

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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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 05656-15

AGENCY DKT. NO. n/a

2015-2797

**IN THE MATTER OF ALLAN KENNEY,
JUVENILE JUSTICE COMMISSION.**

Charles J. Sciarra, Esq., for appellant (Sciarra & Catrambone, LLC, attorneys)

Gregory R. Bueno, Deputy Attorney General, for respondent (Gurbir S. Grewel,
Attorney General of New Jersey, attorney)

Record Closed: September 23, 2015

Decided: January 26, 2018

BEFORE ELIA A. PELIOS, ALJ:

STATEMENT OF THE CASE

Appellant Senior Corrections Office Alan Kenney (Kenney) appeals the decision of respondent, the Juvenile Justice Commission (JJC) to remove him from employment. By Preliminary Notice of Disciplinary Action (PNDA) dated March 20, 2014 (J-1), respondent charged Kenney with violating N.J.A.C. 4A:2-2.3(a): 6. Conduct unbecoming a public employee; and 12. Other sufficient cause defined as violation of JJC human resources policies: H19.7 C.6 Inappropriate physical contact; C-9 Falsification; C-12 Conduct unbecoming a public employee and N.J.A.C. Title 13:95-3.2 Use of force policy.

PROCEDURAL HISTORY

Respondent issued a Final Notice of Disciplinary Action (FNDA) dated April 20, 2015, removing him from employment based upon those charges, effective April 20, 2015. Rhodes appealed the FNDA to the Office of Administrative Law (OAL) on April 21, 2015. The matter was heard on July 9, 2015. By way of letter dated August 20, 2015, appellant waived the 180-Day Rule between the time of the completion of the hearing and submission of simultaneous closing briefs. The record closed on September 23, 2015.

FACTUAL DISCUSSION AND FINDINGS

Respondent alleges that on or about January 12, 2014, while on duty at New Jersey Training School in Jamesburg, New Jersey, appellant, a senior correction Officer assigned to that area, initiated inappropriate physical force against a resident when he pushed the resident backward against a wall. It also alleged that Kenney used excessive force when he used hand- and knee-strikes while restraining the resident. The respondent has also alleged that on or about January 12, 2014, appellant provided false information concerning the incident during his initial report. Respondent argues that appellant's actions demonstrate an abuse of his authority and jeopardized the safety of the resident and his fellow officers. It is further argued that appellant's false statement demonstrated a lack of respect for his position as a law enforcement officer and a role model for troubled youth, and that such actions constitute conduct unbecoming a public employee.

Eric McLeod (McLeod), a senior investigator with the JJC, testified on behalf of respondent. He has been employed by JJC for seventeen years. He previously was a corrections officer from 1998 through 2000, and a probation officer from 1992 to 1994, in Bergen County. McLeod has been trained for his current position, which calls on him to investigate sexual assaults, and staff and administrator incidents. He investigated the incident of January 12, 2014.

The incident occurred at the New Jersey training school, and involved the appellant, Officer Collazo (Collazo), and a resident, D.S. The appellant received discipline in the form of removal, and as a result of the investigation, Collazo was given a sixty-day suspension.

McLeod handled both appellant's and Collazo's investigation. He reviewed photographs that had been taken of Kenney and D.S., conducted interviews of Kenney, Collazo, Sergeant Fisher (Fisher), and several residents. McLeod did not interview D.S., as D.S. refused, having declined after being read his Miranda rights. McLeod wrote reports which summarized his findings. This is his regular practice, and it is required by JJC. He acknowledged signing the January 12, 2014 Investigation Report (J-3), and also reviewed the January 12, 2014 Narrative Report of Senior Corrections Office (SCO) A. Kenney (J-11).

McLeod stated that D.S. was in the day room, and intentionally hit his head on the bathroom door, after which he was called into the hallway by officers. McLeod then reviewed Report TS-140112-02 Juvenile Statement Form of D.S., dated January 12, 2014 (J-8). He stated that Collazo called D.S. into the hallway, and Collazo and appellant talked to D.S. about why he was hitting his head. Kenney approached D.S., initiated contact, and the struggle ensued. He reviewed an Investigation Report dated January 31, 2014 (J-12), which is a memo of an interview with Kenney that the appellant signed. Kenney said that while talking to D.S. about hitting his head, he saw that D.S. was belligerent. D.S. then lunged at him, which resulted in the altercation. Kenney changed his statement, calling it more of a flinch than a lunge. D.S. broke free, Kenney applied hand strikes, and both went down to the ground. Kenney did not recall D.S. using force, but said that he may have pushed Kenney. Kenney admitted to striking D.S. in the head, and striking him with knees and with a closed hand. No one other than Collazo saw the incident. Officers did respond to an emergency code called over the radio. Investigation Report of Eric D. Cloud, dated February 3, 2014 (J-3), at page 15, indicated D.S. was taking a step toward Kenney, and raised his hand to waist-level.

