



STATE OF NEW JERSEY

In the Matter of Tequila Thompson,
Albert C. Wagner Youth Correctional
Facility, Department of Corrections

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NO. 2013-627
OAL DKT. NO. CSV 13667-12

ISSUED: MARCH 29, 2018 BW

The appeal of Tequila Thompson, Correction Sergeant, Albert C. Wagner Youth Correctional Facility, Department of Corrections, 30 working day suspension, on charges, was heard by Acting Director and Chief Administrative Law Judge Laura Sanders, who rendered her initial decision on October 23, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on March 27, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to modify the 30 working day suspension to a 15 working day suspension.

Since the penalty has been modified, the appellant is entitled to 15 working days of back pay, benefits, and seniority pursuant to *N.J.A.C. 4A:2-2.10*. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C. 4A:2-2.12(a)*, the award of counsel fees is appropriate 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 any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See *Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *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. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12(a)*, counsel fees must be denied.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the 30 working day suspension to a 15 working day suspension. The Commission further orders that appellant be granted 15 days of back pay, benefits, and seniority. Per *N.J.A.C. 4A:2-2.10*, the amount of back pay awarded is to be reduced and mitigated to the extent of any income earned by the appellant during this period. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

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

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 27TH DAY OF MARCH, 2018



Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 13667-12

AGENCY DKT. NO. 2013-627

**IN THE MATTER OF TEQUILA THOMPSON,
ALBERT C. WAGNER YOUTH
CORRECTIONAL FACILITY,
DEPARTMENT OF CORRECTIONS.**

Patricia B. Quelch, Esq., for appellant Tequila Thompson (Helmer, Conley & Kasselmann, attorneys)

Susan Sautner, appearing pursuant to N.J.A.C. 1:1-5.4(a)(2), for respondent Albert C. Wagner Youth Correctional Facility, Department of Corrections

Record Closed: October 5, 2017

Decided: October 23, 2017

BEFORE LAURA SANDERS, Acting Director & Chief ALJ:

STATEMENT OF THE FACTS

Appellant Tequila Thompson appeals the action by respondent Albert C. Wagner Youth Correctional Facility (the Facility) suspending her for thirty days on grounds that on two consecutive days she violated the facility's security and safety rules through serious mistakes by returning an inmate to his housing unit after the inmate had obviously been subject to questioning by correction officers. She also is charged with

failing to file a required Use of Force Report. Sergeant Thompson contends that she acted appropriately at all times, such that no discipline is warranted.

PROCEDURAL HISTORY

On May 9, 2012, Sergeant Thompson was served with a Preliminary Notice of Disciplinary Action. She requested a departmental hearing, which was held on August 6, 2012. On August 24, 2012, a Final Notice of Disciplinary Action sustaining the charges and imposing the thirty-day suspension at a date to be determined was issued. The thirty days were served in May, June, and July 2013. She timely appealed the suspension to the Civil Service Commission (CSC), which determined to transmit the contested case to the Office of Administrative Law (OAL), where it was filed on September 26, 2012. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The matter was assigned to Administrative Law Judge Patricia M. Kerins, who heard the case on September 13, 2013, January 17, 2014, and October 28, 2014. The record was left open for closing statements, and closed on March 25, 2015. Following numerous extensions, an additional extension was granted to allow time to contact the parties pursuant to N.J.A.C. 1:1-14.13 to determine if the parties could settle or wished to relitigate the matter upon transfer to a new judge. The answer having been in the negative, the undersigned was assigned the case. An additional extension was granted to allow time to procure transcripts, review the record, and write the initial decision. The record was reopened on October 3 for information on appellant's start date with the Department of Corrections, and whether the thirty-day suspension had been served. The information having been received and marked as P-7, the record closed again on October 5, 2017.

FACTUAL DISCUSSION

With regard to the first incident, the parties agree on limited facts. On March 26, 2012, Sergeant Thompson was responsible for overseeing the B wing, which has approximately 42 to 44 cells housing 42 to 50 inmates on three floors, with an officer assigned to each floor. (Tr. September 13, 2013, at 13.) It housed mostly medium-security inmates, along with some maximum-custody inmates. Among them were some

inmates with mental problems creating special needs requiring separate attention, such as ensuring receipt of medication. Senior correction officer (SCO) Lakeya White was the primary officer on duty on tier B-1 on March 26, 2012. At about 5:15 p.m., Officer White notified the sergeant that she was having a problem getting an inmate to move into his cell for lockup. Sergeant Thompson arrived, along with a correction officer recruit (COR), Feliciano. The inmate, who had special needs, was handcuffed and escorted to the day room. (Id. at 27.) Shortly afterward, Correction Officer Gonzalez relieved COR Feliciano, who was assigned to a search detail. Officer Gonzalez brought along a pair of keys to the handcuffs, having retrieved them from central control. The inmate was then released back to his cell. SCO White complained about the return of the inmate to the tier to two lieutenants in charge that evening. Sergeant Thompson also spoke to them.

