IN THE MATTER OF ANDREW GALES, EDNA MAHAN CORRECTIONAL FACILITY, DEPARTMENT OF CORRECTIONS	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001131-22 ON APPEAL FROM A FINAL AGENCY DECISION OF THE CIVIL SERVICE COMMISSION DOCKET NOS.: CSR-16941-19 AND CSR-04864-20 SAT BELOW: EXECUTIVE DIRECTOR HON. JEFFREY RABIN, A.L.J.

APPELLANT'S AMENDED BRIEF

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PRELIMINARY STATEMENT

Appellant, Andrew Gales, was a Corrections Officer at the Edna Mahan Correctional Facility. On August 16, 2019, Mr. Gales was working in Stowe Two North. During his shift, an inmate, D.S., attempted an escape through a window that had been broken. A majority of the inmates were aware that the window had been broken and, despite requests to repair it, the Department of Corrections (the "DOC") did not. In addition, the DOC was aware that D.S. posed a flight risk but still allowed the inmate to be housed in a dormitory with an unsecured window that could have been opened by any inmate at any time.

On August 17, 2019, Mr. Gales returned to work and was in line up where he learned that there may have been a false posting alleging that Mr. Gales had some "involvement in D.S.'s" attempted escape. The posting was made on a members' only Facebook web page entitled "EMCF Brother and Sisterhood" to which a number of Corrections Officers belong. Mr. Gales was given affirmative permission to address his colleagues at the end of the line up.

Investigator Dalrymple interrogated Mr. Gales about the attempted escape. Investigator Leinter, a close friend of Investigator Dalrymple, interrogated Mr. Gales with the goal of having him confess to inappropriate behavior which he refused to do. Investigator Leitner's investigation was

more akin to an inquisition wherein the accused must prove his innocence and not an unbiased fact finding investigation.

On October 1, 2019, Mr. Gales was charged on a Preliminary Notice of Disciplinary Action for the August 16th incident including: violation of *N.J.A.C.* 4A:2A-2.3(a)(1) "incompetency, inefficiency or failure to perform duties;" *N.J.A.C.* 4A:2A-2.3(a)(7) "neglect of duty;" *N.J.A.C.* 4A:2A-2.3(a)(12) "other sufficient causes;" Human Resources Bulletin ("HRB") HRB 84-17, Section B2 "neglect of duty, loafing, idleness or willful failure to devote attention to tasks which could result in danger to persons or property;" HRB 84-17, Section B4 "sleeping while on duty (essential);" HRB 84-17, Section C8 "falsification: Intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation, or other proceeding;" HRB 84-17, Section C11 "conduct unbecoming of an employee;" HRB 84-17, Section D1 "negligence in performing duty resulting in injury to persons or damage to property;" HRB 84-17, Section D2 "negligently contributing to an elopement or escape;" HRB 84-17, Section D7 "Violation of administrative procedures and/or regulations involving safety and security;" and HRB 84-17, Section E1 "violation of a rule, regulation, policy, procedure, order, or administrative decision."

No other persons were charged or disciplined.

On October 16, 2019, Mr. Gales was charged on a Preliminary Notice of Disciplinary Action for the incident on August 17, 2019. The reason for the delay was unexplained as the Department of Corrections did not make any further inquiry into he matter.

Mr. Gales was charged with *N.J.A.C.* 4A:2A-2.3(a)(6) "conduct unbecoming a public employee;" *N.J.A.C.* 4A:2A-2.3(a)(12) "other sufficient causes;" HRB 84-17, Section C8 "falsification: Intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation, or other proceeding;" HRB 84-17, Section C11 "conduct unbecoming of an employee;" HRB 84-17, Section C24 "threatening, intimidating, harassing, coercing or interfering with fellow employees on State [sic] Property;" and HRB 84-17, Section E1, "violation of a rule, regulation, policy, procedure, order, or administrative decision.

Again, no other person was charged or disciplined – even those that made the posting on the members only Facebook website.

At the time of the administrative hearing, Investigator Dalrymple did not testify as he was longer with the Department of Corrections because he had been terminated for disciplinary reasons.

Mr. Gales was found to have violated various Administrative Codes as well as internal DOC Rules and Regulations. Despite his limited disciplinary record, the DOC terminated Mr. Gales. However, his termination was disparate as compared to other persons.

STATEMENT OF PROCEDURAL HISTORY

Mr. Gales was charged with two different Preliminary Notices of Disciplinary Action ("PNDA") dated September 27, 2019 and October 16, 2019, respectively, regarding incidents that allegedly occurred on the successive dates of August 16 and 17, 2019. (Pa109a-112a). On the September 27, 2019 PNDA, Mr. Gales had a Loudermill hearing before Sean St. Paul and Major Ryan Valentin. (Pa113a-P116a) At the time, Mr. Gales was suspended "WITHOUT pay effective immediately". (Pa113a-Pa116a). Mr. Gales' petition for a stay was not addressed by Hearing Officer St. Paul. (Pa113a-P116a).

Otherwise, Mr. Gales did not have any administrative hearings with respect to these two PNDAs.

Mr. Gales was issued two Final Notice of Disciplinary Actions on October 25, 2019 and January 14, 2020 that mirrored the September 27, 2019 and October 16, 2019, respectively PNDAs. (Pa113a-Pa119a).

On November 9, 2019, Mr. Gales filed an appeal with the Civil Service Commission asserting the lack of a hearing for the first PNDA. The DOC terminated him effective October 17, 2019. (Pa110a; Pa119a).

The First FNDA was transmitted to the Office of Administrative Law, where it was filed on December 2, 2019, for determination as a contested case. (Pa3a). The second FNDA was transmitted to the Office of

Administrative Law, where it was filed on May 4, 2020, for determination as a contested case. (Pa3a).

A hearing was held at the Office of Administrative Law on February 9, 10, 11, and March 15, 2021. (Pa3a) [1]. On October 5, 2022, Jeffrey N. Rabin, A.L.J., issued his decision. (Pa1a-32a). The record closed on April 19, 2022. (Pa125a). The decision was sent to the Civil Service Commission. (Pa30a).

Mr. Gales filed timely exceptions to the October 5, 2022 decision by October 17, 2022. (Pa124-136a). The DOC did not file its exceptions until October 24, 2022 – beyond the thirteen day statutory deadline of October 18, 2023. (Pa137a). *N.J.A.C.* 1:1-18.4. The DOC had not request any extensions. *N.J.A.C.* 1:1-18.8(d) and (e).

The Civil Service Commission issued a Final Administrative Action on November 2, 2022. (Pa33a-67a). Final Administrative Action of the Civil Service Commission was served upon Mr. Gales by email on November 4, 2022.

A timely Notice of Appeal was filed.

[1] 1T refers to the transcript of February 9, 2021.
2T refers to the transcript of February 11, 2021.
3T refers to the transcript of March 15, 2021.

STATEMENT OF FACTS

A. The August 16, 2019 Incident

On or about August 16, 2019, Mr. Gales was assigned as a Senior Corrections Officer at the Stowe 2 North Dormitory at the Edna Mahon Correctional Facility. (1T34.10-14; 1T58.16-19). Senior Corrections Officer Thomas McDowell ("McDowell") was assigned to the Stowe 2 South Dormitory. (1T34.20-22; Pa121a)[2]. Both Gales and McDowell were on third shift. (1T34.10-22).

Stowe Two Housing Unit is a second floor housing unit with a vestibule between the first and second doors. (Pa4a). To the left, there is a common area with benches. (Pa4a). To the right, there are six housing wings. Additionally, there is an officer's desk area. (Pa4a). There is also a common day-space area that also has benches. (Pa4a). The day-space is shared between the two housing units. (1T10.16 to 11.5). There are typically eight inmates per wing and approximately 40 inmates per housing unit. (1T11.23-25; 1T12.1-3).

Senior Corrections Officer Igor Minivich ("Minivich") worked as the Relief Officer for Stowe 2 North and South housing units. (1T64.19-22;

[2]The entire matter was audio recorded by the Office of Administrative Law. However, for some unexplained reason, the transcription service informed the parties that the transcript for February 10, 2021 were missing. Therefore, Judge Rabin "attempted a reconstruction of the entire day's missing testimony from my notes." As a result, there are no "page:line" references for February 10, 2021. Instead, there are only references to the page numbers.

1T64.23 to 65.3). Minivich would go on security checks throughout the night shift. (1T64.23 to 65.3). In fact, at approximately 1:26 a.m., Minivich wrote in the logbook that he had conducted a search/count. (1T173.21-25).

Corrections Officer Jaime Rivera ("Rivera") was assigned to the blotter in center control. (Pa325a). Rivera was responsible for receiving each officer's inmate count and recording that count in the main blotter. However, Rivera[3] was not interviewed as to whether or not officers had called in their counts to him. (1T178.25 to 179.2).

On or before August 16, 2019, one of the windows on Stowe 2 North had been broken and not fixed. (1T107.2-11)[4]. Inmates housed on Stowe 2 North Dormitory knew that the window could be opened at will. (Pa122a). Officer Velasco had reported the window was broken and would not close. (2T20.1-4).

It is undisputed that neither Gales nor any other Corrections Officer was told about D.S.'s plans to escape nor that D.S. was an escape risk.[5] Despite D.S.'s plans to escape, she was housed in a dormitory that had an

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[3]A review of Investigator Dalrymple's investigative report reveals that Rivera served as Gray's and McDowell's union representative during their respective interviews with DOC SID.

[4]The window had been in disrepair since March 2, 2017.

[5]Based on the discovery that was provided to Mr. Gales, but not presented at the hearing, on or before August 15, 2019, Inmate D.S., had had discussions with inmates and others, including during her monitored phone calls with persons outside of the correctional facility, that she had intentions of escape. D.S. wanted to escape in an effort to be able to reunite with her boyfriend who allegedly worked as a contractor at the Edna C. Mahan Correctional Facility.

unsecured window that could have been opened by any inmate at any time. (Pa122a).

On August 16, 2019, Gales returned to Stowe 2 North from his sanctioned break. (1T50.13-16). In the video, McDowell and Minivich were seen in Stowe 2 North. (1T187.1-15; 1T191.20-23). McDowell and/or Minivich left Stowe 2 South completely unattended. (*Id.*; 1T187.9-18; Pa454a). Lieutenant Karpew ("Karpew") was able to view the video on Stowe 2. It should be noted that neither McDowell or Minivich were disciplined for leaving Stowe 2 South completely unattended and/or for failing to report that a post was unattended. (1T187.9-18; 1T181.1-4). It is uncertain for how long McDowell had left Stowe 2 South unattended. (*Id.*)

On or about August 15, 2019, D.S. placed sheets and/or laundry in her bed to make appear as if she were sleeping in her bed. (1T110.11-16). During Mr. Gales' tour of the wings, he did not see anything unusual in D.S.'s dormitory wing. (1T122).

During the early morning hours of August 16, 2019, D.S. left her dormitory wing, went onto an adjacent wing where the broken window was, and tried to escape through that window. (1T188). The window was not secured nor was it alarmed.[6]

[6] Based on the discovery provided to Mr. Gales by the State, during her escape, D.S. lost her footing and landed below the window. D.S. lost her shoe. Additionally, during the fall a razor that D.S. had concealed in her vaginal cavity fell out of D.S.'s underwear. D.S. stated to representatives of the DOC that she

D.S. then crawled up the exterior staircase and knocked on the emergency exit. (Pa122a). Once Mr. Gales heard the knock on the door, Gales opened the door and let D.S. into Stowe 2 North. (Pa122a) Gales immediately notified the requisite personnel. (1T109.1-6).

Mr. Gales was the only one charged with any disciplinary action. In fact, McDowell was not even questioned, investigated or disciplined for leaving his area unattended. (1T187.9-18; 1T181.1-4). Nor did the DOC question or investigate Minivich. (1T192.7 to 193.24).

B. <u>The August 17, 2019 Incident</u>

On August 17, 2019, at approximately 10 p.m., Mr. Gales attended line up – the time where officers receive their assignments, relevant briefings, etc. ahead of their respective shifts. (1T140.1-5; 1T141.19-22; 1T142.3-6). Mr. Gales had already been subjected to a lengthy investigative process and interview.

During that lineup, Mr. Gales learned that there may have been an "alleged" posting about Mr. Gales's involvement in Inmate D.S.'s escape on a closed Facebook web page entitled "EMCF Brother and Sisterhood."

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was visible from the exterior fence. While D.S. was outside, she saw Corrections Officer Irving Gray ("Gray") patrol the exterior fence in a DOC vehicle. D.S. tried to flag down Gray to get assistance. According to D.S., Gray looked at her and did not offer any assistance. Instead, Gray merely took off and continued his tour. D.S. was neither charged with attempted escape or escape.

(1T145.24 to 146.12; 1T199.10-13). Mr. Gales does not have any social media accounts. (1T146.3).

Several officers, including Lt. Nestor, were making comments about what had occurred the previous day. (1T146.4-12). In response, Mr. Gales made a comment aloud. (1T143.20-24). It was not addressed to any one person. (1T147.11-14). That comment was heard by several officers during line up. (Pa114a-115a).

Initially, the comment was taken by Investigator Leitner as a threat and sent to the Hunterdon County Prosecutor's Office for consideration. (1T209.18 to 210.6). The Hunterdon County Prosecutor's Office did not find anything criminal about the comment and referred it to the DOC for further action.

Investigator Leitner, who had already interrogated Mr. Gales once, interrogated him again with the end goal being to have Mr. Gales confess to inappropriate behavior. Investigator Leitner admitted that he accepted the other officers' denial of the posting at face value. (1T206.14-17; 1T207.17-20). However, Investigator Leitner spent 10 to 15 minutes accusing Mr. Gales of lying and told him that he had evidence contradicting his statement. (1T206.18 to 207.1). Investigator Leitner never presented that contrary evidence during this administrative hearing. Mr. Gales denied any wrongdoing.

C. TRIAL TESTIMONY

(1) The August 16, 2019 Incident

For the August 16, 2019 incident, the State presented the testimony of Lieutenant Michael Leitner, Officer Irving Gray, Officer Thomas McDowell and Major Michael White. Mr. Gales presented the testimony of Officer Carlos Velasco.