At this time the video was set up to be reviewed. McLeod stated that he had previously seen the video. At the start of the video, McLeod identified D.S. sitting in the second row from the front, in the day room. He identified D.S. getting-up and exiting the room, and the video shows what seems more of not banging his head so much as tapping his head against the door, (in a manner that is barely discernable). D.S. then returned from the bathroom, and the first video concluded. McLeod concluded that D.S. did make physical contact with his head to the bathroom door. The video from the hallway (J-5) was then reviewed. McLeod had seen it before, and used this video in his investigation. He identified Officer Collazo at the end of the hall. He identified the appellant standing at the podium.

D.S. entered into the video by the podium, which was obscured somewhat by the time stamp. Appellant was at the podium, and D.S. was standing in front of him. McLeod explained that the appellant asked D.S. why he banged his head, and on the video Collazo can be seen moving closer to D.S. while appellant remained at the podium.

McLeod continued, noting that Collazo's back was to the wall, away from D.S. Kenney then stepped-out from behind the podium. He told McLeod during his interview that at this point D.S. was being belligerent, (which cannot be discerned from the video). Appellant was now leaning on the podium, and D.S. moved away from the wall toward the officers. Kenney leaned off the podium, stood-up and took another step. At this time D.S. is in front of the podium and Kenney is in front of D.S. Kenney then moved toward D.S. Collazo told McLeod that D.S. did not lunge (which is consistent with the video). Both individuals bounced back and forth and then went to the ground. Another officer identified as Sergeant Fisher then arrived. Fisher had been called by appellant, who at this time was on the ground subduing D.S. Appellant got up, D.S. remained on the floor, but was not restrained. Upon arriving, Fisher put his foot on D.S., and kept it there for a while—D.S. was not trying to move. Five to six officers arrived on the scene, and D.S. was taken up off the ground, and placed against the wall. D.S. was taken out of the camera view. Medical Officer North then walked down the hall and was speaking with officers at the podium as the video concluded.

McLeod further testified that Kenney had told Collazo that D.S. had lunged, which Collazo believed is inconsistent with what was on the video. McCleod noted that this was the same video he observed in conducting his investigation. He reiterated that D.S. was moving backward as appellant lunged.

McLeod explained that D.S. was charged with assault on a staff member, and a disciplinary infraction report was filed as a result of this altercation. D.S. was found guilty, and given a five-day room restriction. McLeod reviewed D.S.' Notice of Violation (J-15), as reported by appellant, which stated that D.S. assaulted him by pushing him to the floor, and striking him in the face. McLeod also reviewed Room Restriction/Separation Form, D.S., J201B Assault on Staff, dated January 12, 2014 (J-16), which is the prehearing restriction. He did not believe that the allegations contained in J-15 or J-16 are supported by the video. McLeod identified Disposition Recommendations By Office of Investigation, D.S.,

Inconclusive and Unfounded, Wimson J. Crespo, Sr., Chief, dated February 19, 2014 (J-17), which deemed allegations by Kenney unfounded and inconclusive, and Disposition Recommendations By Office of Investigations, SCO Allan Kenney, Substantiated, Wimson J. Crespo, Sr., Chief, dated February 19, 2014 (J-18), substantiating charges against appellant. McLeod had investigated prior discipline against Kenney.

On cross-examination, McLeod acknowledged that he did not list or mention the day room video in his report. He stated that the lack of its inclusion does not make his a false report, as it was merely an oversight. He noted that the video was cut-off before D.S. was taken into the hallway. The videos were reviewed again with McLeod. He did not know how many frames per second comprise the frame rate of the video. He stated there is nothing inappropriate about pulling D.S. out. He stated that an officer does not have an obligation to wait to be assaulted, and conceded that no one had the benefit of the video, when Collazo and Kenney made their reports.

