



on this history, the ALJ found that the 120 working day suspension was appropriate.

In his exceptions, the appellant argues that the ALJ improperly failed to consider his motion to dismiss the matter. Alternatively, he contends that the penalty imposed was too severe and should be reduced to a 10 working day suspension.

In response, the appointing authority argues that the appellant's exceptions are without merit and the ALJ's initial decision should be affirmed in its entirety.

Upon its *de novo* review of this matter, the Commission agrees with the ALJ regarding the charges. However, it disagrees that the 120 working day suspension was appropriate. Rather, it finds that suspension to be unduly harsh. In determining the proper penalty, the Commission's review is also *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 N.J. 571, 580 (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). However, where an infraction has not been found to be egregious, the tenets of progressive discipline are generally followed. *See In the Matter of Anthony Stallworth*, 208 N.J. 182 (2011).

In this case, while the appellant's infraction is serious, the Commission does not find it worthy of the penalty imposed by the appointing authority. While it is clear that the appellant has a history of insubordination, with three prior disciplinary actions for such behavior, those matters occurred in 2000, 2001 and 2009. The current offense occurred in 2015, nearly six years after the 2009 offense. Further, while the Commission does not condone any form of insubordination, the nature of the appellant's misconduct in this matter is not so significant as to support the serious penalty imposed. In this regard, the Commission notes that a 120 working day suspension is equivalent to a six-month suspension, which is the most severe suspension allowed for non-criminal behavior in Civil Service law and rules. Moreover, the record indicates that at the time of the infraction, the appellant had been employed by the appointing authority for over 17 years. In this case, given the appellant's years of service, the nature of this specific incident and the fact that his prior disciplines for insubordination are both remote in time and were for a maximum of 10 working days, the Commission finds the 120 working day

suspension disproportionate to the offense. Accordingly, based on the above, and in line with the tenets of progressive discipline, the Commission finds that the appropriate penalty in this matter is a 45 working day suspension. This significant suspension in no way minimizes the appellant's misconduct and should serve as a warning that any future infractions would support a disciplinary penalty up to and including removal.

Since the suspension has been reduced, the appellant is entitled to 75 working days of back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10. Regarding 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); *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 this matter, while the penalty was modified, the charges were sustained, and major discipline was imposed. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12, counsel fees must be denied. This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, unpublished, 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.

### ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified. However, the Commission modifies the 120 working day suspension to a 45 working day suspension. Pursuant to *N.J.A.C.* 4A:2-2.10, the appellant is entitled to receive 75 working days of mitigated back pay, benefits and seniority. 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 are encouraged to make a good faith effort to resolve any dispute as to back pay.

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 3<sup>RD</sup> DAY OF JUNE, 2020

*Deirdre' L. Webster Cobb*

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Deirdré L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Christopher S. Myers  
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. CSV 07110-15

AGENCY DKT. NO. 2015-2921

**IN THE MATTER OF EDWARD OLSZEWSKI,  
SOUTH WOODS STATE PRISON,  
DEPARTMENT OF CORRECTIONS**

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**Kevin McCann, Esq., for appellant, Edward Olszewski (Chance & McCann,  
L.L.C., attorneys)**

**Karen Campbell, Legal Specialist, for respondent, South Woods State Prison,  
Department of Corrections, appearing pursuant to N.J.A.C. 1:1-5.4 (a)(2)**

Record Closed: March 18, 2020

Decided: May 8, 2020<sup>1</sup>

**BEFORE JEFFREY R. WILSON, ALJ**

**STATEMENT OF THE CASE**

The appellant, Edward Olszewski, a Heavy Equipment Operator, appeals the 120 working-day suspension imposed by the respondent South Woods State Prison, Department of Corrections (SWSP) for insubordination.

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<sup>1</sup> Executive No. Order 127, executed by Governor Philip D. Murphy on April 14, 2020, extended the time for issuing Initial Decisions and Final Agency Decisions. Any decision that was due anytime from March 9, 2020, (when the Governor declared a State of Emergency) until thirty days after the emergency ends, now has an automatic ninety-day extension. Accordingly, here, the decided date was extended to May 8, 2020.

### PROCEDURAL HISTORY

On January 7, 2015, SWSP issued a Preliminary Notice of Disciplinary Action (PNDA) removing the appellant effective upon a date to be determined. On April 22, 2015, SWSP issued a Final Notice of Disciplinary Action (FDNA) imposing a 120 working-days suspension. He appealed the suspension and the matter was transmitted to the Office of Administrative Law, where it was filed on May 18, 2015, as a contested case. N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13.