Sergeant Thompson did not testify in her own behalf. Only one witness with firsthand knowledge of the March 26 incident testified, and that person was SCO White. No one with firsthand knowledge of the March 27 incident testified. Aside from the testimony by SCO White and the two lieutenants, the respondent Department of Corrections relied entirely on testimony from an investigating lieutenant; from a major who helped to determine that discipline should be imposed; on an investigation report, and on written reports to support its factual position.

SCO White testified that on March 26, inmate A.C. returned from dinner mess and then refused multiple orders from her to walk into his cell, so she could then lock the door. (Tr. January 17, 2014, at 9.) Instead, he kept telling her to hold on and wait, which was unacceptable. She contacted Sergeant Thompson, her immediate superior, who initially told her to take the inmate to a space known as the dugout. (Id. at 41.) During this time, the inmate was standing at another inmate's door, continuing to talk. (Id. at 41, 42.) SCO White replied that Sergeant Thompson had to come to the unit to see for herself, and the appellant did, accompanied by COR Feliciano. (Id. at 40.) Sergeant Thompson placed A.C. in handcuffs, escorted him down the unit, and placed him in the day room. (Id. at 12.) SCO White was not sure whether the day room is visible from any cell; she thought perhaps from cell one. (Id. at 14.) Although SCO White expected Sergeant Thompson to take the inmate to detention for the night as a

means of enforcing the need for inmates to follow orders from SCO White, the sergeant instead returned inmate A.C. to the tier, saying she had to do so because he was a special-needs inmate. SCO White became very upset because she felt that Sergeant Thompson was not supporting her. (Id. at 19.) She explained that because placement in handcuffs generally leads to detention, the fact that it did not on a particular occasion could be misinterpreted by other inmates to mean that a particular inmate has special privileges. (Id. at 18.) Further, since the inmate will undoubtedly be unhappy with the original officer, returning the inmate to the unit opens the possibility of retaliation against the officer. (Id. at 19.) According to SCO White, she was the one left to return the inmate to the cell, and she was afraid. "I had the [gate] key in my hand just in case he tried to do anything physical to me." (Id. at 32.) Although SCO White could have written a charge against the inmate for failing to follow her orders, she felt that it would have been pointless because the sergeant had not placed the inmate in detention. (Id. at 20.) SCO White later spoke again with Sergeant Thompson, who told her she needed to be clearer in why she wanted to pursue charges against the inmate. However, SCO White felt that she had been clear that the inmate persistently delayed locking-in when she directed him to do so. (Id. at 24.) She also complained to two lieutenants, Bradley and Hull, who took her off the unit for the rest of the night because of her upset. (Id. at 26.) However, they were so focused on her emotional level that she never had the opportunity to explain fully about the inmate being returned to the tier after being put in handcuffs. (Id. at 27.) The next day, she spoke to Lt. Phillip DiPetta, who told her this was a serious enough incident to merit filing a report. (Id. at 29, 30.)

Lt. Bertha Hull, who had been with the Department of Corrections since 1996, testified that she worked on the third shift as lieutenant for the Administrative Segregation Unit, and was called in on overtime on March 26, 2012. She arrived around 7:30 p.m. to find SCO White in the control center, crying. (Id. at 63.) Lieutenant Hull said that SCO White never mentioned to her that the inmate had been handcuffed. Had she done so, Lieutenant Hull would have expected Sergeant Thompson to have filed a Use of Force Report. Also, "the shift commander is . . . responsible for what happens after the handcuffs have been placed on an inmate for a use-of-force incident." (Id. at 70.) Had Lieutenant Hull been aware of the handcuffing, she would have sent a different sergeant to get the inmate and place him in pre-hearing detention status for