The next witness to testify was Captain Edwin Gonzales (Gonzales), who is employed by the JJC. At the time of hearing Gonzales had been a captain for two years and seven months, and described his work duties as overseeing custody, security, and being in charge of training. He teaches use of force classes to JJC officers, as well as firearms certification and recertification. He noted that JJC has policies in which officers are trained regarding the use of force, and they are only tested as recruits. Gonzales is also trained on how to write incident reports. He reviewed Exhibit R-2, New Jersey Juvenile Justice Commission, Office of the Deputy Executive Director of Operations, Subject Use of Force, Effective Date November 4, 2011, which is the policy. The policy defines non-deadly force, states when force is appropriate, and gives examples from the policy. Gonzalez noted that the expectation is that reports will be true and accurate when submitted, and noted that the JJC keeps records of training. He reviewed the training roll call from September 28, 2007 (R-4), noting that Kenney was present. He noted that use of force was the subject of that session. This demonstrated that Kenney was present and was trained in the use of force. He also reviewed the Juvenile Justice Commission, Custody Discipline Table H-19.7 (R-3) regarding inappropriate physical contact, and noted that the recommended penalty range for a first offense would run from an official reprimand to removal. A second's offense would be removal. A charge of falsification

recommends for a first offense a range from official reprimand to removal, and a second offense would be official written reprimand to removal. Such a charge would apply to an incident report. Gonzales stated that officers are trained two times a year in areas including use of force and report writing. Retraining is needed. He stated that the use of force training is about one-hundred and twenty slides of a PowerPoint presentation. He stated that the retraining gives examples of improper use of force. When resistance ends force ends. On cross-examination, Gonzales noted that the use of force does occur daily. Gonzales stated that use of force is ideally a last resort, and that it is a violation of policy to use force in response to verbal insults.

Appellant Kenney testified in his own behalf. He stated that he started in September 2007, and went to Sea Girt for training and became a corrections officer. Appellant then became a senior corrections officer. He has had prior discipline, but nothing to do with the use of force. He has had to use physical force previously, and has been assaulted. He was injured and bitten in the face, punched in the face, kicked, pushed, and has had to go to the hospital. Kenney was out of work for six months after a previous incident when he was assaulted. He estimated using force approximately twenty times.

With regard to the January 12, 2014, incident, he noted that he was terminated the following April of that year. He performed the same job during that time from the incident to his removal. He noted that one other officer was on that particular wing of the facility at that time. There are thirty residents between two wings. Residents have committed crimes, but they are young.

The video was reviewed again. D.S. was new, and appellant was looking out for D.S., as new residents can be given difficulty. He is aware where the camera is located. Appellant asked why D.S. banged his head, and D.S. responded that he can do that, and he became belligerent. Appellant made it clear that D.S. was not in trouble. He called Officer Fisher twice, but had not yet called in a code. Everything appellant did to try to calm D.S. down only made him angrier. D.S. balled his fists and cursed at him. Appellant then called the Sergeant, and asked him for back up. D.S. got angrier, so appellant moved out from behind the podium to try and de-escalate the matter. Appellant assumed a defensive position when D.S.'s hand came up and determined that D.S. was an immediate threat. Kenney took the

appropriate action. When appellant physically engaged D.S, appellant stated that they were beyond verbal. D.S. was a threat, and Kenney engaged D.S. and pulled him down.

Appellant got out of his grasp, D.S. resisted, and Collazo and Kenney subdued D.S. Once D.S. stopped resisting, appellant stated he stopped using force. Appellant was pulling D.S.'s arms behind his back, when Fisher approached. Fisher told him to let him go.

Appellant wrote-up an assault on staff charge against D.S., and recalls that D.S. was convicted of assaulting him. With regard to the use of the word "lunge," he stated that he sought advice of colleagues, supervisors, and union reps. He described the situation for them, and all agreed that the word lunge was appropriate. Kenney was not trying to be intentionally misleading. He knew that a camera was on at all times, and he believes that his actions were reasonable. Appellant does not know if the JJC reviewed the video, or if they had the ability to.

Kenney reiterated that he was leaning on the podium, and was trying to look relaxed, and that when he told D.S. to back-up, D.S. did not back-up, and so he engaged him. He did not perceive D.S. backing away toward the wall. He observed D.S. pulling his hand toward his chest, and resisting putting his hands behind his back. Noting that D.S. told appellant to "suck my dick," appellant did not take it as an insult, rather he took it as verbal aggression and as a manifestation of his anger.