This matter was assigned to the Honorable Todd Miller, ALJ who heard the respondent's case on January 29, 2016. Shortly thereafter, Judge Miller was elevated to the Superior Court of New Jersey and this matter was reassigned to this Administrative Law Judge who conducted a telephone status conference on December 22, 2016. At that time, it was agreed that the hearing in this matter would start anew and the parties were directed to disregard any prior motions or rulings entered by Judge Miller.

A hearing was conducted in this matter on June 7, 2019. The record remained open for receipt of transcripts and the submission of written closings. On August 23, 2019, the appellant filed a written renewal of his oral motion to dismiss that was denied at the hearing on July 7, 2019. SWSP submitted their objection to the renewed motion to dismiss and the appellant responded by a letter, dated October 7, 2019. The appellant's renewed motion to dismiss was denied by Order, dated January 10, 2020. As agreed to by the parties, the record closed on March 18, 2020.

### FACTUAL DISCUSSION AND FINDINGS

Based on the testimony of the witnesses and examination of the documentary evidence, I **FIND** the following **FACTS** are undisputed:

1. At all relevant times, the appellant was employed as a Heavy Equipment Operator/Truck Driver at the SWSP; a position he held for approximately twenty-three years.
2. As a Heavy Equipment Operator/Truck Driver, the appellant was a member of Local No. 195, International Federation of Professional and Technical Engineers (IFPTE).
3. On January 7, 2015, while at work, the appellant was approached by Christopher Jennings (Jennings), his supervisor. At the time, Jennings directed the appellant to transport a delivery to another nearby facility. The appellant verbally refused to comply with the directive.
4. On January 7, 2015, SWSP issued a PNDA removing the appellant effective upon a date to be determined. (R-1.)
5. The PNDA included the following charges:
  - N.J.A.C. 4A:1-1.3 General causes (a)2. Insubordination; HRB 84-17, as amended C. Personal conduct, 9. Insubordination; Intentional disobedience or refusal to accept order, assaulting or resisting authority, disrespect or use of insulting or abusive language to supervisor.
6. On February 20, 2015, a departmental hearing was conducted at the appellant's request. (R-1.)
7. On April 22, 2015, the SWSP issued a FNDA imposing a 120 working-days suspension. (R-1.) The FNDA alleged the following:

On duty date January 7, 2015 at 1:05 pm. I gave you instruction to take the trailer, which was loaded for Shoreline Storage, for a delivery and pick up, and you said 'no, I am not doing it'. The next driver that arrived had to perform the duties you were instructed to do and it cause(d) 1 hour of

overtime. If you would have done it, as asked, overtime would have been avoided.  
(R-1.)

8. The FNDA included the following sustained charges:

- N.J.A.C. 2:2.3(a)(2): Insubordination
- HRB 84-17 (as amended) C9. Insubordination: Intentional disobedience or refusal to accept order, assaulting or resisting authority, disrespect or use of insulting or abusive language to supervisor.  
(R-1).

Testimony

**Christopher Jennings** testified on behalf of the respondent. He has been employed with the New Jersey Department of Corrections for twenty-four years and presently holds the title of Manager II at SWSP for DEPTCOR.<sup>2</sup> DEPTCOR at SWSP ships and receives food products for New Jersey's entire prison population as well as some developmental centers throughout the state. That food is relied upon throughout the Department of Corrections – approximately 39,000 meals, served three times per day.

On January 7, 2015, Jennings was working in the food service warehouse at SWSP. Those under his direct supervision that day included the appellant, Christopher Taguwa (Taguwa), Todd Butcher and Robert "Bobby" Miller (Bobby). On that date, Jennings directed the appellant to transport a trailer of food to Shoreline, a privately owned freezer storage plant used by DEPTCO and located across the street from SWSP. The appellant responded, "I'm not doing it." (T33:7-12.) It was Jennings' understanding that Shoreline stopped accepting deliveries at a specific time and he was

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<sup>2</sup> DEPTCOR is New Jersey's correctional industry program. An entity within the New Jersey Department of Corrections, DEPTCOR provides products and services manufactured and offered by adults incarcerated in New Jersey's correctional system. The products produced at the numerous plants across the state range from furniture to food items and license plates. Some other DEPTCOR products are city and highway signs, men and women's garments, textiles, silk screening/embroidery, and bedding. Services provided by DEPTCOR include graphics and printing.



concerned that if that deadline was missed there could possibly be spoilage to the food in the trailer.

Jennings went to his office and then returned to the appellant who offered to place his trailer "on the hill" which is an area used to store trailers. Jennings again directed, "Yes, but I still need you to go take pallets across the street to Shoreline and bring whatever they have to return." the appellant responded again, "I'm not doing it." (T33:15-21.) The appellant went on to state, "Get the next guy to do it," as Jennings was explaining the next driver was not close enough. (T46: 23 – T47:-2.)