failure to comply. (Id. at 74.) The lieutenant explained that in general, once a person has been handcuffed for not complying with orders, the person would be removed from the general population to allow investigation into the reasons for the noncompliance. (Id. at 70, 71.) For example, a refusal to lock-in is generally followed by a medical check, which could result in constant watch if depression and potential suicide are concerns, or just placement in detention, based on what the medical evaluation determines. (Id. at 72.) If the inmate is identified as special needs, it is possible that the person did not take his medication. (Id. at 70.) In her view, "If we've gone the step to restrain him and place him in handcuffs, obviously, there's something that needs to be immediately addressed. He can always be cleared and go back to his unit a few days later, after all the process has been completed." (Ibid.) A return to the unit shortly after handcuffing could leave others in the unit to believe that the inmate is getting preferential treatment for some reason. (Id. at 73.)

Lt. Cynthia Bradley had been a lieutenant at Albert C. Wagner since 2005. On March 26 she worked part of the second shift as area lieutenant, which involved supervising all the areas of the jail, and then she filled in as shift commander when another lieutenant had an emergency that necessitated leaving. When Sergeant Thompson approached her that night, the sergeant did not tell her she had handcuffed the inmate. She left Lieutenant Bradley with the impression that SCO White was given to using reasons such as refusal to lock-in as a means of having inmates that she did not like or could not handle well removed from the unit. (Id. at 89.) Had Lieutenant Bradley known that the inmate had been cuffed, it would have changed the scenario because now when the inmate returns, other inmates wonder, "[W]hat did he give up in order to not have to be locked up?" (Id. at 91.) She said the handcuffing requires a Use of Force Report because the failure to lock-in is not a routine reason for placing an inmate in cuffs. (Id. at 92.) Without the report to document what occurred, "it can be construed as saying we're just throwing cuffs on anybody and . . . it could be shown as a form of punishment." (Id. at 93.) In addition, an officer would write up a charge, such as refusing a housing assignment. Later, when SCO White appeared, she did tell Lieutenant Bradley about the cuffing. At that point, the lieutenant felt that she did not know what was occurring, as she now had two different accounts of the same incident. She determined to back the sergeant's decision for the moment, on the theory that the

appellant had a reason for putting the inmate back on the tier. (Id. at 96, 97.) She acknowledged that there is “nothing written saying you’ve got to take him off the unit,” but had she been sure that the inmate had been cuffed, she would have removed him immediately. (Id. at 98.)

According to Brian Boyle, shift commander relief and area lieutenant relief, who investigated the incidents, the Facility’s “Use of Force—On Duty” policy (R-16) requires the immediate filing of a CUS-1 Special Custody Report “following all instances in which . . . physical, mechanical or deadly force has been used” with the shift supervisor. Handcuffs count as mechanical force. The person responsible for filling out the Use of Force form is “the highest-ranking supervisor on the scene,” who in this instance was Sergeant Thompson. (Id. at 47.) If the officer who handcuffed the inmate was not the highest-ranking supervisor, then that person is responsible for filing a special report form. Both reports should be written “as soon as practical,” but neither were done in this instance, Boyle said. (Id. at 48.) He did, however, acknowledge that “[t]here are many times where it’s realized that the inmate was not involved in something, and then that inmate is immediately released from the restraints.” (Id. at 122.) Although the written policy would indicate that a Use of Force form still needed to be filed, Lieutenant Boyle indicated by common practice, officers often do not. Lieutenant Boyle also stated that Officer White should have logged the incident into the B Unit Logbook, which is the custodial officer’s official record of what happened on that date. (Id. at 60, 61.)

According to Lieutenant Boyle’s report, Sergeant Thompson told him that SCO White did not give her a tangible reason to lock up the inmate, and that she, not SCO White, walked the inmate back to his cell and locked him in. She also stated that she told Lieutenant Bradley everything.

According to Lieutenant Boyle, Sergeant Thompson should have told her superior, Lieutenant DiPetta, on the 27th about the incident with the same inmate on the 26th. Additionally, by returning the inmate to his cell on the 26th and then again on the 27th, she compromised the safety of the inmate. (Id. at 95.) When the inmate was released back twice, “a lot of the inmates . . . could automatically assume that he is a snitch . . . giving information to the custody staff.” (Id. at 95, 96.) Sergeant Boyle said

he is not aware of a standard protocol as to when or how an inmate can be interviewed. (Id. at 131.) Nor is there a written protocol that mandates that an inmate has to be placed in pre-hearing detention. (Id. at 134, 135.)