Appellant does not know on how many instances he has implemented use of force. He believes he has suffered several injuries which have taken a physical toll on him, but does not believe that they have taken a mental toll. He denied that these instances have made him jumpy, but stated they have made him more aware and less complacent.

Considering the foregoing¹, I **FIND** that on January 12, 2014, resident D.S. was in a day room at the New Jersey Training School in Jamesburg, New Jersey, when he put his head in physical contact with the door to the bathroom. Appellant, a senior correction Officer

¹ At hearing, ruling on an objection by appellant to photographs of D.S. and appellant after the incident (J-7) was reserved upon. In its closing brief, respondent withdrew its request that the document be included in the record, and it was given no weight or consideration.

assigned to that area, called D.S. into the hallway to ask him what he was doing. An animated discussion followed. While D.S. did raise his hand at one point, he did not appear to be behaving in a threatening, menacing or aggressive manner toward appellant, and appeared to be backing away from appellant, consistent with appellant's testimony as to his verbal instructions, when appellant came from behind the podium and pushed D.S. to the wall. In the ensuing scuffle, appellant appeared to use hand and knee strikes while attempting to restrain D.S., and another officer, Collazo, assisted in restraining D.S. before help arrived. In filing an initial report describing the incident, appellant stated that D.S. "lunged" at him, a statement which is not borne out by reviewing the video, as D.S. at no time lunged toward appellant or in any way appeared to move aggressively or threateningly toward him. Appellant also brought administrative charges against D.S. for assaulting an officer, which resulted in discipline against D.S. Appellant was properly trained in the use of force.

To the extent that respondent has charged appellant with "falsification," citing inclusion of the word "lunged" in the initial report as the basis for that charge, and to the extent that it has been found as fact that "lunged" did not properly reflect D.S.'s actions during the incident, it must be determined whether or not that inaccurate description was intentional. Additionally, appellant's intent in bringing the charges against D.S. must also be examined. To do that, the credibility of appellant's testimony must be examined.

Credibility is best described as that quality of testimony or evidence which makes it worthy of belief. The Supreme Court of New Jersey considered the issue of credibility in In Re Estate of Perrone, 5 N.J. 514 (1950). The Court pronounced:

Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances. [ibid. at 522.] See also, Spagnuolo v. Bonnet, 16 N.J. 546, (1954), State v. Taylor, 38 N.J. Super. 6 (App. Div.1955).

In order to assess credibility, the witness' interest in the outcome, motive or bias should be considered. Furthermore, a trier-of-fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common

experience, or because it is overborne by other testimony. Congleton v. Pura- Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Respondent alleges that appellant's describing D.S. in his initial report as having "lunged at him" was an intentional misstatement of a material fact, which constituted a provision of false information. Appellant states that he did not intend to mislead, and that he described the situation to colleagues, superiors and union reps, and that they all agreed that "lunged" was the correct word. He further stated that although he knew that cameras were running, he did not know if his employers had the ability to review the video of the incident. While nothing stated is inherently unbelievable, appellant's shopping his language to so many people could cut either way. It is conceivable that he was trying to justify his actions, it was also possible that he was looking for the correct phrasing in consulting colleagues and union reps and superiors so as to give an accurate depiction of the incident. However, given the common usage of the word lunge, coupled with an objective viewing of the video, that so many people who had not seen the event nor reviewed the video all agreed that "lunge" was the correct word tends toward a finding that the event had not been accurately described to them. If it had been, it is likely that at least one would have noted that lunge was not the correct word. Furthermore, even if appellant did believe that use of force was justified, a review of the video makes it hard to believe that he reasonably believed that the incident warranted charges against D.S. for assault of an officer, as nothing depicted fits that description. Accordingly, I **FIND** that appellant's story does not hang together, and that respondent has demonstrated that it is more likely than not that appellant's consulting colleagues and filing of charges was an intentional attempt to justify the action that he knew was excessive.

LEGAL ANALYSIS AND CONCLUSIONS

Under the Civil Service Act, a public employee may be subject to major discipline for various employment-related offenses, N.J.S.A. 11A:2-6. In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:-2.21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J.