After the appellant's second refusal to comply with his directive, Jennings returned to his office, locked the door and proceeded to fill out the paperwork to submit charges for insubordination. While in his office, the appellant attempted entry, but the door was locked. The appellant tried speaking through the locked door, but Jennings could not hear what he was saying. Jennings threw his hand up in the air and the appellant left the area. At that time, Jennings directed Taguwa to secure another driver to complete the run to Shoreline. Bobby completed the run and was authorized for the related overtime. (R-7.)

Jennings stated that in the past year, he and the appellant had some heated discussion, but he did not harbor any personal bias or animus towards the appellant.

**Christopher Tawuga** testified on behalf of the respondent. He has been employed by the Department of Corrections since September 2007, as an Institutional Trade Instructor (ITT) in the food warehouse at SWSP. In that position, he trains inmates how to work in the warehouse, operate equipment and load trucks.

On January 7, 2015, Tawuga was working in the warehouse at the ITT desk located just outside of Jennings' office. At that time, he overheard Jennings direct the appellant to the Shoreline facility. The appellant responded that he was not going to comply. Jennings again directed the appellant to make the run to the Shoreline. Again, the appellant responded that he was not going to do it. It did not appear to Tawuga that Jennings or the appellant were upset during their encounters.

**Joseph E. Volovar** (Volovar) testified on behalf of the respondent. He has been employed by the Department of Corrections for approximately twenty years. He presently holds the position of the Industrial Manager I for DEPTCOR. Volovar was present at SWSP on January 7, 2015, but he did not observe the interaction between Jennings and the appellant. He was made aware of the incident after the fact.

As a truck driver, the appellant is a member of the International Federation of Professional and Technical Engineers, Local 195 (IFPTE). Article 10, Section D of the IFPTE Agreement (R-4) lays out members' entitlement to rest periods during their work shifts. Volovar testified that such breaks for truck drivers are not designated for a specific time. As essential workers, truck drivers are required to complete assigned tasks before taking a rest period. A truck driver cannot dictate when they will take a rest break. All breaks must be authorized by a supervisor.

Volovar noted, pursuant to the New Jersey Department of Corrections Human Resources Bulletin 84-17 as Amended, (HRB-84-17) the appellant was charged with insubordination under Section C9. A first infraction of that section exposes the appellant to discipline ranging from an "Official Written Warning" (OWR) to "Removal" (R). The language defining the term insubordination included in the appellant's PND and FND mirror the language included in HRB-84-17.

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.  
[5 N.J. at 522.]

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.)

When assessing credibility, inferences may be drawn concerning the witness' expression, tone of voice and demeanor. MacDonald v. Hudson Bus Transportation Co., 100 N.J. Super. 103 (App. Div. 1968.) Additionally, the witness' interest in the outcome, motive or bias should be considered. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963.)

Having considered the testimonial and documentary evidence presented and observing the demeanor of Jennings, Tawuga and Volovar, I accept their testimony to be highly credible. They merely stated that facts as they recalled them, without histrionics or magnification. None of these witnesses had anything to gain by testifying.

The appellant testified on his own behalf. He has been employed with the Department of Corrections for approximately twenty-three years as a truck driver/heavy equipment operator. At approximately 1:00 p.m., on January 7, 2015, upon returning to SWSP after completing his morning runs, he encountered Jennings who told him that he had additional work for him. The appellant responded, "Well, I'm going to have to say I can't do that." (T146:3-9.)

The appellant was approached by Jennings again who told him "I have a trailer that's got to go to Shoreline." The appellant responded, "Well, I'm going to have to tell you I can't do that." His reasoning was that he had not had his lunch that day and that his truck needed repairs. (T147:6-10.) With this, Jennings "stormed off and ran to the back office . . ." (T147:16.)

The appellant attempted to approach Jennings at his office, but the door was locked. He spoke through the door to tell Jennings that he would complete the Shoreline run after he had his lunch. Jennings stood up and raised his hand. The appellant interpreted Jennings' gesture to mean "Okay." The appellant never completed the Shoreline run. It was not until he was served with the PNDA that the appellant was aware that he was being charged with insubordination.

On direct examination, the appellant testified as follows:

Q: What did you do other than say, "I'm not doing that", then?

A: Nothing.

Q: Did you say it twice?

A: Did what?

Q: Did you say twice, "I'm not going to do that"?

A: Probably in passing. I don't even remember saying it once, really.

(T152:3-11)

On cross examination, the appellant testified as follows:

Q: As we sit here today, you do admit that you did tell Mr. Jennings twice that you weren't doing the job.