It should noted that:

1. The State did not present the testimony of Investigator Dalrymple because he was no longer with the Department of Corrections and was terminated for disciplinary reasons. (1T15.9-12).

2. The State did not present the testimony of Major Ryan Valentin who oversaw the entire investigation and was the summary witness at Mr. Gales's truncated *Loudermill*[7] hearing. Since the investigation, Major Valentin has been arrested and charged with official misconduct, conspiracy and tampering with public records or information. (Pa68a).

3. The State did not present Igor Minivich as a witness to testify for this incident even though he was present on the date in question, had relevant information, conducted counts and testified on the second incident. (2T). Instead, the State called Minivich as a witness to the alleged incident at the lineup. The State expressly indicated that it Minivich was not being called as a witness to the alleged escape even though Minivich was present and made entries in the logbook on the relevant day in question. See also, Point IV, *infra*.

Investigator Leitner testified that he was not the lead investigator in this case. Investigator Leitner "wasn't assigned the investigation because

[7] *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

there was another investigator, but he was present in Edna Mahan at SID as an investigator, so he knew what was going on." (1T17.5-8). He was, however, present for Mr. Gales's interview. (1T16.23-24; 1T44.5-7). Investigator Leitner was also the lead investigator for Mr. Gales's second incident.

A. <u>The August 17, 2019 Incident</u>

For the August 17, 2019 incident, the State presented the testimony of Lieutenant Michael Leitner, Officer Igor Minivich, Lieutenant Ricky Nestor, Officer Roxanne Lemonies, Officer Bruce DeAngelo, Officer Cody DeBenedetto and Officer Matthew Mariti.

LEGAL STANDARD OF REVIEW

As a general principle of law, the Appellate Court will give deference to an agency's decision and will not disturb its decision unless the agency acts in a manner that is "'arbitrary or unreasonable' or is unsupported 'by substantial credible evidence in the record as a whole.'" *Berta v. N.J. State Parole Bd.*, 473 N.J. Super. 284, 302 (App. Div. 2022) quoting *Henry v. Rahway State Prison*, 81 N.J. 571, 579-80 (1980) and citing *Campbell v. Dep't of Civ. Serv.*, 39 N.J. 556, 562 (1963).

An agency's expertise and decision making is not absolute. *Blanchard v. N.J. Dep't of Corrs.*, 461 N.J. Super. 231, 237-38 (App. Div. 2019). See also, *Mayflower Sec. Co. v. Bureau of Sec.,* 64 N.J. 85, 93 (1973); *Figueroa v. N.J. Dep't of Corrs.*, 414 N.J. Super. 186, 191 (App. Div. 2010). "[The

Appellate Court is] constrained to engage in a 'careful and principled consideration of the agency record and findings' . . . . While [the Appellate] scope of review is limited, [the Appellate Court] cannot be relegated to a mere rubber-stamp of agency action." *Williams v. Dep't of Corr.*, 330 N.J. Super. 197, 204 (App. Div. 2000), citing *State-Operated School District of the City of Newark v. Gaines*, 309 N.J. Super. 327, 332 (App.Div.), *certif. denied,* 156 N.J. 381 (1998); *Chou v. Rutgers*, 283 N.J. Super. 524, 539 (App.Div. 1995), *certif. denied,* 145 N.J. 374 (1996).

"The scope of our appellate review of judgment entered in a non-jury case, as here, we note that our courts have held that the findings on which it is based should not be disturbed unless '…they are so wholly insupportable as to result in a denial of justice,' and that the appellate court should exercise its original fact finding jurisdiction sparingly and in none but a clear case where there is no doubt about the matter." *Rova Farms Resort, Inc. v. Inv'rs Ins. Co.*, 65 N.J. 474, 483-84 (1974) quoting *Greenfield v. Dusseault*, 60 *N.J. Super.* 436, 444 (App. Div. 1960), aff'd o.b. 33 *N.J.* 78 (1960).

"Substantial evidence has been defined alternately as 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' and 'evidence furnishing a reasonable basis for the agency's action.'" *Blanchard v. N.J. Dep't of Corr.*, 461 N.J. Super. 231, 238 (App. Div. 2019) quoting *Figueroa v. N.J. Dep't of Corr.*, 414 N.J. Super. 186, 192 (App. Div. 2010) (citations omitted).

As the Court held in *In re Carter*, 191 N.J. 474, 482 (2007), appellate review is limited to:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

See also, Mazza v. Board of Trustees, 143 N.J. 22, 25 (1995) and *Henry v. Rahway State Prison,* 81 N.J. 571, 579-80 (1980) (citing *Campbell v. Dep't of Civ. Serv.,* 39 N.J. 556, 562 (1963).

LEGAL ARGUMENT

Point I

THE OAL INAPPROPRIATELY ISSUED ITS DECISION BEYOND THE STATUTORY FORTY-FIVE DAY PERIOD IN VIOLATION OF N.J.A.C. 1:1-18.1 THROUGH 1:18-3, INCLUSIVE.
(OAL DECISION AT PAGE 1; Pa2a)
(CSC OPINION AT PAGE 1; Pa33a)

As a matter of law, pursuant to *N.J.A.C.* 1:1-18.1 through 18.3, inclusive, the OAL typically has forty-five days to render its decision. The OAL never filed for any extension beyond the forty-five days. *N.J.A.C.* 1:1-18.8(c).

In this case, the record closed on April 19, 2022. Summations were ordered by Jeffrey N. Rabin, A.L.J. to be submitted by April 4, 2022.

Rebuttals were ordered to be submitted by April 18, 2022. Timely submissions and rebuttals were submitted to the OAL by both sides.

Since the OAL received all rebuttals by April 19, 2022, the OAL should have rendered its decision no later than June 3, 2022 or request a statutory exception from the Director of the OAL pursuant to *N.J.A.C.* 1:1-18.8(c), (d) and/or (e). It did not.

In fact, numerous joint correspondences and/or emails were sent to the Court requesting its decision. However, the OAL did not provide a response to any of these.

Point II

THE DEPARTMENT OF CORRECTIONS FAILED TO MEET ITS BURDEN OF PROOF BECAUSE IT SOLELY INTRODUCED HEARSAY EVIDENCE WITHOUT THE REQUIRED RESIDUUM OF ANY COMPETENT EVIDENCE TO PROVE THE ULTIMATE FACTS. (OAL DECISION AT PAGES 12, 14-16, 29; Pa12a; Pa14-16; Pa29a)

In a civil-service disciplinary case, the employer bears the burden of providing sufficient, competent and credible evidence of facts essential to the charge. *N.J.A.C.* 4A:2-1.4. As a matter of law, the Court in *In re Polk*, 90 N.J. 550, 560 (1982) held, in substance and in part,

> This jurisdiction has long recognized that the usual burden of proof for establishing claims before state agencies contested administrative adjudications is a fair preponderance of the evidence. In *Atkinson v. Parsekian*, 37 N.J. 143, 149 (1962), we observed that: "In proceedings before an administrative agency, . . . it is only necessary to establish the truth

> of the charges by a preponderance of the believable evidence and not to prove guilt beyond a reasonable doubt." See *In re Suspension or Revoc. License of Kerlin*, 151 N.J. Super. 179, 184 n.2 (App. Div. 1977) ("Where disciplinary proceedings with respect to a profession or occupation are vested in an administrative agency in the first instance, the charges must be established by a fair preponderance of the believable evidence").

"The term 'fair preponderance of the evidence' means the greater weight of credible evidence in the case. It does not necessarily mean the evidence of the greater number of witnesses but means that evidence which carries the greater convincing power to our minds." *State v. Lewis*, 67 N.J. 47, 49 (1975) citing *Model Jury Charge, Criminal, 3:180*. See also, *Zive v. Stanley Roberts, Inc.*, 182 N.J. 436, 457 (2005)(applying the standard to a wrongful termination).

The burden of proof cannot be accomplished simply by introducing hearsay evidence. *N.J.A.C.* 1:1-15.1(b). *In the Matter of Nathaniel Parker, Juvenile Justice Commission*, 2009 N.J. AGEN LEXIS 250, *14-15, OAL DKT. NO. CSV 02994-08S (April 15, 2009), the Court held:

> While hearsay evidence is admissible in administrative hearings, *N.J.A.C.* 1:1-15.5, in order to prove its case, the appointing authority must produce a residuum of competent evidence to prove any ultimate fact. *Weston v. State*, 60 N.J. 36 (1972). Although credible hearsay evidence may serve to buttress the foundation of credible competent evidence such as to provide a more satisfactory degree of proof of guilt, hearsay that is not otherwise admissible

> under the Rules of Evidence (thus competent) cannot by itself support an ultimate finding of fact.

See also, *Russian White House Restaurant v. Village of Ridgewood*, 2000 N.J. AGEN. LEXIS 188, *109, OAL DKT. NO. ABC 7585-97 & ABC 7036-98 Consolidated (November 29, 1999)(the residuum rule requires legally competent evidence to support the entire decision or ultimate finding of fact.

For instance, the State, over objection, moved the relevant sheet into evidence as a "business record." (1T41.11-13). The State admitted that the entire "crux of its case" was the surveillance footage and the log entry book. (1T30.13-17). However, State asked Investigator Leitner, who was not part of the investigation, to provide factual testimony regarding the entries which appeared on the logbook. (1T37.4 to 38.1; 1T39.8-10; 1T40.2-5; 1T48.7-11; 1T57.13 to 58.14). In fact, Investigator Leitner's "first-hand knowledge" came from "reviewing the logbook" that contained hearsay – without more. (1T50.20-23). The record is devoid of any actions that Investigator Leitner may have undertaken to ascertain the authenticity of the logbook entries.

Instead, the State then asked Investigator Leitner to testify about the veracity of the video surveillance tape even though he was not part of the investigation. (1T66.18-21; 1T81.11-22). In fact, a witness that was available to the State, had personal knowledge of the entries to the logbook, and whom the State called on a separate matter, was not called to testify about this topic.

In the Matter of Rhoda Livingston, the Court was called upon to consider whether Officer Livingston facilitated a romantic relationship between an inmate and another corrections officer. 2007 N.J. AGEN. LEXIS 826, *1, OAL DKT. NO. CSV 05786-06; AGENCY DKT. NO. 2006-2024-I (December 24, 2007). The crux of the matter against Officer Livingston was that her name was contained in a packet of 53 love-letters that an inmate had drafted to his paramour. *Id*. at *7-9. The inmate accused Officer Livingston of being the "facilitator" of the illicit relationship. *Id*. at *8-9. The Court did not find Officer Livingston facilitated any relationship between the inmate and the corrections officer. *Id*. at *12. Held the Court, "[e]ven though the Department may have reason to suspect that Livingston aided or abetted Arroyo's improper conduct, mere suspicion is no substitute for competent evidence at an administrative hearing. The only person who accused Livingston of any wrongdoing was not offered as a witness and Livingston's legal representative never had an opportunity to cross-examine his version." *Id*. at *14-15. See also, *State in the Interest of D.C.*, 114 N.J. Super. 499, 502 (App. Div. 1971)(The State must prove the charges by competent evidence; suspicion alone does not suffice.)

In this case, Investigator Leitner's testimony did not provide the necessary residuum evidence to buttress either the business record logbook or the video surveillance tape as he could not provide any legally competent

evidence about the August 16, 2019 incident. Further, Mr. Gales did not have an opportunity to cross-examine the lead investigator.

As previously stated, the burden of proof cannot be accomplished simply by introducing hearsay evidence. *N.J.A.C.* 1:1-15.1(b). However, that is exactly what happened in this matter.

Point III

THE OAL ERRONEOUSLY CONSIDERED MR. GALES'S ADMISSIONS TO CORROBORATE OR SUPPLY THE REQUISITE RESIDUUM OF COMPETENT PROOF SUFFICIENT TO SUPPORT THE DISCIPLINARY CHARGES. (OAL DECISION AT PAGES 12, 14-16, 29; Pa12a; Pa14-16; Pa29a)

To the extent that the State relied upon, and the Court accepted, Mr. Gales's statements to DOC to provide the necessary residuum, this Court has held, "[a person's] admissions or prior sworn statements serve to potentially contradict some of the hearsay evidence admitted under *N.J.A.C.* 1:1-15.5(a), **but certainly cannot serve to corroborate or supply a residuum of competent proof sufficient to support the appointing authority's allegations**." (emphasis added). *Anderson v. County of Monmouth*, 2006 N.J. AGEN LEXIS 960, *32, OAL DKT. NO. CSV 2101-05 (REMAND OF CSV 4698-04); AGENCY DKT. NO. 2004-2204 (October 2, 2006).

In fact, the ALJ apparently decided the case, in part, on the evidence that was presented.

In this case, the ALJ held that "Appellant chose not to testify at the within hearing, where he could have offered testimony contradicting the evidence presented against him." In short, the ALJ shifted the burden of proof to Mr. Gales to disprove the allegations against him by a preponderance of the evidence. This is in direct contradiction with the established law. See, See, *N.J.A.C.* 1:1-14.7(f)(3), *N.J.A.C.* 4A:2-1.4. See *In re Polk*, 90 N.J. 550, 560 (1982)

Point IV

THE COURT FAILED TO TAKE AN ADVERSE INFERENCE AGAINST THE DEPARTMENT OF CORRECTIONS FOR FAILING TO CALL THE ONLY WITNESS WHO COULD HAVE PROVIDED THE REQUISITE RESIDUUM OF COMPETENT PROOF EITHER IN ITS CASE IN CHIEF OR IN REBUTTAL. (OAL DECISION AT PAGE 19; Pa19a)

During its case in chief, the State called Officer Minivich to testify solely for the August 17, 2019 incident. (Pa113a-Pa114a). The State did not elicit a single shred of evidence or ask Officer Minivich any questions regarding the August 16, 2019 incident even though there was plethora of testimony regarding Officer Minivich's presence on Stowe 2 North and South during that evening. (1T). Specifically, there was testimony and/or evidence that Officer Minivich made at least one entry into the Stowe 2 South logbook (a critical piece of evidence in the State's case-in-chief) and/or may have conducted at least one count during the relevant time.