143 (1962); In re Polk, 90 N.J. 550 (1982). When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

The respondent has charged appellant with violations 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), specifically, violations of JJC human resources policies: H19.7 C.6 (Inappropriate physical contact); C-9 (Falsification); C-12 (Conduct unbecoming a public employee) and N.J.A.C. Title 13:95-3.2 (Use of force policy).

Regarding the charges against appellant for conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6), to the extent that appellant is charged with violation of JJC human resources policy H19.7 C-12, which addresses unbecoming conduct, consideration of such violation will be addressed in concert with the current analysis. "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that "adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services." Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also, In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins v. City of Atlantic City, 152 N.J. 532, 555 (1998) [quoting In re Zeber, 156 A.2d 821, 825 (1959)]. Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) [quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)]. Suspension or removal may be justified where the misconduct occurred while the employee was off-duty. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

In the present matter, the record reflects that appellant utilized physical force in his encounter with a juvenile resident, D.S. on January 12, 2014. He initiated physical contact that did not appear to be commensurate with what D.S.'s actions warranted. He described

the incident in his initial report in a manner which was not consistent with what was depicted in the video of the incident and that appeared designed to justify his actions, and he filed charges against D.S. for assaulting him, an allegation which is not apparent from the video. This clearly constitutes behavior which could adversely affect the morale of the facility and undermine public respect in the services provided. Accordingly, I **CONCLUDE** that the appointing authority has proven, by a preponderance of credible evidence, that the charge of N.J.A.C. 4A:2-2.3(a)6 (conduct unbecoming a public employee), and JJC human resources policy H19.7 C-12, should be and are hereby **SUSTAINED**.

Appellant is also charged with a violation of N.J.A.C. 4A:2-2.3(a)12. (Other sufficient cause). Specifically, appellant is charged with violations of JJC human resources policies H19.7 C.6 (Inappropriate physical contact); C-9 (Falsification); C-12 (Conduct unbecoming a public employee) and N.J.A.C. Title 13:95-3.2 (Use of force policy). Violation of policy H19.7 C-12 has already been addressed and **SUSTAINED** within the discussion of the violation of N.J.A.C. 4A:2-2.3(a)6. The JJC Human Resources policies violations appear to correspond to the Juvenile Justice Commission Custody Discipline Table H-19.7 (R-3), specifically Section C which addresses personal conduct violations.

The record reflects that appellant inappropriately initiated physical contact against resident D.S. by taking him down when D.S. was not acting in a manner so as to threaten D.S. or others or that would otherwise justify such. Accordingly, I **CONCLUDE** that a violation of JJC human resources policies H19.7 C.6, which prohibits "inappropriate physical contact or mistreatment of a patient, client, resident, employee or adult inmate" (R-3), should be and is hereby **SUSTAINED**.

Section C9 of that document addresses "Falsification" which is defined as an "intentional misstatement of material fact in connection with work, employment application attendance, or in any record, report, investigation or other proceeding." In the present matter, the record reflects that appellant authored a report describing the incident at issue in a manner which is not consistent with what actually occurred, and did so in a manner which appeared designed to justify the actions taken. Specifically he described D.S. as having "lunged" at him, a description which connotes aggressive physical behavior by D.S. directed toward appellant that simply is not a fair description of any action by D.S. depicted in the

video of the incident, constituting a misstatement of a material fact necessary for one to determine the appropriateness of the action. This is compounded by appellant's filing charges of assaulting an officer against D.S. that simply are not supported by an objective review of the video. Even if appellant reasonably believed that use of force was justified, it belies credulity that he reasonably believed he had been assaulted. Accordingly, I **CONCLUDE** that that a violation of JJC human resources policies H19.7 C.9, which prohibits "Falsification" (R-3), should be and is hereby **SUSTAINED**.

N.J.A.C. 13:95-3.2 provides that:

- a. In any case that a custody staff member uses force while on-duty, the custody staff member shall only use that force that is objectively reasonable and necessary under the totality of the circumstances as known by the custody staff member at the time force is used.
- b. A custody staff member may use the amount of force reasonably necessary to accomplish the law enforcement objective. If the individual resists, the custody staff member may increase the degree of force as necessary to accomplish the law enforcement objective, but as soon as the individual submits, the custody staff member shall reduce the degree of force used.