A: I don't know if it was twice or one time.

(T160:15-18)

Based upon his testimonial evidence and having had the opportunity to observe the appearance and demeanor of the appellant, I **FIND** as **FACT** that on January 7, 2015, the appellant intentionally twice refused to comply with direct orders from his supervisor, Jennings. The appellant was evasive and contradictory while testifying

## LEGAL ANALYSIS AND CONCLUSIONS

The appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The respondent shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted.) Stated differently, 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); see also, Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959.)

HRB 84-17, as amended, defines insubordination as intentional disobedience or refusal to accept an order. Based upon my findings, I **CONCLUDE** that the respondent has met its burden as to the charge of insubordination relative to the incidents on January 7, 2015.

## DISCIPLINARY ACTION

In appeals concerning major disciplinary actions brought against classified employees, the burden of proof is on the appointing authority. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A2-1.4(a); In re: Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962.)

The act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1 et seq. New Jersey's Civil Service Act is construed liberally in order to protect employees

from arbitrary discipline. Mastrobattista v. Essex Cty. Park Comm'n, 46 N.J. 138, 147 (1965); Prosecutors, Detectives and Investigators Ass'n v. Hudson County Bd. of Freeholders, 130 N.J. Super. 30, 41 (App. Div. 1974); Scancarella v. Dep't of Civil Serv., 24 N.J. Super. 65, 70 (App. Div. 1952.)

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. 11:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. Grounds for discipline, include, among other things, insubordination, chronic or excessive absenteeism or lateness, conduct unbecoming a public employee, and other sufficient cause. See N.J.A.C. 4A:2-2.3(a)(2), (4), (6), and (12).

The appellant's Work History (R-11) was sealed at the hearing and not unsealed until after this ALJ made his findings and conclusions as to the charge alleged. The appellant's disciplinary record reflects six prior incidents of discipline. Three of these were for insubordination.

A September 19, 2000, incident of insubordination resulted in the appellant's five-day suspension. The appellant received a ten-day suspension for insubordination relative to an October 10, 2001, incident involving profanity to a supervisor and refusal to follow an order. A March 30, 2009, incident of insubordination resulted in a ten-day suspension for walking out of a meeting with his supervisor, cursing and refusing to follow directions.

I have **CONCLUDED** that the respondent has met its burden as to the charge of insubordination relative to the incidents on January 7, 2015. A review of the appellant's Work Record reveals he was disciplined for insubordination on three prior occasions. HRB 84-17 as amended recommends only removal for three or more incidents of insubordination. Here, the respondent seeks only a suspension of 120-days. This is reasonable considering the appellant's disciplinary history. Therefore, I **CONCLUDE** that the respondent's assessment of a 120-day suspension period for the appellant's fourth incident of insubordination on January 7, 2015, is appropriate.

**ORDER**

It is hereby **ORDERED** that the appellant's 120-day suspension assessed by the respondent relative to the incidents of January 7, 2015, is **AFFIRMED**. The appellant's appeal is hereby **DISMISSED**.

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

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

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



May 8, 2020  
DATE

\_\_\_\_\_  
**JEFFREY R. WILSON, ALJ**

Date Received at Agency: \_\_\_\_\_

Date Mailed to Parties: \_\_\_\_\_

JRW/tat

**WITNESSES**

**For Petitioner:**

Edward Olszewski

**For Respondent:**

Christopher Jennings

Joseph E. Volovar

Christopher Taguwa

**EXHIBITS**

**For Appellant:**

None

**For Respondent:**

- R-1 Preliminary Notice of Disciplinary Action, dated January 7, 2015, and Final Notice of Disciplinary Action, dated April 22, 2015
- R-2 Assignment and Use of State Owned Cellular Wireless Devices Acknowledgement, dated September 14, 2012
- R-3 Assignment and Use of State Owned Cellular Wireless Devices Acknowledgement, dated October 23, 2012
- R-4 State of New Jersey Agreement – IFPTE - Local No. 195 and Local 518, dated July 11, 2011 to June 30, 2015
- R-5 DEPTCOR Cell Phone Listing
- R-6 Withdrawn / Not Admitted
- R-7 Overtime Authorization for Robert Miller, dated January 7, 2015
- R-8 South Woods State Prison Institutional Sign In Log, dated January 7, 2015 to January 8, 2018



- R-9 South Woods State Prison Receiving Gate Vehicle Log, dated January 7, 2015
- R-10 New Jersey Department of Corrections Human Resources Bulletin 84-17  
As Amended – Disciplinary Action Policy
- R-11 "Work History" (SEALED JUNE 7, 2019 – UNSEALED MAY 4, 2020)