It has long been recognized by our jurisprudence that:

> Generally, 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 (3*d 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. See *State v. Cooper*, 10 N.J. 532, 566 (1952); *State v. Elliott*, 129 N.J.L. 169 (*Sup. Ct.* 1942), aff'd o.b. 130 N.J.L. 174 (*E. & A.* 1943); *State v. Callahan*, 76 N.J.L. 426 (Sup. Ct. 1908)

State v. Clawans, 38 N.J. 162, 170-71 (1962) (emphasis added.) See also, *Gonzalez v. Safe & Sound Sec. Corp.*, 185 N.J. 100, 118 (2005); *New Jersey Model Civil Jury Charge*, 1.18, revised October 2016. In the New Jersey Model Civil Jury Charge, the Court provides the following guidance to the trial court to determine whether an adverse inference charge should be given:

> To guide that assessment, the Court in *Hill*[8] prescribed a four-pronged test: (1) that the uncalled witness is peculiarly within the control or power of only the one party, or that there is a special relationship between the party and the witness or the party has superior knowledge of the identity of the witness or of the testimony the witness might be expected to give; (2) that the witness is available to that party both practically and physically; (3) that the testimony of the uncalled witness will elucidate relevant and critical facts issue; and (4) that such testimony appears to be superior to that already utilized in respect to the fact to be proven. *Id.* at

[8] *State v. Hill,* 199 N.J. 545, 560-61 (2009).

> 561-62. (See also *Torres v. Pabon*, 225 *N.J.* 167 (2016)).

In this matter, the State called Officer McDowell to testify about the August 16, 2019 incident. During his testimony,

> McDowell made reference to Officer Minivich, saying Minivich would only perform counts when Gales or McDowell were on their break. Minivich would then move on to the next post.
>
> During re-cross by Fernandez, McDowell stated that Minivich was the cover guy for all four officers on duty, so he would cover for Gales or McDowell or the other two officers. Minivich did not cover for McDowell that night because McDowell did not take a dinner break that night.
>
> On redirect, McDowell said that Gales took only one break on August 16, 2019, **so Minivich would have only done one count for Gales that night. On re-cross, McDowell stated that if Minivich had come in at the beginning of Gales' forty-minute break, he might have conducted two counts for Gales that evening.**

(2T at page 4)(emphasis added.) Further, Investigator Leitner was not able to testify about any part of the investigation as he constantly reiterated that it was not his investigation. (1T169.15-16; 1T174.24 to 175.1; 1T177.4-5; 1T178.16; 1T178.19-20; 1T186.16; 1T187.22; 1T194.4; 1T218.20).

Accordingly, although Minivich was called to testify in a separate incident, it is clear that pre-requisites of *Hill* have been met for this Court to

draw an adverse inference against the State for the August 16, 2019 incident.[9] First, there was, and continues to be, a special relationship between the State and Minivich as Minivich is still a DOC employee. Second, Minivich was, and continues to be, available to the State both practically and physically. Third, the testimony of Minivich was elucidate relevant and critical facts issue. On this issue there was considerable cross examination of Investigator Leitner regarding the entry in the log bog which was admitted as a "business record." Investigator Leitner repeated that he could not testify as to the particulars of those entries – other than that which he purportedly observed by simply watching the video – because he was not the lead investigator on the matter. (1T169.15-16; 1T177.4-5; 1T178.19-20; 1T187.22; 1T194.4). Finally, Minivich's testimony appears to be superior to that already utilized in respect to the fact to be proven because he would have been able to testify: as to which entries he personally made; the reason for those entries; the policy and procedures which allowed him to make those entries; and any

[9] It should be noted that in opposition to Mr. Gales's initial request for the adverse inference, the State argued "Based on my recollection, Mr. Fernandez raised an objection to Minevich [sic] testifying in the first place. I provided a proffer that I was only interested in questioning Minevich [sic] about the lineup incident. Opposing Counsel cannot have it both ways. If Mr. Fernandez believed there were critical issues with the inmate escape, he should have questioned Minevich. [sic] After all, the State did make him available and was happy to go down that path." (State's January 2, 2022 letter to the Court). To be clear, it was the State that limited Minivich's testimony because it did not want to turn over Minivich's personnel file to be used during cross examination of the August 16, 2019 incident. Therefore, it is disingenuous for the State to now argue "the State did make him available and was happy to go down that path." (*Id.*).

conversations he had with Mr. Gales and others regarding searches and counts. *State v. Hill*, supra. at 561-62 and *Torres*, supra.

Point V

THE ALJ ERRONEOUSLY ADMITTED EXHIBITS THAT CONTAINED HEARSAY AND/OR WERE NOT SELF-AUTHENTICATING WITHOUT REQUIRING THE DEPARTMENT OF CORRECTIONS TO PROVIDE ANY EVIDENTIARY FOUNDATION FOR THOSE EXHIBITS. (OAL DECISION AT PAGE 19; Pa19a)

During multiple times throughout the hearing, the OAL accepted the videos as truth because "the videos spoke for themselves."

As a matter of law, a "document" and/or "video" cannot "speak for itself" unless they are self-authenticating documents. *N.J.R.E.* 902. In this case, none of the documents was proffered as self-authenticating. Neither, quite frankly, were the documents or the videos presented to be evidentiary because they were self-authenticating. (1T18.20-24; 1T23.22-25; 1T39.2-7). Nor was the video accepted as a self-authenticated video. (1T20.22-25; 1T24.5-8). It should be noted that the Court sustained Mr. Gales's objection to at least one document (1T39.11-13), but inexplicably still admitted the document without basis. (1T39.14-25).

A number of the DOC's exhibits were summarily introduced as exhibits. As to the logbooks, on cross-examination, Investigator Leitner admitted that he could not determine what, if anything, Mr. Gales had written in the logbook. (1T162.1-17). Likewise, Investigator Leitner could not testify if Mr. Gales had

not called in a count as recorded on the logbook. (1T169.13-20). More importantly, Investigator Leitner admitted that he could not state with any specificity that the entries that appeared in the logbook were false or even what those entries meant. (1T170.1-22; 1T178.10-16).

Held the Court in *State v. Brown*, 463 N.J. Super. 33, 51 (App. Div. 2020), "[I]t is well-settled that a videotape "qualifies as a writing[]" under *N.J.R.E.* 801(e) and must be "properly authenticated" before being admitted." citing *State v. Wilson*, 135 N.J. 4, 17 (1994). It should also be noted, "[a]uthentication of a videotape is similar to the authentication of a photograph." *Brown*, 463 N.J. Super at 52, citing *State v. Loftin*, 287 N.J. Super. 76, 98 (App. Div. 1996).

In this case, the DOC would mark an exhibit for identification, and without more, would then move it into evidence. The DOC offered no testimony which allow such an exhibit to be duly authenticated and admitted into evidence.

> The Court in *State v. Sweet*, 195 N.J. 357, 370 (2008) held:
>
> The standard for the admissibility of business records has remained constant. In order to qualify under the business record exception to the hearsay rule, the proponent must satisfy three conditions:
>
> > First, the writing must be made in the regular course of business. Second, it must be prepared within a short time of the act, condition or event being described. Finally, the source of the information and the method and circumstances of the preparation of the writing must justify allowing it into evidence.

(citing *State v. Matulewicz*, 101 N.J. 27, 29, 499 A.2d 1363 (1985)).

The Respondent has failed to provide any evidence whatsoever that any of these three elements have been met. The sole witness for the Respondent on this matter was Investigator Leitner.

Investigator Leitner tried to extrapolate his evidence on several occasions. The only two video surveillance tapes that the State introduced was one from the hallway and one from the exterior. There is no video tape surveillance of the common area. However, Investigator Leitner testified that Officer Gales could not have conducted the required counts at 2:00 a.m., 2:30 a.m., 3:00 a.m. and 3:30 a.m. based solely on the review of video surveillance tape – without more. (1T70.15-20)[10].

As to the log books qualifying as business records, Investigator Leitner admitted that he could not determine what, if anything, Mr. Gales had written in the logbook. (1T162.1-17). Likewise, Investigator Leitner could not testify if Mr. Gales had not called in a count as recorded on the logbook. (1T169.13-20). More importantly, Investigator Leitner admitted that he could not state with any specificity that the entries that appeared in the logbook were false or even what those entries meant. (1T178.10-16).

Not a single witness testified with any certainty that Mr. Gales wrote entries into the log book. More importantly, not one person could testify that the handwriting in the log book was that of Mr. Gales. It would have been easy for

[10]It is essential to note that even the State acknowledges that Lt. Leitner could not testify that Mr. Gales "placed the counts in the logbook." (1T74.24-25).

the State to present any witness, including Investigator Leitner, who was present at Mr. Gales's interviews when he signed the *Garrity* warnings, to testify that that witness was familiar with Mr. Gales's handwriting and the handwriting in the log book was consistent with Mr. Gales' own writing. However, the State did not.

Point VI

MR. GALES'S DISCIPLINE WAS OVERLY SEVERE AND NOT CONSISTENT WITH HIS DISCIPLINARY RECORD.[11] (OAL INITIAL DECISION AT PAGES 25-29; Pa25-29a).

Mr. Gales was charged on two PNDAs for incidents on August 16 and 17, 2019. For these, he was terminated from his position at the Department of Corrections.

A. The August 16, 2019 Incident (OAL INITIAL DECISION AT PAGES 25-29; Pa25-29a).

For the incident on August 16, 2019, Mr. Gales was charged with *N.J.A.C.* 4A:2-2.3(a)(1) "incompetency, inefficiency or failure to perform duties," *N.J.A.C.* 4A:2-2.3(a)(7) "neglect of duty," *N.J.A.C.* 4A:2-2.3(a)(12) "other sufficient causes," Human Resources Bulletin ("HRB") HRB 84-17, Section B2 "neglect of duty, loafing, idleness or willful failure to devote

[11]Mr. Gales had a *Loudermill* hearing on October 3, 2019. At that time, SCPO Gales was suspended without pay. Mr. Gales made a Post Hearing Motion for a Stay, pursuant to *N.J.A.C.* 4A:2-1.2(c)(1) through (4). Hearing Officer St. Paul refused to consider Mr. Gales's Post Hearing Motion for a Stay. The merits of the underlying PNDA were not heard. The State presented the testimony of Major Ryan Valentin. It should be noted that St. Paul and Major Valentin were both arrested and charged with official misconduct, conspiracy and tampering with public records or information. (Pa68a-108a).

attention to tasks which could result in danger to persons or property," HRB 84-17, Section B4 "sleeping while on duty (essential)," HRB 84-17, Section C8 "falsification: Intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation, or other proceeding," HRB 84-17, Section C11 "conduct unbecoming of an employee," HRB 84-17, Section D1 "negligence in performing duty resulting in injury to persons or damage to property," HRB 84-17, Section D2 "negligently contributing to an elopement or escape," HRB 84-17, Section D7 "Violation of administrative procedures and/or regulations involving safety and security," and HRB 84-17, Section E1 "violation of a rule, regulation, policy, procedure, order, or administrative decision".

1. *N.J.A.C.* 4A:2-2.3(a)(1)

"In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance." *In the Matter of Kathleen Carr Trenton Psychiatric Hospital Department of Human Services*, 2014 N.J. CSC LEXIS 373, *47, CSC DKT. NO. 2012-1708 OAL DKT. NO. CSV 740-12 (March 13, 2014) citing *Clark v. New Jersey Dep't of Agric.*, 1 N.J.A.R. 315 (1980). See also, *Rivera v. Hudson County Department of Corrections*, 2016 N.J. AGEN LEXIS 869, *38, OAL DKT. NO. CSR 06456-16 (August 29, 2016)("In this type of breach, an employee performs his or her duties, but in a manner that exhibits

insufficient quality of performance, inefficiency in the results produced, or untimeliness of performance, such that his or her performance is sub-standard.")

In this case, no one testified that Mr. Gales did not perform his assigned duties. As previously argued, Investigator Leitner admitted that he could not determine what, if anything, Mr. Gales had written in the log book. (1T162.1-7; 1T162.15-17). Likewise, Investigator Leitner could not testify if Mr. Gales had not called in a count as recorded on the log book. (1T169.13-20). More importantly, Investigator Leitner admitted that he could not state with any specificity that the entries that appeared in the log book were false or even what those entries meant. (1T170.1-13; 1T170.115-22; 1T178.10-16).

Additionally, Officer McDowell testified on behalf of the State. First, Officer McDowell testified that "[he] saw Gales in the television room. They talked and watched some television. Gales was sitting. Sometimes Gales' eyes were open, sometimes they were closed. McDowell could not recall seeing Gales leaving the television room to perform inmate counts or to go to the bathroom. McDowell left the television room to perform his counts." (Pa454a). Second, McDowell testified that "[he] was not aware of Central Command ever telling an officer to get out of the television room." (Pa114a). It was only "[a]fter this issue with Gales, their supervisor told officers to be at their desks and not to hang out in the television room. Gales hanging out in the television room on August 16 was not by itself a department violation."

(*Id.*) Third, McDowell testified that "an assignment officer could do an officer's counts, if necessary." (*Id.*). Finally, McDowell testified that "Gales might have done his inmate counts on August 16, 2019; **McDowell does not know**." (*Id.*, emphasis added).

It bears noting that Officer McDowell testified that "[t]here is a camera in the television room, so one could see if a person was in the television area for hours." (Pa114a). However, the State failed to produce a single video clip from that camera either in discovery or at trial to prove that Mr. Gales spent hours in the television room, failed to do his rounds or had fallen asleep.

Interestingly, Major White testified that "[o]fficers may go into a television room to do tours, but officers are not supposed to sit in the television room." (Pa116a). Major White also testified that "a lack of diligence will not be tolerated." (Pa116a). Not only is this testimony at complete opposite with McDowell's testimony (*i.e.* "[he] was not aware of Central Command ever telling an officer to get out of the television room."), but it demonstrates that the DOC engages in selective enforcement since Mr. Gales is the only one who was disciplined even though McDowell admitted that he and Mr. Gales sat in the television room that evening. (1T187.9-18; 1T181.1-4).