In the present matter, the record reflects that circumstances did not necessitate the degree of force utilized by appellant. Specifically, as D.S. did not act aggressively or threateningly toward appellant, and appeared to be backing away from him, it is not clear that any force was objectively reasonable or necessary under the totality of the circumstances as known by appellant at the time. Accordingly, I **CONCLUDE** that the charge of violating N.J.A.C. 13:95-3.2 should be **SUSTAINED**.

Given the foregoing, I further **CONCLUDE** that the charge of violating N.J.A.C. 4A:2-2.3(a)12. (Other sufficient cause) must be **SUSTAINED**.

PENALTY

In West New York v. Bock, 38 N.J. 500, 522 (1962), which was decided more than fifty years ago, our Supreme Court first recognized the concept of progressive discipline, under which “past misconduct can be a factor in the determination of the appropriate penalty for present misconduct.” In re Herrmann, 192 N.J. 19, 29 (2007) (citing West New York v. Bock, 38 N.J. 500, 522 (1962)). The Court therein concluded that “consideration of past record is inherently relevant” in a disciplinary proceeding, and held that an employee’s “past record” includes “an employee’s reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee.” West New York v. Bock, 38 N.J. 500, 523-524 (1962).

As the Supreme Court explained in In re Herrmann, 192 N.J. 19, 30 (2007), “[s]ince Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct.” According to the Court:

. . . First, principles of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct . . .

The second use to which the principle of progressive discipline has been put is to mitigate the penalty for a current offense . . . for an employee who has a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions . . .

. . . [T]hat is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when . . . the misconduct is severe, when it is unbecoming to the employee’s position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.

[In re Herrmann, 192 N.J. at 30-33 (citations omitted).]

In the case of In re Carter, 191 N.J. 474 (2007), the Court decided that the principle of progressive discipline did not apply to the sanction of a police officer for sleeping on-duty and, notwithstanding his unblemished record, it reversed the lower court and reinstated a removal imposed by the Board. The Court noted the factor of public-safety concerns in matters involving the discipline of correction officers and police officers, who must uphold the law and "present an image of personal integrity and dependability in order to have the respect of the public." In re Carter, 191 N.J. 474 (2007)

In the matter of In re Stallworth, 208 N.J. 182 (2011), a Camden County pump-station operator was charged with falsifying records and abusing work hours, and the ALJ imposed removal. The Civil Service Commission (Commission) modified the penalty to a four-month suspension and the appellate court reversed. The Court re-examined the principle of progressive discipline. Acknowledging that progressive discipline has been bypassed where the conduct is sufficiently egregious, the Court noted that "there must be fairness and generally proportionate discipline imposed for similar offenses." In re Stallworth, 208 N.J. 182, 208 (2011). Finding that the totality of an employee's work history, with emphasis on the "reasonably recent past," should be considered to assure proper progressive discipline, the court modified and affirmed (as modified) the lower court and remanded the matter to the Commission for reconsideration.

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).

The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not properly operated, have a capacity to become "tinderboxes."

[Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).]

In the present matter, respondent has brought and sustained charges of violations 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), specifically, violations of JJC human resources policies: H19.7 C.6 (Inappropriate physical contact); C-9 (Falsification); C-12 (Conduct unbecoming a public employee) and NJAC Title 13:95-3.2 (Use of force policy). The record also reflects that on April 15, 2013, just shy of nine months before the incident at issue, appellant entered into a settlement agreement in which he pled guilty to charges of incompetence, inefficiency or failure to perform public duties; conduct unbecoming a public employee; neglect of duty; and other sufficient cause, specifically, violations of JJC Disciplinary Policies covering Neglect of duty, Physical or mental abuse of a resident; and Falsification (R-1). The agreement called for, and appellant served, a ninety-day suspension. Sixty days were unpaid and thirty days were recorded as a record-only suspension. A final notice of disciplinary action was issued memorializing and ratifying the agreement.

Taken together with the settlement agreement, which constitutes the appellant's substantive disciplinary history, the charges sustained in the present matter constitute a second offense for Conduct Unbecoming and a second offense for falsification. The remaining charges appear to be a first offense. Juvenile Justice Commission Custody Discipline Table H-19.7 (R-3) recommends appropriate penalty ranges for specific infractions. For a second infraction of Conduct Unbecoming, the table recommends a penalty range of ten days to removal. For a second offense of Falsification, it recommends a penalty range of Written Reprimand to Removal. For a first offense of Inappropriate Physical Contact, the table recommends a penalty range of Written Reprimand to Removal. The table is not binding on this tribunal, and the document itself notes that management reserves the right to deviate from the recommended penalties; however, the recommended penalty ranges appear to be reasonable and consistent with progressive discipline.