Major Gerard Caldarise was assigned to the Garden State Youth Correctional Facility at the time of his testimony, but was the security major at Albert C. Wagner in March 2012. Major Caldarise stated that “Every time—what we do—understand that it’s not written anywhere, but standing procedure, if you lock an inmate up [in handcuffs] on your housing unit, even if he’s not going to catch charges, you move him off the housing unit.” (Id. at 135.) Usually, the inmate is put in lockup for a day, then sent to a different housing unit, to keep other inmates from thinking he is a snitch. (Id. at 136.) Additionally, as regards SCO White, Major Caldarise felt that the failure to remove undermined her authority. “She kind of loses some . . . control of the unit because they see that the sergeant’s not supporting her.” (Ibid.) In this instance, in Major Caldarise’s opinion, the failure to remove the inmate resulted in what he understood to be an assault on the inmate the next day. (Ibid.) Major Caldarise said that pulling the inmate out of the line on the next day was an error because this action was apparent to the rest of the inmates on his tier. Appellant should have allowed inmate A.C. back into the housing unit, then him called, “either by the hospital, the medical officer,” or another unit to create an excuse to remove him without raising suspicion. (Id. at 144.) In Major Caldarise’s view, the appellant’s actions merited discipline because they resulted “in an inmate being assaulted, and one of . . . our main jobs is to make sure that they are safe.” (Id. at 149.)

Major Sheree Culvert testified on behalf of Sergeant Thompson. Having personally conducted many investigations, she was aware of the procedures and was certain that an officer had to be given Weingarten Rights by someone above the rank of that person. (Tr. January 17, 2014, at 19.) Before investigations are begun, there is usually a specific focus. Major Culvert stated, “So, in other words, [a] lieutenant as . . . a shift commander would say, ‘Something’s not right here. I need to have this investigated.’” (Id. at 21.) Major Culvert testified that inmates in close custody must be in handcuffs whenever they are moved, and such movements do not require a Use of Force Report. (Id. at 26.) She did not believe that the handcuffing of an inmate for not

locking-in was necessarily a significant enough act to require a Use of Force Report. (Id. at 43.) Rather, it depends on the totality of the circumstances. "I don't believe that we actually have written within our policies routine or non-routine." (Ibid.) She likened the refusal to lock in at the Wagner facility, which houses "a younger population," to "telling your child to go to their room and them sitting in front of the door, saying, 'I'm not going in my room.'" It is not obedient, but it is also "not being totally disobedient." (Id. at 44.) She also said that when an officer observes another correction officer using force, the observing officer is not required to file a Use of Force form. (Id. at 27.) However, if it is the sergeant physically applying handcuffs to an inmate, the sergeant would be the one who should fill out the Use of Force Report. (Id. at 45.) Major Culvert said that the level of the thirty-day suspension brought questions to her mind, given the presence of a commendation and no prior discipline. (Id. at 37.)

Based on SCO White's credible testimony, I **FIND** that in response to a request from her, Sergeant Thompson came to the unit, removed inmate A.C. to the day room, which is visible to at least one of the inmate cells on the tier, questioned the inmate, and then had him returned to the cell. I **FIND** that although there was no written protocol requiring this to be done, SCO White was upset that neither Sergeant Thompson nor the other officer returned the inmate to the tier; she was the one who locked him back in his cell. I **FIND**, based on the credible testimony of the two lieutenants to whom SCO White and Sergeant Thompson spoke on that night, that both lieutenants understood there was a disagreement between Sergeant Thompson and SCO White over the inmate, and that, eventually, Lieutenant Bradley had knowledge that the inmate was still in his cell, but did not order his removal elsewhere.

With regard to the incident on March 27, 2012, appellant filed a motion to dismiss the charges, based on a lack of competent, credible evidence. Appellant accurately points out that none of the Department's witnesses had firsthand knowledge of the second incident. The Department argues that appellant's own statements provided through the exhibits and the testimony of others are sufficient to establish its factual case. Respondent also notes that the appellant was available to testify, but chose not to do so, and has requested a negative inference from the failure to testify.

First, with regard to the descriptions of events recounted by Lieutenant Boyle, and recorded in her own reports to the facility, I **CONCLUDE** that Sergeant Thompson's statements are admissions pursuant to N.J.R.E. 803(b)(1), a statement by a party-opponent, and are therefore admissible as competent evidence.