Mr. Gales presented the testimony of Officer Velasco. Officer Velasco testified that, during the third shift, the blotter would instruct the officers not

to call in the counts between 12:00 a.m. and 4:00 a.m. (3T17.12-22; 3T18.3-11). Sometimes, Officer Velasco called in his counts during those hours and no one answered the phone. (3T28.14-17).[12] Additionally, Officer Velasco testified that Mr. Gales's unit neither had an IMP or an Emergency Book. (3T25.2-14). On cross-examination, Officer Velasco testified that even if an officer requested the IMP or the Emergency Book from his supervisor, they "never used to get a response back." (3T29.15-18).

In short, none of the State's witnesses have demonstrated by a preponderance of credible evidence that Mr. Gales demonstrated an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. *In the Matter of Kathleen Carr Trenton Psychiatric Hospital Department of Human Services*, 2014 N.J. CSC LEXIS 373, *47, CSC DKT. NO. 2012-1708 OAL DKT. NO. CSV 740-12 (March 13, 2014) citing *Clark v. New Jersey Dep't of Agric.*, 1 N.J.A.R. 315 (1980).

[12]There is no indication that any blotter was ever disciplined for failing to receive calls between 12:00 a.m. and 4:00 a.m. Clearly, such a dereliction of duties should have given rise to an investigation and/or disciplinary actions if third shift did not operate under a protocol and/or procedure that was sanctioned by the Superior Officers.

2. *N.J.A.C.* 4A:2-2.3(a)(7)

"In 'Neglect of Duty' the emphasis is placed on the negligent performance of one's duty or on the actor's neglect to perform an act required by his job duties." *In the Matter of Marisha Penn, Hudson County Department of Family Services*, 2020 N.J. AGEN LEXIS 300, *54-55, OAL DKT. NO. CSV 13865-18; CSC DKT. NO. 2019-585 (August 19, 2020). "The term 'neglect' means a deviation from the normal standards of conduct." *Rivera v. Hudson County Department of Corrections*, 2016 N.J. AGEN LEXIS 869, *37-338, OAL DKT. NO. CSR 06456-16 (August 29, 2016). See also, *In re Kerlin*, 151 N.J. Super. 179, 186 (App. Div. 1977)

As previously stated, no one testified that Mr. Gales negligently performed his duties. Likewise, no one testified that Mr. Gales "deviated from the normal standards of conduct." To reiterate, McDowell testified that "[he] was not aware of Central Command ever telling an officer to get out of the television room." (Pa114a). It was only "**[a]fter this issue with Gales, their supervisor told officers to be at their desks and not to hang out in the television room.** Gales hanging out in the television room on August 16 was not by itself a department violation." (*Id.*) (emphasis added.)

3. *N.J.A.C.* 4A:2-2.3(a)(12)

Presumably, *N.J.A.C.* 4A:2-2.3(a)(12) ("other sufficient causes"), is the catchall administrative code that encompasses all of the violations not otherwise specifically delineated by other codes. *In the Matter of Gary*

MacDonald, Mercer County Corrections Center, 2014 N.J. AGEN. LEXIS 236, OAL DKT. NO. CSR 9803-13 (May 19, 2014). In this case, this administrative code provision was meant to capture the various alleged violations of the HRB not otherwise mirrored by the various N.J.A.C. provisions.

For example, Mr. Gales was charged with HRB 84-17[13], Section B4 "sleeping while on duty (essential)," HRB 84-17, Section C8 "falsification: Intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation, or other proceeding," HRB 84-17, Section D2 "negligently contributing to an elopement or escape," HRB 84-17, Section D7 "Violation of administrative procedures and/or regulations involving safety and security," and HRB 84-17, Section E1 "violation of a rule, regulation, policy, procedure, order, or administrative decision".

Mr. Gales was charged with sleeping on the job. However, the State did not provide one iota of evidence to support this allegation. In fact, the closest that the State could get to support this allegation is McDowell's testimony that "[t]hey talked and watched some television. Gales was sitting. Sometimes Gales' eyes were open, sometimes they were closed." (Pa114a).

[13] Many of the HRB violations appear to mirror *N.J.A.C.* 4A:2-2.3(a)(1) through (11). Where these mirror, or are duplicative of, the Administrative Codes, Mr. Gales will rely upon the substantive arguments in those sections.

In a similar fashion, Mr. Gales was charged with "negligently contributing to an elopement or escape." What should be noted is that in the discovery the State provided to Mr. Gales, it was well known among the inmate population that the window in Wing 3 was broken and could be opened at any time. Likewise, Officer Velasco testified that he had alerted the staff at Edna Mahan, as early as 2016, that the window was broken and needed repairs. (2T19.15 to 20.24). By 2018, the window had still not been repaired. (*Id.*). Additionally, there were indications from J-Pay – an internal DOC computer system – that Inmate D.S. intended to escape. These were not communicated to Mr. Gales. Further, and most importantly, the DOC never charged, or disciplined, Inmate D.S. with and/or for escape. Therefore, it would be unjust to solely ascribe to Mr. Gales the sum combinations of these elements – each of which contributed to the attempted escape of Inmate D.S.

B. <u>The August 17, 2019 Incident</u>
(OAL INITIAL DECISION AT PAGES 25-29; PA25A-29A)

For the incident of August 17, 2019, Mr. Gales was charged with *N.J.A.C.* 4A:2A-2.3(a)(6) "conduct unbecoming a public employee," *N.J.A.C.* 4A:2A-2.3(a)(12) "other sufficient causes," HRB 84-17, Section C8 "falsification: Intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation, or other proceeding," HRB 84-17, Section C11 "conduct unbecoming of an employee," HRB 84-17, Section C24 "threatening,

intimidating, harassing, coercing or interfering with fellow employees on State [sic] Property" and HRB 84-17, Section E1, "violation of a rule, regulation, policy, procedure, order, or administrative decision.

1. *N.J.A.C.* 4A:2-2.3(a)(6)

Mr. Gales was charged with conduct unbecoming a public employee because he voiced his displeasure after learning of a post regarding the escaped inmate on a closed Facebook page to which a select number of corrections officers belonged. Mr. Gales was upset – and rightfully so – that matters concerning the safety, security, protocol and investigations within Edna Mahan Correctional Facility were being published to an unknown number of persons who may or may not be associated with the Correctional Facility staff and personnel.

Officer Minivich was in lineup on August 19, 2019 with Lt. Nester in Thompson Hall. Officer Minivich testified that Mr. Gales asked to say something during the lineup, and said, "If you have something to say on Facebook, say it to my face" in response to comments made about the prior evening's activities. (Pa114a). Minivich testified that he did not know what had been posted on Facebook. (Pa114a). During cross-examination, Minivich admitted that he never felt threatened by Mr. Gales's words. (Pa114a). Officer Minivich also testified that the only thing Mr. Gales said to Officer Maretti was, "If you say something, say it to my face." (Pa114a).

In a similar fashion, Lt. Nester did not hear any threatening language or threats addressed to Officer Maretti. (Pa114a). Maretti and Mr. Gales were at opposite ends of the line during the lineup. (Pa114a).

Officer Lemonies testified that at the end of the lineup, Mr. Gales stated, "Can I say something? Anyone with something to say on social media can say it to my face. I have the screen shots. I'll f*ck up your family." (Pa116a). Then Mr. Gales got out of line, turned to face Maretti, and told him that they could take it outside. (Pa115a). However, Mr. Gales never got close to Maretti. (Pa116a).

Officer DeAngelo testified that Mr. Gales's comments toward Officer Maretti were in direct response to Maretti's admonition to Mr. Gales to calm down. (Pa116a). However, there was no physical interaction between Messrs. Gales and Maretti. This was echoed by Officer DeBenedetto's testimony. (Pa116a).

Officer Matthew Maretti acknowledged that before Mr. Gales spoke, Lt. Nester had given him affirmative permission to address the lineup. (3T6.14-17).

> Q: Okay. And you testified that then Officer Gales asked the Lieutenant for permission to speak to the group, correct?
>
> A: Correct.
>
> Q: **And that permission was given to him, correct?**

A: Yes.

(3T16.1-7) (emphasis added).

Officer Maretti testified that Mr. Gales asked "if anybody has anything to say, to say it to his face and not post stuff on social media." (3T6.15-17). Maretti admitted that he tried to tell Mr. Gales to "calm down [and] stop." (3T6.20-23; Pa420a; 3T7.10-11). As a direct result of these admonitions, Mr. Gales then addressed Officer Maretti. (3T7.12-19). Instead of de-escalating the situation, Officer Maretti flexed his bravado and challenged Mr. Gales. Officer Maretti testified as follows:

> Q: After you said you didn't have a problem with him, did he say anything else to you?
>
> A: He sat there and said that cause he's a grown ass man **and I told him that so am I**.

(3T8.1-4; 3T8.16-21 (emphasis added.)) During cross-examination, Officer Maretti admitted that Mr. Gales never touched him. (3T16.17-19).

As a matter of law, "[t]he term 'unbecoming conduct' has been broadly defined and identified as conduct that adversely affects the morale or efficiency of the government unit or has the tendency to destroy the public's respect for public employees and destroy the public's confidence in the delivery of government services." *In the Matter of Tara Dramis, Southern State Correctional Facility, Department of Corrections*, 2021 N.J. AGEN

LEXIS 490, *62, CSC DKT. NO. 2020-545, OAL DKT. NO. CSR 13098-19 (December 15, 2021) citing *Karins v. City of Atlantic City*, 152 N.J. 532, 554 (1998); *In re Emmons*, 63 N.J. Super. 136, 140 (App. Div. 1960). Stated another way, "[s]uch 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'." *Jones Richardson v. City of East Orange, Department of Health and Human Services*, 2015 N.J. AGEN LEXIS 749, *12, OAL DKT. NO. CSV 00937-15; AGENCY DKT. NO. 2015-1706 (December 22, 2015) quoting *Hartmann v. Police Dep't of Ridgewood*, 258 N.J. Super. 32, 40 (App. Div. 1992) and *Asbury Park v. Department of Civil Services*, 17 N.J. 419, 429 (1955).

"'[T]he implicit standard of good behavior' expected of public employees is . . . not defined." *In the Matter of Eric Lange, Edna Mahan Correctional Facility*, 2021 N.J. AGEN LEXIS 414, *38, OAL DKT. NO. CSR 03703-21; CSC DKT. NO. 2021-1426 (November 22, 2021). "The determination of what constitutes conduct unbecoming a public employee is primarily a question of law." *Karins v. City of Atlantic City*, 152 N.J. at 553 citing *Jones v. City of Pittsburgh*, 505 Pa. 25, 476 A.2d 895, 898 (1984).

In this case, at least two witnesses testified that Mr. Gales asked for and subsequently obtained Lt. Nester's permission to address the lineup.

(3T6.14-17; 3T16.1-7; Pa458a). First, Mr. Gales's address to the lineup had been previously approved by a Superior Officer. Second, Mr. Gales's comments were on point about a topic that had been discussed during the lineup. Mr. Gales's comments were directly related to a relevant topic of concern.

As such, it can be properly argued that Mr. Gales's comments did not constitute conduct unbecoming of any public employee. Mr. Gales felt upset that someone had posted about DOC business, including an investigation which may have involved him, on a Facebook page to unknown people who may or may not be associated with the DOC staff and personnel may have access to. With the appropriate permission from his superior, he expressed his displeasure. Accordingly, this Court cannot sanction the DOC's actions, namely, filing an *ex-post facto* recission of that approval and filing of subsequent charges against Mr. Gales for an approved action.

It should be noted that Officer Marreti's actions, namely challenging Mr. Gales, were not attempts at de-escalating a situation. Instead, such a demonstration of bravado could fairly be interpreted as conduct unbecoming a public employee since Officer Maretti appeared to be inviting confrontation. As previously discussed, Mr. Gales was the only person charged in this incident. It would certainly be inequitable for the DOC to

only charge Mr. Gales when Officer Marreti escalated an already delicate situation.[14]

2. *N.J.A.C.* 4A:2-2.3(a)(12)[15]

Presumably, *N.J.A.C.* 4A:2-2.3(a)(12) ("other sufficient causes"), is the catchall administrative code that encompasses all of the violations not otherwise specifically delineated by other codes. *In the Matter of Gary MacDonald, Mercer County Corrections Center*, 2014 N.J. AGEN. LEXIS 236, OAL DKT. NO. CSR 9803-13 (May 19, 2014). In this case, this administrative code was meant to capture the various alleged violations of the HRB not otherwise mirrored by the various N.J.A.C. provisions. Mr. Gales was charged with HRB 84-17, Section C8 "falsification: Intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation, or other proceeding," HRB 84-17, Section C11 "conduct unbecoming of an employee," HRB 84-17, Section C24 "threatening, intimidating, harassing, coercing or interfering with fellow employees on State [sic] Property" and HRB 84-17, Section E1, "violation of a rule, regulation, policy, procedure, order, or administrative decision.

[14]It bears noting that the DOC did not provide any testimony or any reports that it conducted any sort of investigation regarding the Facebook post on a selected webpage as such a posting would certainly be in violation of a number of HRB's.
[15]Many of the HRB violations appear to mirror *N.J.A.C.* 4A:2-2.3(a)(1) through (11). Where these mirror, or are duplicative of, the Administrative Codes, Mr. Gales will rely upon the substantive arguments in those sections.

Here, Investigator Leitner, who had already interrogated Mr. Gales once, interrogated him again with the end goal of having Mr. Gales confess to alleged inappropriate behavior. Investigator Leitner admitted that he accepted the other officers' denial of the posting at face value. (1T206.14-17; 1T207.17-20). However, Investigator Leitner spent 10 to 15 minutes accusing Mr. Gales of lying and told him that he had evidence contrary to Mr. Gales' statement. Investigator Leitner never presented that contrary evidence during this administrative hearing. Based on the evidence that the State presented during this hearing, it is clear that Investigator Leitner did not have any information that Mr. Gales posted anything to the website to contribute to its post. Also, based on the evidence adduced at this hearing, there is no indication that Mr. Gales lied during his interview with SID.