Considering the foregoing, the totality of appellant's history and the specifics of the present matter, I **CONCLUDE** that the behavior exhibited in the present matter is not aberrational, but rather a continuation of a pattern that seems to be increasing in seriousness and frequency rather than decreasing. Appellant does not seem to be learning from his mistakes, but rather appears to be compounding them. When an officer is involved in an incident like the present matter presents, it is to be expected that an officer will deal with the

incident, and its aftermath, in an honest, forthright, responsible manner. To expect otherwise is to invite disorder and confusion in responding to such instances, possibly leading to worse, more dangerous situations, and serves to undermine the confidence the public places in the correctional system. Appellant has failed to respond honestly and forthrightly, and has acted in an unbecoming manner, twice in fairly short order. It cannot be tolerated. Furthermore, although the violation of N.J.A.C. 13:95-3.2 (Use of Force) and of inappropriate contact are only first infractions, taken together with the previous guilty plea to physical or mental abuse of a resident it reflects two occasions, again in fairly short order, which reveal a pattern of not acting with the appropriate degree of care toward the juvenile individuals in his charge. Accordingly, I **CONCLUDE** that the respondent's action in removing the appellant from his position was justified.

DECISION AND ORDER

The appointing authority has proven by a preponderance of credible evidence the charges against Kenney with violations of N.J.A.C. 4A:2-2.3(a): 6. Conduct unbecoming a public employee; and 12. Other sufficient cause defined as violation of JJC human resources policies: H19.7 C.6 Inappropriate physical contact; C-9 Falsification; C-12 Conduct unbecoming a public employee and NJAC Title 13:95-3.2 Use of force policy, and I **ORDER** that these charges be and are hereby **SUSTAINED**. Furthermore, I **ORDER** that the penalty of removal is hereby **AFFIRMED**.

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

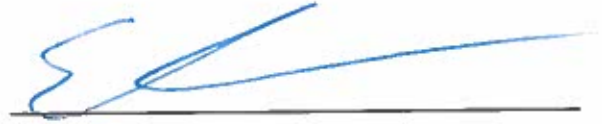
This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF**

APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 26, 2018

DATE



ELIA A. PELIOS, ALJ

Date Received at Agency:

January 26, 2018

Date Mailed to Parties:

January 26, 2018

nd

APPENDIX

WITNESSES

For appellant:

Allan Kenney

For respondent:

Eric McLeod

Captain Edwin Gonzales

EXHIBITS

Jointly:

- J-1 Preliminary Notice of Disciplinary Action (31-A), Civil Service Commission, State of New Jersey, dated March 20, 2014
- J-2 Final Notice of Disciplinary Action (31B), Civil Service Commission, State of New Jersey, dated April 20, 2015
- J-3 Eric D. Cloud, Senior Investigator #9, State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission; Investigation Report, Date/Time of Incident: January 12, 2014 at Approximately 1:15 p.m., Review Date February 19, 2014, dated February 3, 2014
- J-4 Video Footage from the Day Room, January 12, 2014
- J-5 Video Footage from the Hallway, January 12, 2014
- J-6 Incident Number TS-140112-02N, Suspected Child Abuse Report, Confidential, DCF Institutional Abuse Unit, dated January 12, 2014
- J-7 Withdrawn
- J-8 D.S., Report TS-140112-02, Juvenile Justice Commission, Juvenile Statement Form, dated January 12, 2014
- J-9 State of New Jersey, Department of Law and Public Safety, Complaint Notification, TO; SCO A. Kenney from SR Inv. E. Cloud, dated January 31, 2014
- J-10 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Office of Investigation, Complaint Notification, dated January 30, 2014