Appellant filed a Preliminary Incident Report related to the March 27, 2012, incident. In it, she explained that at 3 p.m. SCO Emmert informed her that he had found contraband in the cell that housed inmate A.C. (R-4.) Per Lieutenant DiPetta's orders, she "pulled the inmate in to B shop" when he was returning with the B wing inmates from the recreation yard, and she questioned him. When she called Lieutenant DiPetta with the information on drug movement from the prison, she informed him that "the inmate was back on his unit, was issued charges, and the items were confiscated." (R-4.) The report goes on to state that at 7 p.m. SCO Emmert notified appellant that the inmate had asked to see her. SCO Emmert said when he opened the door and asked the inmate why, "he noticed the inmate's face was red and swollen." Sergeant Thompson reported to the tier, and the inmate told her he had been assaulted in his room by several inmates and could not identify any of them. She escorted him off the floor, and he told her he was assaulted because he did not go to lockup after a lighter was found in his room. The inmate was then taken to the prison nurse for evaluation. (Ibid.)

Lieutenant Boyle's report, to which he testified, contains a statement by Sergeant Thompson that on March 27, 2012, she removed inmate A.C. (who was involved in the March 26 incident) from the returning recreation movement of inmates from his tier and had him placed in the A shop holding cage. There he was interviewed. The report indicates that both actions were taken in response to an order from Lieutenant DiPetta. (R-2.) According to Lieutenant Boyle's report, appellant told him that Lieutenant DiPetta stated, "as soon as that inmate comes in, find out where he got that lighter from." The report states that Sergeant Thompson told Lieutenant Boyle she could not remember who actually pulled the inmate over to A shop for the interview. The report states that the appellant said the inmate denied having a lighter but started to give information about drugs in the institution. "She stated that she informed Lieutenant DiPetta and that Lieutenant DiPetta then wanted her to try and identify the inmates named and then to

bring the information back to him to see it before it was forwarded to SID.” (ibid.) Sergeant Thompson argues that the decision to return the inmate to the tier was made by Lieutenant DiPetta, but there is no competent, credible evidence in the record to support that argument.

Therefore, based on the admissions, I **FIND** as **FACT** that on March 27, in response to an order from Lieutenant DiPetta to interview the inmate as soon as he came in from recreation, Sergeant Thompson saw to it that A.C. was pulled out of the line of inmates returning from recreation. I **FIND** that he was then interviewed and Sergeant Thompson either directed or allowed his return to the tier on which he was housed. I **FIND** that neither statement indicates that the lieutenant ordered her to pull the inmate in front of all the other inmates, and, similarly, neither statement establishes that she was directed to place him back with the other inmates who saw him taken away. Rather, she was told to get information and get it back to the lieutenant. Therefore, I **FIND** as **FACT** that the determination on how to pull the inmate and where to put him after the interview was left to Sergeant Thompson, and that she herself made the decisions or went along with decisions made by those reporting to her.

Whether inmate A.C. actually was subject to an assault is not established, because the comment about how he was injured was hearsay within Sergeant Thompson’s report, and there is no other competent evidence as to what exactly occurred. The most that can be said is that, based on the nurse’s medical report, which qualifies as a public record under N.J.R.E. 803(c)(8), A.C. presented with three scratches on the left side of face, one about one centimeter long. (R-11.) How he got them is unknown.

With regard to the negative inference, the general rule is that

failure of a party to produce before a trial tribunal proof which, it appears, would serve to elucidate the facts in issue, raises a natural inference that the party so failing fears exposure of those facts would be unfavorable to him. 2 Wigmore, Evidence, § 285 (3d ed. 1940). But such an inference cannot arise except upon certain conditions and the inference is always open to destruction by explanation of

circumstances which make some other hypothesis a more natural one than the party's fear of exposure. This principle applies to criminal as well as civil trials, to the State as well as to the accused. Id. §§ 285, 290 (citations omitted).

[State of New Jersey v. Clawans, 38 N.J. 162, 170–71 (1962).]

See also Duratron Corp. v. Republic Stuyvesant Corp., 95 N.J. Super. 527, certif. denied, 50 N.J. 404 (1967). Indeed, a negative inference may even be drawn in a civil or administrative proceeding where the person has pleaded the Fifth Amendment. "But the inference may be drawn only if there is other evidence supporting an adverse finding; it must not alone constitute the evidence of guilt. Also, no inference may be drawn if the penalty imposed at the conclusion of the proceeding is so severe as to effectively destroy the privilege, such as disbarment or the loss of professional reputation." State Dep't of Law & Pub. Safety, Div. of Gaming Enforcement, 216 N.J. Super. 579, 587 (1987) (citations omitted).