The State has not provided a single scintilla of evidence that Mr. Gales "falsified, intentionally misstated any material fact in connection with work, employment application, attendance, or in any record, report, investigation, or other proceeding" as it relates to these allegations. Specifically, Mr. Gales does not have social media. Mr. Gales informed Investigator Leitner that he did not have social media. The State has failed to demonstrate that Mr. Gales has, or ever had, social media even though the State has broad subpoena power and this case was presented to this Court more than 18 months after its inception. Therefore, respectfully, this Court should not find that Mr. Gales violated any of the provisions of HRB 84-17, Section C8.

The State has also not proven that Mr. Gales violated HRB 84-17, Section C24. Harassment is defined by *N.J.S.A.* 2C:33-4. The New Jersey Model Criminal Charge on *N.J.S.A.* 2C:33-4 (revised January 9, 2012) provides:

> A person commits an . . . offense if, with purpose to harass another, he:
>
> a. Makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm;
>
> b. Subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or
>
> c. Engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.[16]

In this case, there was no indication that Mr. Gales "purpose" was to "harass another." *N.J.S.A.* 2C:33-4. Similarly, the State has not proven, by a preponderance of the competent evidence, that Mr. Gales had committed any of the predicate acts required by the statute.

On the issue of threatening, *N.J.S.A.* 2C:12-3a, "A person is guilty of a crime if he threatens to commit any crime of violence with the purpose to . .

[16] *See State v. B.H.*, 290 N.J. Super. 588, 597 (App. Div. 1996), *rev'd in part and aff'd in part*, 149 N.J. 564 (1997) (The subsections of the statute "address categories of conduct which can be broadly described as communications, physical contact, and course of conduct.")

. terrorize another or in reckless disregard of the risk of causing such terror." (New Jersey Model Criminal Charge, Terroristic Threats, revised September 12, 2016). "The words or actions of the defendant must be of such a nature as to convey menace or fear of a crime of violence to the ordinary person. It is not a violation of this statute if the threat expresses fleeting anger or was made merely to alarm."[17] (*Id.*) All competent evidence, including witness testimony, demonstrates that Mr. Gales was angry at a Facebook posting that was allegedly made outside of the correctional facility. In fact, two of the witnesses, Officer Minivich and Lt. Nester, completely dispel the notion that Mr. Gales issued threats that evening. During cross-examination, Officer Minivich admitted that he never felt threatened by Mr. Gales's words. (Pa115a). Similarly, Lt. Nester did not hear any threatening language or threats addressed to Maretti. (Pa115a).

In order for the State to prove that Mr. Gales "coerced" any person, the State must prove that Mr. Gales had "a purpose unlawfully to restrict another's freedom of action to engage or refrain from engaging in conduct," by threatening a specific action. *N.J.S.A.* 2C:13-5a(1) through (7). Again, the State had neither prove the requisite *mens rea* necessary nor any of the predicate acts.

[17]See Final Report of the New Jersey Criminal Law Revision Commission, Vol. II: Commentary (October 1971).

C. Disparate Treatment

(ISSUE NOT RAISED BELOW)

In the Matter of Michael Dalrymple, Investigator, Secured Facilities, Edna Mahan Correctional Facility, Department of Corrections, CSC Docket No. 2022-1829; OAL Docket No. CSR 01471-22 (November 2, 2022), Investigator Dalrymple was charged with "[t]he alleged misconduct by the appointing authority in this case is that the petitioner did not follow proper interviewing techniques and made an intentional misstatement of a material fact (falsification) in connection with the preparation of an SID report relating to an inmate trying to smuggle a piece of chicken out of the cafeteria." In that case,

> appointing authority contends, *inter alia,* that it has established that the appellant's inaccurate statements were indeed, intentionally false. In the alternative, it argues that even if not intentional, providing such false information was conduct unbecoming a public employee. It also argues that the charges relating to the photos were timely as that information was only uncovered during the investigation into the other infractions. Finally, it argues that should the Commission uphold the charges, the penalty of removal is appropriate based on the egregious nature of the misconduct.

The Civil Service Commission found that Dalrymple "misrepresented at least one statement. . . and conduct unbecoming a public employee." The Civil Service Commission considered Dalrymple's prior disciplinary record and reversed Dalrymple's removal and instead imposed a 30 day suspension. See *Carter v. South Woods State Prison*, OAL Dkt No. CSCV6415-00, AGEN. REF. NO. 2006-3914 (Decided September 11, 2003)(In its discussion as to whether to

terminate Officer Carter for purposely "misrepresented and falsified his employment application," the ALJ reinstated Officer Carter to his post noting that another officer, identified as "Officer Bennett" was also not removed from his position even though he was accused of "falsifying his hours and stealing money from the prison.").

Mr. Gales's disciplinary record only consists of a written warning and counseling for one incident.

It is disparate and patently unjust that Mr. Gales should be so severely disciplined while others who are similarly situated have had absolutely no repercussions – disciplinary or otherwise. Mr. Gales performed his assigned duties on the evening of August 16 through August 17, 2019 according to the practices and protocols that existed at that time at the Edna Mahan Correctional Facility. These were the same practices and protocols followed by officers during the third shift.

Despite each following these protocols, only Mr. Gales was investigated and, ultimately, punished. It is clear from the evidence presented that a number of persons failed to perform their duties that evening – and even well before. The window was broken which was known to all. D.S. threatened to escape which was not communicated to Mr. Gales or anyone else in the evening shift. Grey saw D.S. on the outside and said nothing. The video showed that McDowell had also abandoned his post. However, as a result of DOC looking for a scapegoat for D.S.'s actions, Mr. Gales received disparate punishment.

CONCLUSION

Mr. Gales performed his assigned duties on the evening of August 16 through August 17, 2019 according to the practices and protocols that existed at that time in the Edna Mahan Correctional Facility. In fact, on August 16, 2019, Mr. Gales performed them to the same standard as Officers McDowell and Minivich – who were not disciplined. The State failed to prove, even by a preponderance of the competent evidence, that Mr. Gales failed to perform his duties or that he deviated from the protocols established by the DOC staff during the night shift.

The State also failed to prove, by a preponderance of the competent evidence, that Mr. Gales's address to the other officers, which had been approved by his Superior Officer, constituted a threat of any kind to any person. In fact, all of the testimony adduced on this point indicated that Mr. Gales was upset that internal investigations were being published in external social medial websites. It was not until another officer exercised his bravado and escalated the situation that Mr. Gales reacted. Again, that other officer was not disciplined for that escalation.

For these reasons, the decisions of the Office of the Administrative Law and the Civil Service Commission should be reversed and Mr. Gales should be reinstated to his position as Senior Corrections Officer at the Edna Mahan Correctional Facility.

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Dated: October 13, 2023

IN THE MATTER OF ANDREW GALES,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
Appellant,	:	DOCKET NO. A-1131-22
v.	:	Civil Action
EDNA MAHAN CORRECTIONAL FACILITY, DEPARTMENT OF CORRECTONS, Respondent.	:	ON APPEAL FROM A FINAL DECISION OF THE COMMISSIONER OF THE CIVIL SERVICE COMMISSION
	:	January 17, 2024

BRIEF ON BEHALF OF RESPONDENT DEPARTMENT OF CORRECTIONS, EDNA MAHAN CORRECTIONAL FACILITY

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PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Andrew Gales was a Senior Correctional Police Officer ("SCPO") employed by the New Jersey Department of Corrections ("Department"), and, on August 16, 2019 and August 17, 2019, worked as the Housing Unit Officer ("HUO") for the Department's Edna Mahan Correctional Facility ("Edna Mahan"). (1T34:10-14).[2]

Gales worked the third shift, between 10:00 p.m. until 6:00 a.m., assigned to Stowe Two North, which is part of the Stowe Two Housing Unit. (1T34:23-35:1; 1T10:14-11:8). During Gales' shift that night, one of the inmates he was assigned to monitor attempted to escape. (1T10:3-9; 1T12:4-12). The Department's Special Investigation Division (SID) investigated, and during his SID interview, Gales claimed that he had performed all his inmate counts. (Pa048a). The Department also determined, after reviewing surveillance footage, that Gales failed to perform his required inmate counts at 2:00 a.m., 2:30 a.m., 3:00 a.m., 3:30 a.m., 4:00 a.m.

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[1] Because they are closely related, these sections are combined for efficiency and the court's convenience.

[2] "Pa" refers to Gales' Appendix; "Ab" refers to Gales' Brief; "Ra" refers to Respondent's Appendix; "1T" refers to the transcript of the February 9, 2021 OAL hearing. The recording for the February 10, 2021 hearing date is missing. The parties agreed to a reconstructed record by Judge Rabin, which has been accepted by the Appellate Division as part of the record. This reconstruction will be referred to as part of Gales' Appendix. Accordingly, "3T" refers to the transcript of the February 11, 2021 OAL hearing, and "4T" refers to the transcript of the March 15, 2021 hearing.

and 4:30 a.m. (Pa039a). SID then concluded that Gales falsified his logbook entries for that shift, since they indicated that he had performed those counts. Ibid.

The next day, August 17, 2019, during a meeting conducted by Lieutenant Ricky Nester, officers discussed a memorandum about checking windows and making sure there is a physical body in the bed when doing inmate counts. (4T6:4-9). At the end of the lineup, Gales asked if he could speak to the group and proceeded to threaten his co-workers. (4T6:10-17). Gales told everyone that "there's plenty of green grass outside the gate" and "things could be handled out there." (4T6:10-174T6:24-7:4). Ibid. Other officers attempted to calm Gales down but those attempts failed. (4T7:12-19).

A. The Department's Disciplinary Action

Because of the above conduct, the Department issued Gales two Preliminary Notices of Disciplinary Action ("PNDA"). First, on October 1, 2019, the Department served Gales with the PNDA for his failure to conduct inmate counts during his shift on August 16, 2019. (Pa109a, Pa111a). Gales was charged with incompetency, inefficiency, or failure to perform duties, pursuant to N.J.A.C. 4A:2-2.3(a)(1), neglect of duty, pursuant to N.J.A.C. 4A:2-2.3(a)(7), other sufficient cause, pursuant to N.J.A.C. 4A:2-2.3(a)(12), and numerous other violations of Department policy. Ibid. All charges were sustained and a Final Notice of

Disciplinary Action ("FNDA") issued on October 25, 2019; Gales was removed from his position effective October 17, 2019. (Pa111a).

On October 16, 2019, the Department served Gales with a second PNDA related to the lineup incident on August 17, 2019. (Pa117a). Gales was charged with conduct unbecoming a public employee, pursuant to N.JA.C. 4A:2-2.3(a)(6), other sufficient cause, pursuant N.J.A.C. 4A:2-2.3(a)(12), and various other violations of Departmental policy. A FNDA was issued on January 14, 2020, sustaining all charges against Gales. (Pa119a).

Gales appealed his removal to the Civil Service Commission ("Commission") and the matter was transmitted to the Office of Administrative Law ("OAL") as a contested case.

B. Contested Hearing

Administrative Law Judge Jeffrey N. Rabin ("ALJ") presided over hearings on February 9, February 10, February 11, and March 15, 2021. The Department presented nine witnesses on its behalf: Matthew Leitner, Irving Gray, Thomas McDowell, Igor Minivich, Ricky Nester, Roxanne Lemonies, Bruno DeAngelo, Cody DeBenedetto and Michael White. Gales did not testify on his own behalf. Instead, he presented former SCPO Carlos Velasco and SCPO Matthew Moretti. (Pa012a).

i. August 16, 2019 Incident

Major Michael White had been employed by the Department for twenty-three years, including, at the time of his testimony, as a Regional Major for four years. (Pa124a). White was previously a custody officer and institutional major, where he handled policies and disciplines for the Department. Ibid. White explained that part of an HUO's job is to perform inmate counts at designated times; during third shift, they should occur at 10:00 p.m., 11:00 p.m., 12:00 a.m., and then every half hour until the end of the shift. Ibid. After the count, HUOs should immediately report to the Center Control and enter the information into the logbook. Ibid. During the count, HUOs are expected to see "flesh and movement" in the bed, as required by Departmental policy. (Pa124a-125a).

SID Investigator Leitner first identified the logbook for Stowe Two North during the third shift on August 16, 2019. (1T47:2-5). Leitner explained that according to the logbook, Gales performed inmate counts at 2:00a.m., 2:30a.m., 3:00a.m., 3:30a.m., and 4:00a.m. (1T54:9-1T55:11; Ra1). Leitner then reviewed the surveillance footage and explained that this was not possible. (1T72:13-16). He noted that in Stowe Two, there is a food preparation room that has only two points of entry and both are within view of a surveillance camera. (1T65:25-66:9). Surveillance video showed shared common space between the Stowe Two Housing Units, Stowe Two North and South. (Pa004a). Stowe Two North's wings are to

the right of the officer's desk. Ibid. The food preparation room is located to the left of the officer's desk and the wings in Stowe Two North. (1T62:18-23).

The surveillance video for August 16 to 17, 2019 was introduced in evidence and revealed that during Gales' shift, he took a meal break in the food preparation room, and then returned to his station at the Stowe Two North desk at 1:31 a.m. Ibid. He is seen picking up the telephone on the officer's desk and then returning to the food preparation room. (1T65:8-13). Between 1:26 a.m. and 4:30 a.m., Gales leaves the food preparation room only at 2:15 a.m., 3:41 a.m., and 4:05 a.m. and each time, returned shortly after. (1T66:18-1T67:23; 1T68:11-1T69:1; 1T71:14-20). Only at 4:05 a.m. does Gales even walk in the direction of any Stowe Two North inmate housing wings. (1T71:14-20). Based on the layout of Stowe Two, Leitner explained that it was not possible to leave the food preparation room and perform inmate counts without being seen by surveillance cameras. (1T72:13-16). In fact, at no time between 2:00a.m. and 4:05a.m. did Gales walk into the wings. (1T71:14-20).

Officer Thomas McDowell worked the third shift in Stowe Two South on August 16, 2019. (Pa122a). McDowell was responsible for inmate counts in that unit during his shift. Ibid. McDowell testified that during third shift inmate counts, officers needed to ensure a human body was alive in each bed by kicking the bed, as taught at the police academy and Edna Mahan. Ibid. On the night in question,

McDowell spoke to Gales in the food preparation room for a little while and saw Gales watching television and napping during the shift. (Pa0122a-Pa123a).