- J-11 Juvenile Justice Commission, Attachment Narrative Report, SCO, Kenney, A., dated January 12, 2014
- J-12 Eric D. Cloud, Senior investigator #9, State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, Allan Kenney, dated January 31, 2014
- J-13 Juvenile Justice Commission, Attachment Narrative Report, COR Collazo, A. dated January 12, 2014
- J-14 Eric D. Cloud, Senior investigator #9, State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, Andres Collazo, dated February 7, 2014
- J-15 Juvenile Justice Commission, Notice of Violation, D.S., undated
- J-16 New Jersey Juvenile Justice Commission, Room Restriction/Separation Form (Prehearing Room Restriction), D.S., J201B Assault on Staff, dated January 12, 2014
- J-17 Department of Law and Public Safety, Juvenile Justice Commission, Disposition Recommendations by Office of Investigations, D.S., Inconclusive and Unfounded, Wimson J. Crespo, Sr., Chief, dated February 19, 2014
- J-18 Department of Law and Public Safety, Juvenile Justice Commission, Disposition Recommendations By Office of Investigations, SCO Allan Kenney, Substantiated, Wimson J. Crespo, Sr., Chief, dated February 19, 2014
- J-19 Department of Law and Public Safety, Juvenile Justice Commission, Disposition Recommendations By Office of Investigations, COR Andres Collazo, Substantiated, Wimson J. Crespo, Sr., Chief, dated February 19, 2014
- J-20 Juvenile Justice Commission, Attachment Narrative Report, Lt. T. Braun, dated January 12, 2014
- J-21 Eric D. Cloud, Senior investigator #9, State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, Sergeant Terry Fisher, dated February 11, 2014
- J-22 Juvenile Justice Commission, Attachment Narrative Report, Sergeant t. Fisher, dated January 12, 2014
- J-23 Juvenile Justice Commission, Attachment Narrative Report, SCO J. Pintado, dated January 12, 2014

- J-24 Juvenile Justice Commission, Attachment Narrative Report, B.S. Pearson, dated January 12, 2014
- J-25 Juvenile Justice Commission, Attachment Narrative Report, SCO W. Narath, dated January 12, 2014
- J-26 Juvenile Justice Commission, Attachment Narrative Report, ES Rosado, dated January 12, 2014
- J-27 Juvenile Justice Commission, Attachment Narrative Report, OO/SCO Raul Yepez, dated January 12, 2014
- J-28 Juvenile Justice Commission, Attachment Narrative Report, SCO M. Toranzo, dated January 12, 2014
- J-29 Juvenile Justice Commission, Incident Report, Sergeant T. Fisher, dated January 12, 2014
- J-30 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, A.J., dated January 22, 2014
- J-31 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, T.H., dated January 22, 2014
- J-32 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, H.H., dated January 22, 2017
- J-33 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, C.O., dated January 22, 2014
- J-34 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, I.R., dated January 22, 2017
- J-35 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, X.S., dated January 22, 2014
- J-36 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, G.H., dated January 22, 2014
- J-37 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, Denial of Statement from D.S.; Approval to Interview D.S. by N.J.; Non-witness Statement of U.T., S.R., K.J., D.F., D.M., W.D., J.P., E.S., J.O., and S.B. by Senior Investigator #9 Eric D. Cloud, dated February 7, 2014
- J-38 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, K.G., dated January 22, 2014

- J-39 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, J.R., dated January 22, 2014
- J-40 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, N.B., dated January 22, 2014
- J-41 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Office of Investigation, Witness Acknowledgment Form, by Sergeant Fisher, dated February 11, 2014
- J-42 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Office of Investigation, Administrative Investigations Only, A. Collazo, dated January 30, 2014, and Allan Kenney, dated January 31, 2014
- J-43 Department of Law and Public Safety, Juvenile Justice Commission, Disposition Recommendations by Office of Investigations, Subject Employee: Corrections Officer Recruit Andres Collazo, Victim: Resident D.S., dated February 19, 2014
- J-44 Juvenile Justice Commission, Notice of Special Observation Status, D.S., date January 12, 2014
- J-45 Secure Facilities 13:95-3.4 Supp. 5-21-12, page 95-10.1, and Secure Facilities 13:95-3.5 Supp. 2-6-06, page 95-11

For appellant:

None

For respondent:

- R-1 Final Notice of Disciplinary Action (31B), Civil Service Commission, State of New Jersey, Suspension for Ninety-Working Days, Sixty Without Pay May 5, 2013 through July 25, 2013, dated April 23, 2015
- R-2 New Jersey Juvenile Justice Commission, Office of the Deputy Executive Director of Operations, Subject: Use of Force, Effective Date November 4, 2011
- R-3 Juvenile Justice Commission, Custody Discipline Table H-19.7
- R-4 Department of Law and Public Safety, Juvenile Justice Commission Training Academy, BCJCO #21, dated September 27 2007