 10/4/19
J-25 Bostick email dated 10/5/19
J-26 D.W. Statement dated10/22/19
J-27 D.W. Job Change Form
J-28 Job Change Form
J-29 Video of Area Where the Alleged Incident Occurred on 10/2/19
J-30 D.W. SANE Refusal Videos
J-31 Video of Investigator Bostick's Interview of Officer McElroy
J-32 Video of Footlocker Search

For Petitioner:

P-1 10/2/19 Incident Report
P-3 DOC Record for Penalties for 10/2/19 Incident
P-4 Mr. R.'s Superior Court Uniform Defendant Intake
P-5 8/23/18 South Woods Disciplinary Report
P-6 Adjudication of 8/23/18 Charge