Here, there already is sufficient competent evidence to demonstrate that the March 26 and March 27 decisions at issue were made by Sergeant Thompson. Thus, I **CONCLUDE** that, for the little it adds here, the negative inference may be drawn.

I **FIND**, based on Lieutenant Boyle's credible testimony and the Use of Force—On Duty policy, effective February 1, 2011, and still in force at the time of the two incidents, that "mechanical restraints" are included among the items identified as "Non-deadly force," and handcuffs are a mechanical restraint. The section entitled "Reporting Use of Force" states that "Immediately following all instances in which . . . physical, mechanical or deadly force has been used, each staff member who participated in or witnessed the event shall write a Special Custody Report (CUS-100) to the area supervisor or Shift Commander as applicable. Additionally, it shall be the responsibility of the ranking custody supervisor on the scene to insure that a 'Use of Force Report' (CUS—102) is completed and submitted as appropriate." (R-16.) The following section, entitled "Reports," states:

Immediately following any incident in which force has been used, each staff member who participated in or witnessed the event shall write a special report to the shift supervisor. The report shall contain:

- a. A description of the events leading up to the use of force;
- b. A description of the incident;
- c. The type of force used;
- d. The reason(s) for employing force;
-
- g. Other relevant facts or comments about the incident or conduct of employees or inmates.

[Ibid.]

Lieutenant Bradley was particularly persuasive on the question of why Use of Force Reports are required, explaining that force cannot be used as punishment, and that without documentation of what happened, the facility is open to accusations that force is being used any time a correction officer is unhappy with someone. Based on the comments of lieutenants Boyle, Bradley, and Hull, as well as Major Caldarise, I **FIND** that Thompson was required to file a Use of Force Report on March 26, 2012, and failed to do so. However, I also **FIND**, based on Major Culvert's credible testimony, that there is no written policy on routine versus non-routine handcuffing, and inmate A.C.'s conduct, while a violation of the rules that was subject to discipline, could be viewed along the lines of a child refusing to go to his room, and therefore, reasonably could have been viewed as a routine problem, which is in line with Lieutenant Bradley's non-reactive response to what occurred that night. Thus, it was a violation, but one viewed as serious only in hindsight.

Both Lieutenant Bradley and Major Caldarise acknowledged that no written protocol states when an inmate must be removed from a unit. Major Culvert suggested credibly that the March 26 refusal to lock-in was not a major violation by the inmate, which would help to explain why, based on what she knew, Lieutenant Bradley did not

act to remove the inmate. Based on those facts, I **FIND** that Sergeant Thompson violated no written policy or procedure by returning the inmate to his cell on March 26.

All of the lieutenants, as well as Major Caldarise, testified to the dangers of pulling an inmate out in front of his tier, taking him away, and then returning him. That also is not in written policy form, but their testimony, along with SCO White's statements about her own fears, underlined the ongoing importance of the simple fact that a correctional facility can be a dangerous place and officers are expected to be aware of those dangers. The record, including appellant's own admissions, established that Lieutenant DiPetta did not order the sergeant either to pull the inmate out of the line or to put him back on the tier. He left to her the decision on how to carry out his orders. This is consistent with the fact that she was a sergeant and sometimes the primary shift officer. All of the lieutenants credibly explained that questioning someone and then returning them creates the suspicion in other prisoners that the person is a snitch. Their potential for retaliation makes that return dangerous. Major Caldarise's testimony that the decision to return A.C. to the tier constituted poor judgment on appellant's part was persuasive, independent of whether A.C. was actually attacked or not. Therefore, I **FIND** as **FACT** that although Sergeant Thompson did not violate a specific protocol, she did exercise poor judgment in a way that comprised the safety of an inmate.

LEGAL ANALYSIS AND CONCLUSION

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant, and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982).

Here, the appellant is charged with other sufficient cause, in the form of a serious mistake due to carelessness which may result in danger or injury to persons or property,

as well as violation of administrative procedures involving safety and security and violation of a rule, regulation, policy, procedure, order, or other administrative decision.