Around 5:15 a.m., McDowell was informed by an inmate that someone was on top of the fire escape in Stowe Two. (Pa123a). McDowell asked Gales to look around. Ibid. Gales identified Inmate D.S., who was housed in a housing wing under his purview. Ibid. McDowell went to look at D.S.'s bed and saw that it was made and vacant. Ibid.

Velasco was not at Edna Mahan the night of the incident. (Pa047a). He testified about the inmate counting process, but the ALJ found that he contradicted himself. Ibid.

ii. August 17, 2019 Incident

Officer Igor Minivich worked as a shift officer at Edna Mahan on August 17, 2019 during the third shift. (Pa125a). At 10:00 p.m., Minivich participated in a lineup with other officers run by Lieutenant Ricky Nester. (Pa126a). Nester told the officers to make sure they were performing their inmate counts. Ibid. Gales requested to speak at the end of the lineup and said, "[i]f you have something to say on Facebook, say it to my face" and specifically mentioned another corrections officer, Moretti. Ibid. During the lineup, Gales also said "I am a different motherfucker . . . I'll fuck up your wife and kids." Ibid. Minivich described Gales as "fuming" when making these comments. Ibid. Although Lieutenant Nester did

not recall the incident, SCPOs Roxanne Lemonies, Bruce DeAngelo, and Cody DeBenedetto confirmed that Gales made the above statements and physically threatened Moretti. (See Pa126a-127a). Gales' witness, Moretti also confirmed his interactions with Gales. Ibid.

C. Decision

In his decision, issued on October 5, 2022 ("Initial Decision"), the ALJ found that Gray, McDowell, White, Minivich, Lemonies, and DeBendetto appeared credible based on their mannerisms, tone, and the substantive information they provided. (Pa011a-Pa012a). The ALJ also found Moretti's testimony credible, noting he testified in a calm manner without hesitation. (Pa011a). On the other hand, the ALJ found Nester, DeAngelo, and Velasco to not be credible. (Pa011a-Pa012a). Based on the credible testimony and evidence presented, the ALJ ultimately substantiated all charges issued against Gales. (Pa017a-Pa025a).

i. August 16, 2019 Escape

The ALJ determined that Gales failed to perform required inmate counts on August 16, 2019. (Pa018a). Based on the ALJ's own examination of the video evidence, the ALJ explained that Gales essentially took a three-hour meal break during his shift. (Pa021a). Although Gales signed out for his meal break from 12:42 a.m. to 1:26 a.m., the surveillance footage showed that Gales was "almost continually" in the break room from between 1:24 a.m. and 4:18 a.m. (Pa018a).

Further, the ALJ noted that when Gales did leave the break room, it was not at the designated times to conduct an inmate count. Ibid. Because the inmate exited Wing Six at 3:16 a.m., the ALJ reasoned that, if Gales had properly conducted his inmate counts, he would have noticed her made, unoccupied bed during both his 3:30 a.m. and 4:00 a.m. counts. (Pa018a-Pa019a). But he did not, despite being properly trained. Ibid. Instead, he slept, spoke with other officers, and watched television in the food preparation room. Ibid. Gales offered no evidence to contradict this testimony. Ibid. As such, the ALJ found that Gales did not perform his inmate counts at 2:30 a.m., 3:00 a.m., 3:30 a.m. and 4:00 a.m. Ibid.

Based on the above, the ALJ also determined that Gales falsified logbook entries and lied to SID Investigators by indicating that he had indeed performed his inmate counts. (Pa022a). The ALJ reiterated that Gales could not have performed his counts at 2:30 a.m., 3:00 a.m., 3:30 a.m. and 4:00 a.m., as Gales noted in the logbook, because the surveillance footage does not show Gales leaving the food preparation room at those times. Ibid. Moreover, the ALJ explained that D.S. began her escape at 3:16 a.m. and remained away until 5:15 a.m. so she was not physically in her bed at 3:30 a.m., 4:00 a.m., 4:30 a.m. and 5:00 a.m. Ibid. Thus, at a minimum, Gales' inmate counts incorrectly noted all inmates were in their cells. Ibid.

The ALJ found Gales in clear violation of IMP Custody Directives #1 and #2, which both require HUOs to conduct frequent, irregularly timed tours of all areas under their control, as well as inmate counts at set times. (Pa023a; Ra2-62). The ALJ also noted that the Department's Rules and Regulations require officers to devote their full attention to their assignments and explain that lack of diligence will not be tolerated. (Ibid.; Ra67-68). False or misleading statements are also prohibited. Ibid. For the above stated reasons, the ALJ sustained all charges against Gales.

ii. August 17, 2019 Incident

With respect to Gales' conduct on August 17, 2019, the ALJ found Gales made threatening comments at the end of an officer's lineup on August 17, 2019. (Pa024a). Based on credible testimony, the ALJ determined Gales stated "I'll fuck up your wife and kids," to Moretti. (Pa025a). Then, after the lineup concluded, Gales continued threating Moretti, using language reserved for individuals "prepared to engage in a physical fight." Ibid. As such, the ALJ found Gales' language met the threshold of threatening, intimidating, harassing, coercing, or interfering with fellow State employees on State property because Gales continuously threatened his coworkers and indicated he was prepared to physically fight outside of the workplace, in violation of the rules of the Department. Ibid.

For these reasons, the ALJ sustained all charges against Gales. Ibid.

iii. Evidentiary Issues

The ALJ also addressed Gales' argument that much of the Department's evidence was hearsay and inadmissible. (Pa019a). As the ALJ noted, hearsay is admissible in the OAL so long as it is supported by a residuum of supporting evidence. Ibid.; N.J.A.C. 1:1-15.5(a). As such, the ALJ found that the surveillance videos corroborated any potential hearsay statements regarding Gales failing to conduct his inmate counts. (Pa019a). The ALJ then determined that the logbook constituted a business record, which is an exception to hearsay. N.J.R.E. 803(c)(6). Gales also made the logbook entries, rendering them a party-opponent statement and not excluded by the hearsay rule. N.J.R.E. 803(b)(1). Last, the ALJ concluded that statements made by Gales during his SID interview are also not hearsay. Ibid.

The ALJ also considered Gales' claim that he should take an adverse inference against the Department for failing to question Minivich about the incident on August 16, 2019. Ibid. Gales claimed that McDowell's testimony confirmed Minivich conducted at least one inmate count for Gales during his shift. Ibid. Gales contended that, in these circumstances, an adverse inference may be drawn from failure the State's failure to question Minivich about that shift. Ibid. The ALJ, however, determined McDowell's testimony shows that Minivich worked during this shift but only performed inmate counts that night when the responsible officer was on a break. Ibid. Therefore, at most, Minivich may have performed one or two

of Gales' counts that shift. Ibid. Additionally, the ALJ noted the issue in this matter is whether Gales conducted his inmate counts that he wrote in his logbook for 2:00 a.m., 2:30 a.m., 3:00 a.m., 3:30 a.m., 4:00 a.m., and 4:30 a.m., making Gales' argument ultimately irrelevant. Ibid.

iv. Penalty

Given the severity of the Gales' misconduct, the ALJ determined that progressive discipline was inappropriate here because "[t]he public good would be affected by returning an officer to a position where he previously failed to perform his official duties then falsified records to cover up his violations." (Pa027a). Further, the ALJ explained that Gales allowed an attempted escape under his watch and therefore endangered his co-workers, other inmates, and the public at-large. Ibid. As such, the ALJ upheld the penalty of removal. (Pa029a).

v. Final Decision

On November 2, 2022, the Civil Service Commission ("Commission") issued a Final Administrative Action upholding the ALJ's Initial Decision, after reviewing Gales' exceptions, the Department's reply to exceptions, and the record. (Pa033a). The Commission determined that there was no reason to comment extensively on Gales' exceptions because the filings were not persuasive enough for the Commission to find the ALJ's Initial Decision arbitrary, capricious, or unreasonable. Ibid. The Commission cited to the Initial Decision where it stated

that Gales "allowed an escape attempt to take place on his watch. Although thwarted, an escaped convict would pose a security threat to other inmates, other prison officials, and the public at large. Prison safety was of paramount concern, and the failure to follow official protocols was an egregious offense." (Pa034a). The Commission also explained that Gales' conduct "presented the public with the image of an undependable officer." (Pa035a). This appeal followed.

ARGUMENTS

POINT I

THE COMMISSION'S FINAL DECISION WAS SUPPORTED BY SUSBTANTIAL CREDIBLE EVIDENCE AND WAS NOT ARBITRARY, CAPRICIOUS, OR UNREASONABLE.

A. The ALJ's Decision is Supported By The Credible Evidence

The Initial Decision should be affirmed because it is supported by substantial credible evidence. This court has a limited role when reviewing administrative determinations. In re Stallworth, 208 N.J. 182, 194 (2011). That is, an appellate court will not reverse the decision of an administrative agency unless that decision is arbitrary, capricious, or unreasonable, or is not supported by substantial credible evidence in the record as a whole. In re Eastwick Coll. LPN-to-RN Bridge Program, 225 N.J. 533, 541 (2016) (quoting Univ. Cottage Club of Princeton N.J. Corp. v. N.J. Dept. of Env't Prot., 191 N.J. 38, 48 (2007)); see also Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980). If sufficient credible evidence exists in the

record to support an agency's conclusions, the court must uphold these findings even if the court might have reached another result. In re Carter, 191 N.J. 474, 483 (2007).

Moreover, administrative agency action is accorded a presumption of reasonableness, particularly when an agency is addressing specialized matters within its area of expertise. Newark v. Natural Resource Council, 82 N.J. 530, 539-41, cert. denied, 449 U.S. 983 (1980); In re Vey, 272 N.J. Super. 199, 205 (App. Div. 1993), aff'd, 135 N.J. 306 (1994). This is particularly true when it comes to matters involving employee discipline at correctional facilities. Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06 (App. Div. 1993).

Based upon these principles, the Commission's decision to adopt the Initial Decision should be affirmed because both are well-reasoned and sufficiently supported by credible evidence in the record. In his Initial Decision, the ALJ found that Gales left the food preparation room two times between 1:24 a.m. and 4:18 a.m., despite the fact that he was required to perform inmate counts at 2:30 a.m., 3:00 a.m., 3:30 a.m. and 4:00 a.m. (Pa018a). D.S., who was under Gales' watch for that shift, exited the wing at 3:16 a.m. Ibid. Thus, Inmate D.S. was not in her bed at 3:30 a.m., 4:00 a.m. or anytime until she was discovered on the fire escape. Ibid.

Also, Edna Mahan's surveillance camera footage revealed that Gales failed to perform his inmate counts at the times in question. (1T72:13-16). Officers also saw Gales in the food preparation room on the night in question, watching television and napping during the times he was required to perform his counts. (Pa123a). Yet, Gales wrote in the logbook that he performed his counts at 2:00 a.m., 2:30 a.m., 3:00 a.m., 3:30 a.m., 4:00 a.m., and 4:30 a.m. and told SID during his interview the same. (Ra1; Pa022a). All of these facts are uncontroverted.

Various witnesses testified that the next day, during a lineup, Gales made numerous threatening comments. (Pa011a). The ALJ found them to be credible based on their demeanor and tone on the stand. (Pa011a-Pa012a). Each of those individuals testified that Gales threatened Moretti and Moretti's family with physical violence. (Pa126a-127a). These statements are only contradicted by Nester, who the ALJ rightfully deemed not credible, as Nester clearly had a personal relationship with Gales and his statements did not match any other witness. (Pa126a-127a; Pa011a).

Gales cannot point to any evidence that refutes the ALJ's findings because such evidence does not exist. The uncontroverted evidence shows that the Commission's decision to adopt the ALJ's Initial Decision was not arbitrary, capricious, nor unreasonable and therefore, it should be affirmed.

B. The ALJ's Decision Was Supported By Legally Competent Evidence.

In the OAL, hearsay evidence is admissible subject to the judge's discretion, and accorded whatever weight the judge deems appropriate. See N.J.A.C. 1:1-15.5. A court must ensure that there is "a residuum of legal and competent evidence in the record to support it." Weston v. State, 60 N.J. 36, 51 (1972). "[A] fact finding or a legal determination cannot be based on hearsay alone," but "[h]earsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony." Ibid.

Gales contends that the State failed to meet the residuum rule, arguing that it failed to produce "legally competent evidence about the August 16, 2019 incident." (Ab18-19). But he is incorrect, because the ALJ reasonably relied on various pieces of evidence, including the surveillance video, the logbook and Gales' statement, which are not hearsay.

i. Authenticity of Surveillance Footage

The surveillance video covers the period of Gales' shift on August 16-17, 2019. It shows that Gales left the food preparation room at 2:15 a.m., 3:41 a.m., and 4:05 a.m. and only once walked toward the wing he was responsible for monitoring. (1T66:18-1T67:23; 1T68:11-1T69:1; 1T71:14-20). In his brief, Gales appears to challenge the authenticity of the surveillance footage. (Ab24). But Gales' challenge is barred. N.J.A.C. 1:1-15.6 requires that if authenticity is not raised at least ten (10) days prior to the hearing, the writing, or in this case video, is

presumed to be authentic. Moreover, Gales consented to the video's admission into evidence and requested that the ALJ consider the surveillance footage a joint exhibit. (3T34:3-10). Additionally, after the ALJ admitted the surveillance footage into evidence, opposing counsel explicitly stated "I'm not objecting to the video." (1T62:3-5). As such, Gales waived this objection during the hearing and it should not be considered on appeal. See, State v. Robinson, 200 N.J. 1, 19 (2009) ("Appellate review is not limitless. The jurisdiction of appellate courts rightly is bounded by the proofs and objections critically explored on the record before the trial court by the parties themselves.") .

ii. Logbook Entries

Gales also contends that his logbook entries constituted hearsay and should have been excluded. (See Ab17). But as the ALJ explained, the entries were admissible as a business record under N.J.R.E. 803(c)(6). (Pa019a). Under N.J.R.E. 803(c)(6), a statement may be properly admitted when made at or near the time of observation by a person in the regular course of business and it was regular practice of that business to make such a statement. N.J.R.E. 803(c)(6)

Here, the ALJ properly admitted the logbook entries into evidence under N.J.R.E. 803(c)(6) because the testimony of Leitner, a Senior Investigator assigned to Edna Mahan, established the logbook entries as business records. (1T8:14-23). Leitner explained that housing officers perform security tours and inmate counts in

the unit to which they are assigned. (1T36:4-8). After performing these counts, housing officers are required to write the inmate count in the logbook and call Center Control. (1T36:15-18). Leitner testified that the Department maintains logbooks for accountability and documenting what occurs during a shift. (1T36:19-22).