As noted above, Sergeant Thompson may have committed an error in returning A.C. to the tier on March 26, 2012, but she violated no written policy in doing so, and the internal practice varies with circumstance. Therefore, I **CONCLUDE** that the respondent has not proved the first charge. The second charge of violating an administrative procedure involving safety and security has been proved, in that Sergeant Thompson did not file a Use of Force Report related to the handcuffing on March 26. Presumably the third charge relates to violation of the Internal Management Procedure (R-15), which states that a primary goal of the custody unit is to prevent injury or the loss of life, and ensure a safe environment for staff, visitors, volunteers, and inmates. I **CONCLUDE** that the error in returning the inmate on March 27, 2012, does violate this procedure, as it potentially comprised his safety.

The remaining issue is penalty. Appellant had ten years of unblemished service at the time the incident occurred. The general rule for civil service cases is progressive discipline. W. New York v. Bock, 38 N.J. 500 (1962). Typically, the Civil Service Commission considers numerous factors, including the nature of the offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Nonetheless, progressive discipline is not a fixed and immutable rule to be followed without question. Carter v. Bordentown, 191 N.J. 474, 484 (2007). The respondent imposed the thirty-day penalty based on a violation of policy in returning the inmate on March 26, as well as the failure to file the Use of Force Report that day, and the placement of the inmate back in the tier after the questioning of March 27. Here, the Department did not have sufficient evidence to support the existence of a protocol addressing the March 26 decisions to handcuff or to return to the tier. Additionally, the Department did not prove that the inmate actually had been attacked, and although it proved the violation of the Use of Force policy, a fair amount of testimony indicated that the Department does not discipline for every failure to file the form. Thus, a lesser penalty than the thirty days is warranted. Therefore, I **CONCLUDE** that a fifteen-day, as opposed to a thirty-day, suspension is appropriate.

ORDER

The thirty-day suspension imposed by the Department is hereby **REDUCED** to a fifteen-day suspension.

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

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

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

October 23, 2017
DATE

Laura Sanders
LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency:

October 23, 2017

Date Mailed to Parties:

October 23, 2017

/caa

WITNESSES

For Appellant:

Major Sheree Culvert

For Respondent:

Lieutenant Bryan Boyle

Senior Correction Officer Lakeya White

Lieutenant Bertha Hull

Lieutenant Cynthia Bradley

Major Gerard Caldarise

EXHIBITS

For Appellant:

- P-1 Internal Management, SOP #224, Equipment Issue and Key Control, effective February 1, 2010
- P-2 Special Custody Report of Sergeant Thompson dated June 10, 2013
- P-3 Law Enforcement Personnel Rules and Regulations
- P-4 Handbook of Information and Rules
- P-5 New Jersey Department of Corrections Policy Statement, Use of Force and Security Equipment, revised October 15, 2009
- P-6 New Jersey Department of Corrections Human Resources Bulletin 84-17
- P-7 Letter from Patricia B. Quelch, Esq., dated October 5, 2017

For Respondent:

- R-1 Final Notice of Disciplinary Action dated October 24, 2012, and Preliminary Notice of Disciplinary Action dated May 9, 2012
- R-2 Investigation report of Lt. Brian Boyle, dated March 27, 2012
- R-3 No exhibit

- R-4 Preliminary Incident Report of Sergeant Thompson concerning March 27, 2012, dated March 27, 2012
- R-5 Preliminary Incident Report of Sergeant Thompson concerning March 26, 2012, dated March 27, 2012
- R-6 Shift Commander Report dated March 27, 2012
- R-7 Shift Commander Report dated March 26, 2012
- R-8 Logbook of March 26, 2012
- R-9 Special Custody Report dated March 27, 2012
- R-10 Special Custody Report of SCO Emmert dated March 27, 2012
- R-11 Medical report concerning inmate A.C. dated March 27, 2012
- R-12 Disciplinary report regarding A.C. dated March 27, 2012
- R-13 Use of Force Report, signed by Sergeant Thompson, dated March 27, 2012
- R-14 Pre-Hearing Protective Custody Placement Form for A.C., dated March 27, 2012
- R-15 Internal Management Procedure, #402, A & B Wing Sergeant, effective May 1, 2011
- R-16 Internal Management Procedure, #232, Use of Force—On Duty, effective February 1, 2011
- R-19 Disciplinary History
- R-20 Confiscated contraband (BIC lighter and pipe clamp)