Because business records are an exception to the hearsay rule, the logbook entries were properly admitted in evidence to show that Gales falsely indicated that he had performed inmate checks.

iii. Gales' Statements During SID Interview

Gales next argues that his statements to the Department during his SID interview were also hearsay and could not form a necessary residuum to support the decision. But the ALJ rightly concluded that these statements are not hearsay. (Pa019a). Under N.J.R.E. 803(b)(1), statements by party-opponents may fall into a hearsay exception if it is the party-opponent's own statement, made in an individual capacity. Clearly, the statements made during Gales' SID interview fit this hearsay exception. Gales made each of these statements himself in an individual capacity during his interview. Accordingly, the ALJ properly considered Gales' statements during his SID interview when rendering the decision in this matter.

iv. Adverse Inference

Finally, there is no merit to Gales' argument that the ALJ should have drawn an adverse inference against the Department because, although the Department called Minivich to testify, it did not question Minivich about the events of August 16, 2019. (Ab20). Gales provides no citations to the record for this contention nor is it clear what specific inference Gales is seeking.

Nonetheless, the ALJ's properly concluded that an adverse inference was inappropriate in this matter. (Pa020a). McDowell's testimony showed that Minivich only conducted inmate counts only when the responsible officer, including Gales, was on break. Ibid.

Gales also failed to satisfy the prongs required for an adverse inference charge. When evaluating if an adverse inference charge should be given, a court must demonstrate that it has taken into consideration all relevant circumstances by placing, on the record, findings on each of the following:

> (1) that the uncalled witness is peculiarly within the control or power of only the one party, or that there is a special relationship between the party and the witness or the party has superior knowledge of the identity of the witness or of the testimony the witness might be expected to give; (2) that the witness is available to that party both practically and physically; (3) that the testimony of the uncalled witness will elucidate relevant and critical facts in issue[;] and (4) that such testimony appears to be superior to that already utilized in respect to the fact to be proven.
> State v. Hill, 199 N.J. 545, 561-62 (2009).

In this matter, Minivich testified. The Department called him to the stand and so Minivich is not an uncalled witness. If Gales had any questions regarding Minivich's involvement on August 16, 2019, his counsel had the opportunity to ask during his cross-examination.

In addition, Minivich's testimony would not be superior to the remaining testimony presented by the Department. As the ALJ noted, the issue here is not whether Minivich might have performed counts during Gales' break; rather it is whether Gales "actually conducted the counts he wrote in his logbook for 2:00 a.m., 2:30 a.m., 3:00 a.m., 3:30 a.m., 4:00 a.m., and 4:30 a.m." (Pa020a). Thus, Minivich's testimony would be wholly irrelevant.

Because Minivich was not an uncalled witness and his testimony was not superior to testimony provided by the Department, no adverse inference should have been drawn. As the ALJ explained, this is merely an attempt to "to obfuscate the issue of [A]ppellant's culpability by introducing an issue of negative inferences." Ibid.

When issuing the Final Agency Decision, the Commission reviewed the record, including the findings and facts and conclusions of law made by the ALJ, as well as the specific concerns pointed out in Gales' exceptions. While considering those factors, the Commission adopted the ALJ's Initial Decision in accordance with N.J.A.C. 1:1-18.6(a). This choice was not arbitrary, capricious, or

unreasonable, and was well supported by the evidence in the record. Thus, it should be affirmed.

POINT II

THE COMMISSION PROPERLY UPHELD THE ALJ'S DECISION TO REMOVE GALES BECAUSE REMOVAL IS THE ONLY APPROPRIATE PENALTY FOR GALES' EGREGIOUS MISCONDUCT.

In light of the sustained charges, removal is the only appropriate penalty for Gales' egregious conduct.

A reviewing court can modify a penalty imposed by an agency if it concludes that the decision to impose the penalty was arbitrary, capricious, or unreasonable. Henry, 81 N.J. at 579-80. But it should do so only "when necessary to bring the agency's action into conformity with its delegated authority[.]'" Herrmann, 192 N.J. at 20 (internal citations omitted). In other words, a reviewing court should alter the penalty only where "such punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." Id. at 29 (citing In re Polk, 90 N.J. 550, 578 (1982)).

In New Jersey, correctional police officers are sworn law enforcement officers and held to a higher standard of conduct than other public employees. See N.J.S.A. 2A:154-4 (noting that correctional officers are empowered to exercise full

police powers); see also In re Phillips, 117 N.J. 567, 576 (1990)(citing Moorestown Twp. v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965)) (holding that a law enforcement officer is a special kind of employee who must present an image of personal integrity and dependability in order to have the respect of the public). Adherence to this high standard of conduct is an obligation that a law enforcement officer voluntarily assumes when he enters public service. In re Emmons, 63 N.J. Super. 136, 142 (App. Div. 1960). Maintenance of strict discipline is especially 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 are not to be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

To be sure, discipline of a law enforcement officer need not 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 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). In this regard, the concept of progressive discipline should be considered in addition to the underlying conduct when appropriate. West New York

v. Bock, 38 N.J. 500, 527-28 (1962). But progressive discipline is not universally applied. In re Herrmann, 192 N.J. 19, 36 (2007). In fact, some offenses are so egregious in nature that removal is appropriate regardless of the employee's prior disciplinary history. Ibid.; see also Carter, 191 N.J. at 483. Stated differently, the imposition of the penalty of removal is appropriate, regardless of the employee's disciplinary history, when the underlying nature of the conduct is sufficiently egregious. Carter, 191 N.J. at 484; Henry, 81 N.J. at 575; West New York, 38 N.J. at 519. Because of the militaristic nature of correctional facilities, the Department's decision regarding penalty is entitled to strong deference. Bowden, 268 N.J. Super. at 305-06.

Here, the Commission found Gales' conduct to be so egregious that it warranted removal. As the Commission noted, over the course of three hours, Gales stayed in the food preparation room watching television, spoke with a fellow officer, and slept, rather than performing the required inmate counts. (Pa034a). Gales falsified official records by indicating in his logbooks that he completed the required inmate counts and lied to SID. Ibid. Gales' appalling negligence allowed an inmate to escape from the prison and remain on the loose for approximately two hours. Then, when the incident was being discussed by his supervisor, Gales' apparent lack of self-control led him to threaten other officers and their families, a sufficiently egregious act in its own right.

Simply put, the Department can no longer trust Gales to perform his duties. Gales' actions placed the inmates at Edna Mahan and his colleagues in danger. Gales was expected to perform his job with honesty, integrity, and good faith. Instead, Gales ignored the well-established procedures and rendered himself undependable. The outcome of Gales' negligence is the exact reason why strict discipline is crucial to correctional facilities: it created a direct threat to the facility and the public as a whole. Because allowing Gales to remain employed by the Department would destroy public confidence and undermine the safety of the facility, the Commission's decision to remove Gales from employment should be affirmed.

CONCLUSION

For all these reasons, this court should affirm the Commission's Final Agency Decision in its entirety.

Respectfully submitted,

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	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
	:	DOCKET NO. A-001131-22
	:	
IN THE MATTER OF ANDREW GALES, EDNA MAHAN CORRECTIONAL FACILITY, DEPARTMENT OF CORRECTIONS	:	ON APPEAL FROM A FINAL AGENCY DECISION OF THE CIVIL SERVICE COMMISSION
	:	DOCKET NOS.: CSR-16941-19 AND CSR-04864-20
	:	
	:	SAT BELOW:
	:	EXECUTIVE DIRECTOR
	:	HON. JEFFREY RABIN, A.L.J.
	:	
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APPELLANT'S REPLY BRIEF

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Point I

THE CSC INAPPROPRIATELY ADOPTED AN OAL DECISION BEYOND THE STATUTORY FORTY-FIVE DAY PERIOD IN VIOLATION OF N.J.A.C. 1:1-18.1 (OAL DECISION AT PAGE 1; Pa2a) (CSC OPINION AT PAGE 1; Pa33a)

It remains undisputed that the record in this case closed on April 19, 2022. Summations were ordered by Jeffrey N. Rabin, A.L.J. ("ALJ") to be submitted by April 4, 2022. The ALJ ordered rebuttals to be submitted by April 18, 2022. Timely submissions and rebuttals were submitted to the OAL by both sides.

Since the OAL received all rebuttals by April 19, 2022, the ALJ should have closed the record on that date. The ALJ should have rendered his Initial Decision no later than June 3, 2022 or, in the alternative, requested a statutory extension from the Director of the OAL pursuant to *N.J.A.C.* 1:1-18.8(c), (d) and/or (e). See also, *N.J.S.A.* 52:14B-10(c). The ALJ did neither.[1]

Numerous joint correspondence and/or emails were sent to the OAL by both parties requesting the ALJ's decision. However, the ALJ did not respond.

[1]Without any support in the record, Judge Rabin inexplicably reports in his Initial Decision that the "Record Closed: October 3, 2022". (Pa001a).

Once the ALJ did render his Initial Decision, the Appellant submitted timely written exceptions. Among these, Appellant cited the ALJ's lack of adherence to the statutory guidelines when he issued his Initial Decision.

Despite this, the Civil Service Commission ("CSC") accepted the ALJ's Initial Decision without "extensive[] comment" to the exceptions and without a single comment regarding the untimeliness of the Initial Decision – despite protestations. (Pa033a)[2].

"Although the OAL is possessed of significant authority in the actual conduct of hearings in contested cases on behalf of administrative agencies, the agency itself retains the exclusive right ultimately to decide those cases." *Matturri v. Bd. of Trs. of the Judicial Ret. Sys.*, 173 N.J. 368, 379 (2002) citing *In re Kallen*, 92 N.J. 14, 20 (1983). No longer must there be a showing that the agency's delay to act was in "bad faith," "inexcusable negligence," "gross indifference," or complete inaction. Instead, *N.J.S.A.* 52:14B-10(c) "eliminate[d] any consideration of whether the failure to act within the prescribed time period is due to circumstances beyond the agency's control." *Matter of Hendrickson*, 235 N.J. 145, 158 (2018) quoting *N.J. Election Law Enf't Com'n v. DiVincenzo*, 445 N.J. Super. 187, 198 (App. Div. 2016).

[2]In its Statement in Lieu of Brief, the CSC is completely silent regarding the untimeliness of the ALJ's Initial Decision.

In this case, the CSC – as the administrative agency – should not have accepted the untimely findings of ALJ and erred by so adopting the ALJ's findings into the CSC's Final Decision.

Point II

RESPONDENT REAILED TO MEET ITS BURDEN OF PROOF BECAUSE IT SOLELY RELIED UPON HEARSAY EVIDENCE WITHOUT THE REQUIRED RESIDUUM OF ANY COMPETENT EVIDENCE TO PROVE THE ULTIMATE FACTS.
(OAL DECISION AT PAGES 12, 14-16, 29; Pa12a; Pa14-16; Pa29a)

In a civil service disciplinary case, the employer bears the burden of providing sufficient, competent and credible evidence of facts essential to the charge. *N.J.A.C.* 4A:2-1.4. The burden does not shift. *N.J.A.C.* 4A:2-1.4(a).

N.J. Dep't of Cmty. Affairs, Sandy Recovery Div. v. Maione, 456 N.J. Super. 146, 155 (App. Div. 2018) held that the Court will:

> "defer to an agency's interpretation of . . . [a] regulation, within the sphere of [its] authority, unless the interpretation is 'plainly unreasonable.'" *U.S. Bank, N.A. v. Hough*, 210 N.J. 187, 200, 42 A.3d 870 (2012) (alterations in original) (quoting *In re Election Law Enforcement Comm'n Advisory Op. No. 01-2008*, 201 N.J. 254, 262, 989 A.2d 1254 (2010)). However, an appellate court is not "relegated to a mere rubberstamp of agency action," but rather must "engage in a 'careful and principled consideration of the agency record and findings.'" *Williams v. Dep't of Corr.*, 330 N.J. Super. 197, 204, 749 A.2d 375 (App. Div. 2000) (citations omitted).

See also, *C.L. v. Div. of Med. Assistance & Health Servs.*, 473 N.J. Super. 591, 598 (App. Div. 2022)(A court does not merely "rubber stamp the agency's decision[s]"; instead, the courts will "intervene . . . in those . . .

circumstances in which an agency action is clearly inconsistent with its statutory mission or other state policy."); *Mejia v. New Jersey Department of Corrections*, 446 N.J. Super 369, 376-377 (App. Div. 2016)(the court's review of an agency's decision is "not simply a *pro forma exercise* in which the court rubber stamps findings that are not reasonably supported by the evidence.)(internal citations omitted.)

Respondent's reliance on *Newark v. Nat. Res. Council in Dep't of Envtl. Prot.*, 82 N.J. 530, 540 (1980) is misplaced. In *Newark*, the issue before the Court was the adoption of technical maps prepared by the Natural Resource Council ("NRC") of the State Department of Environmental Protection ("DEP") pursuant to *N.J.S.A.* 13:1B-13.1 *et seq*. *Id*. at 534. NRC used a novel technique and historical sources, instead of the traditional tidal mapping program, to create a series of topographical maps. *Id*. Appellants challenged the NRC's map methodology. *Id.* at 536. The Law Division conducted a nine-month hearing to create an exhaustive administrative record consisting of 3000 pages of transcripts, 591 exhibits and competent expert testimony. *Id*. The Court affirmed the Law Division's findings in an unreported *per curiam* decision, based, in part, on the technical nature of the subject matter. *Id.*

No such technical questions exist here. The question before this Court is one of legal sufficiency. Specifically, has the Respondent provided sufficient, legally competent evidence to support the entire decision or ultimate finding of fact. *Russian White House Restaurant v. Village of Ridgewood*, 2000 N.J.

AGEN. LEXIS 188, *109, OAL DKT. NO. ABC 7585-97 & ABC 7036-98 Consolidated (November 29, 1999). It has not.

The DOC admitted that the entire "crux of its case" was the surveillance footage and the log entry book. (1T30.13-17). However, the DOC relied upon Investigator Leitner to provide "factual" testimony regarding the entries which appeared in the logbook when he was not even part of the investigation. (1T37.4 to 38.1; 1T39.8-10; 1T40.2-5; 1T48.7-11; 1T57.13 to 58.14).

Even though the logbook page was deemed to be a business record within the meaning of *N.J.R.E.* 803(c)(6), that does not automatically convert the document's inadmissible hearsay into admissible information. In *Commitment of G.G.N.*, 372 N.J. Super. 42, 56 (App. Div. 2004), the Court held, "[e]vidence being proffered as an admissible business record under *N.J.R.E.* 803(c)(6) must be carefully scrutinized for inadmissible included hearsay and other potentially unreliable information." *Id*. citing *Liptak v. Rite Aid, Inc.*, 289 N.J. Super. 199, 221-222 (App. Div. 1996).

Even though the ALJ had admitted the logbook sheet as a business record (1T8.14-22; Rb at 16), it is undisputed that Investigator Leitner's "first-hand knowledge" came from "reviewing the logbook" that contained hearsay – without more. (1T50.20-23). The record is devoid of any actions that Investigator Leitner may have undertaken to ascertain the authenticity of the logbook entries. The cross-examination of the investigator demonstrates

the inherent flaws of the logbook and therefore undermines the "crux" of the DOC's case.

On cross-examination, Investigator Leitner admitted that he could not determine what, if anything, Mr. Gales had written in the logbook. (1T162.1-17). Likewise, Investigator Leitner could not determine if Mr. Gales had not called in a count as recorded in the logbook. (1T169.13-20). More importantly, Investigator Leitner admitted that he could not state with any specificity that the entries that appeared in the logbook were false or even what those entries meant. (1T170.1-22; 1T178.10-16).

Not a single witness testified Mr. Gales wrote entries into the logbook. Not a single witness authenticated Mr. Gales's handwriting in the logbook. Significantly, however, the one witness who did have personal knowledge of the logbook entries was never produced by the DOC.

In its opposition brief, the DOC acknowledged that it called Investigator Leitner to testify about the veracity of the video surveillance tape[3] even though he was not part of the investigation.[4] (1T66.18-21;

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[3]It should be noted that the Court sustained Mr. Gales's objection to the DOC's witness "testifying to the authenticity or veracity of documents [and/or the video tape]". (1T61.21 to 62.8).

[4]In its opposition, Respondent argues that Mr. Gales waived any objection to the authenticity of the video tape. Therefore, Mr. Gales cannot now object to its evidentiary use. However, the Respondent's argument is unsupported by record. Mr. Gales alleged waiver of the authenticity of the videotape did not affect his right to argue, on appeal, that the ALJ erroneously admitted the videotape as evidence.

1T81.11-22). However, the burden of proof cannot be satisfied simply by the DOC introducing hearsay evidence, lack of evidence or speculation. *N.J.A.C.* 1:1-15.1(b). *See In the Matter of Nathaniel Parker, Juvenile Justice Commission*, 2009 N.J. AGEN LEXIS 250, *14-15, OAL DKT. NO. CSV 02994-08S (April 15, 2009). See also, *State in the Interest of D.C.*, 114 N.J. Super. 499, 502 (App. Div. 1971)(The State must prove the charges by competent evidence; suspicion alone does not suffice.)

In sum, Investigator Leitner's testimony was based on speculation. He was not able to testify about any part of the investigation as he constantly reiterated that it was not his investigation. (1T169.15-16; 1T174.24 to 175.1; 1T177.4-5; 1T178.16; 1T178.19-20; 1T186.16; 1T187.22; 1T194.4; 1T218.20). Moreover, Investigator Leitner repeated that he could not testify as to the particulars of those logbook entries – other than that which he purportedly observed by simply watching the video. (1T169.15-16; 1T177.4-5; 1T178.19-20; 1T187.22; 1T194.4).

Point III

APPELLANT'S ADMISSIONS CANNOT BE USED SUPPLY THE REQUISITE RESIDUUM OF COMPETENT PROOF SUFFICIENT TO SUPPORT THE DISCIPLINARY CHARGES.
(OAL DECISION AT PAGES 12, 14-16, 29; Pa12a; Pa14-16; Pa29a)

In its opposition, the DOC noted that Appellant's statements to DOC provide the necessary residuum because they were qualified hearsay

exceptions. (Rb at 17). However, the DOC's understanding of these statements is myopic and misplaced. This Court has long held, "[a person's] admissions or prior sworn statements serve to potentially contradict some of the hearsay evidence admitted under *N.J.A.C.* 1:1-15.5(a), **but certainly cannot serve to corroborate or supply a residuum of competent proof sufficient to support the appointing authority's allegations**." *Anderson v. County of Monmouth*, 2006 N.J. AGEN LEXIS 960, *32, OAL DKT. NO. CSV 2101-05 (REMAND OF CSV 4698-04); AGENCY DKT. NO. 2004-2204 (October 2, 2006) (emphasis added).

In fact, the ALJ decided this case partly on the evidence that was presented, and partly on evidence that was not. The ALJ held that "Appellant chose not to testify at the within hearing, where he could have offered testimony contradicting the evidence presented against him." (Pa023a).

Thus, the ALJ improperly shifted the burden of proof to Mr. Gales to disprove the allegations against him by a preponderance of the evidence in violation of *N.J.A.C.* 4A:2-1.4(a) which provides: "In appeals concerning major disciplinary actions, *N.J.A.C.* 4A:2-2, the burden of proof shall be on the appointing authority." *In re Polk*, 90 N.J. 550, 561 n.1 (1982)(establishing that the burden of proof is on the agency, and that "hearing examiners are required to report their findings of fact and conclusions of law '. . . based upon sufficient, competent, and credible evidence . . .' (citations omitted)).

Point IV

THE COURT FAILED TO MAKE AN ADVERSE INFERENCE AGAINST THE DEPARTMENT OF CORRECTIONS FOR FAILING TO CALL THE ONLY WITNESS WHO COULD HAVE PROVIDED THE REQUISITE RESIDUUM OF COMPETENT PROOF (OAL DECISION AT PAGE 19; Pa19a)

The DOC argument against an adverse inference is two-fold. First, the DOC argued that "is it [not] clear what specific inference Gales is seeking." (Rb at 18). Second, the DOC argued that "[i]f Gales had any questions regarding Minivich's involvement on August 16, 2019, his counsel had the opportunity to ask during his cross-examination." (Rb at 19). Both of these arguments fail to squarely address the issue.

During the hearing, there was testimony and/or evidence that Officer Minivich made at least one entry into the Stowe 2 South logbook (a critical piece of evidence in the State's case-in-chief) and/or may have conducted at least one inmate count during the relevant time. During his testimony,

> McDowell made reference to Officer Minivich, saying Minivich would only perform counts when Gales or McDowell were on their break. Minivich would then move on to the next post.
>
> On redirect, McDowell said that Gales took only one break on August 16, 2019, **so Minivich would have only done one count for Gales that night. On re-cross, McDowell stated that if Minivich had come in at the beginning of Gales' forty-minute break, he might have conducted two counts for Gales that evening.**

(Pa019a-Pa020a)(emphasis added.) The amount of inmate "counts" and their authorship is a critical piece of the DOC's proofs, and therefore this speculative testimony cannot qualify as "sufficient, competent and credible evidence of facts essential to the charge." *N.J.A.C.* 4A:2-1.4.

Second, the DOC argues that Appellant could have cross-examined Minivich regarding his participation in the August 16, 2019 events. The DOC's trial strategy purposely stymied Mr. Gales's opportunity to cross examine Minivich.

It is well established that "[c]ross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness' credibility." *N.J.R.E.* 611(b). See also, *State v. Loftin*, 146 N.J. 295, 344 (1996)("Cross-examination is generally limited to the scope of direct examination").

The DOC did not elicit a single shred of evidence or ask Officer Minivich any questions regarding the August 16, 2019 incident even though there was plethora of testimony regarding Officer Minivich's presence on Stowe 2 North and South during that evening. (1T). Specifically, there was testimony and/or evidence that Officer Minivich made at least one entry into the Stowe 2 South logbook (a critical piece of evidence in the State's case-in-chief) and/or may have conducted at least one count during the relevant time.

Even though Officer Minivich was called to testify in a separate incident, it is clear that pre-requisites of *State v. Hill*, 199 N.J. 545 (2009), have been met for this Court to draw an adverse inference against the DOC for the August 16, 2019 incident. First, there was, and continues to be, a special relationship between the State and Officer Minivich as he is still a DOC employee. Second, Officer Minivich was, and continues to be, available to the State both practically and physically. Third, his testimony was relevant and critical to the facts at issue. There was considerable cross-examination of Investigator Leitner regarding the entry in the log bog which was admitted as a "business record." Investigator Leitner repeated that he could not testify as to the particulars of those entries – other than that which he purportedly observed by simply watching the video – because he was not the lead investigator on the matter. (1T169.15-16; 1T177.4-5; 1T178.19-20; 1T187.22; 1T194.4). Finally, Officer Minivich's testimony is obviously superior to Officer Leitner because he would have been able to testify: (1) as to which entries he personally made; (2) the reason for those entries; (3) the policy and procedures which allowed him to make those entries; and (4) any conversations he had with Mr. Gales and others regarding evening searches and counts.

In short, the failure of the DOC to produce the key witness with firsthand knowledge as to these issues results in the adverse inference that Mr. Gales performed his duties on August 16, 2019 in conformity with the

rules and regulations of those Senior Corrections Officers who work third shift at Edna C. Mahon Correctional Facility.

Point V

MR. GALES'S DISCIPLINE WAS OVERLY SEVERE AND NOT CONSISTENT WITH HIS DISCIPLINARY RECORD.[5] (OAL INITIAL DECISION AT PAGES 25-29; Pa25-29a).

The DOC charged Mr. Gales on two Preliminary Notices of Disciplinary Actions ("PNDA"s) for incidents on August 16 and 17, 2019 and terminated his employment.

As previously stated, no one testified that Mr. Gales "deviated from the normal standards of conduct." To reiterate, Officer McDowell testified that "[he] was not aware of Central Command ever telling an officer to get out of the television room." (Pa114a). It was only "**[a]fter this issue with Gales, their supervisor told officers to be at their desks and not to hang out in the television room.** Gales hanging out in the television room on August 16 was not by itself a department violation." (*Id*. (emphasis added.))

[5]Mr. Gales had a *Loudermill* hearing on October 3, 2019. At that time, SCPO Gales was suspended without pay. Mr. Gales made a Post Hearing Motion for a Stay, pursuant to *N.J.A.C.* 4A:2-1.2(c)(1) through (4). Hearing Officer St. Paul refused to consider Mr. Gales's Post Hearing Motion for a Stay. The merits of the underlying PNDA were not heard. The State presented the testimony of Major Ryan Valentin. It should be noted that St. Paul and Major Valentin were both arrested and charged with official misconduct, conspiracy and tampering with public records or information. (Pa68a-108a).

Mr. Gales was charged with sleeping on the job. Again, there is no evidence to support this allegation. The closest that the State could get to support this allegation is Officer McDowell's testimony that "[t]hey talked and watched some television. Gales was sitting. Sometimes Gales' eyes were open, sometimes they were closed." (Pa114a).

Mr. Gales was not alone in violating DOC's rules and regulations. For example, Officer McDowell admitted that on at least three occasions on August 16, 2019 he himself also left his inmates completely unsupervised: (1) "McDowell spoke to Gales in the food preparation room for a little while and saw Gales watching television and napping during the shift."[6] (Rb at 6); (2) "McDowell was informed by an inmate that someone was on top of the fire escape in Stowe Two" (*id.*); and (3) it was McDowell who "went to look at D.S.'s bed and saw it made and vacant." (Rb at 6).

Despite leaving inmates unattended for significant periods of time, McDowell was neither reprimanded nor disciplined. In fact, he did not suffer any repercussions.

In the *Matter of Michael Dalrymple*, Investigator, Secured Facilities, Edna Mahan Correctional Facility, Department of Corrections, CSC Docket No. 2022-

[6] In its Statement in Lieu of Brief, the CSC acknowledges that "Gales conversed with a coworker, watched television, and could be seen at times with his eyes closed". All of these activities could only have been witnessed by a coworker (i.e. McDowell) who, likewise, had to have abandoned his post to make these observations." (CSC Statement at 4).

1829; OAL Docket No. CSR 01471-22 (November 2, 2022), Investigator Dalrymple was charged with making an intentional misstatement of a material fact in connection with the preparation of an SID report. The Civil Service Commission found that Dalrymple "misrepresented at least one statement. . . and conduct unbecoming a public employee." The Civil Service Commission considered Dalrymple's prior disciplinary record and reversed Dalrymple's removal and instead imposed a 30 day suspension. See *Carter v. South Woods State Prison*, OAL Dkt No. CSCV6415-00, AGEN. REF. NO. 2006-3914 (Decided September 11, 2003)(In its discussion as to whether to terminate Officer Carter for purposely "misrepresented and falsified his employment application," the ALJ reinstated Officer Carter to his post noting that another officer, identified as "Officer Bennett" was also not removed from his position even though he was accused of "falsifying his hours and stealing money from the prison.").

Mr. Gales's disciplinary record only consists of a written warning and counseling for one incident.

It is undisputed that a number of persons failed to perform their duties that evening – and even well before. The broken window was known to all. (2T10.1-7) D.S.'s threat to escape was not communicated to Mr. Gales or anyone else in the evening shift. Officer Grey saw D.S. on the outside and said nothing. The video showed that McDowell had also abandoned his post.

Officers McDowell was not questioned or investigated for leaving his area unattended. (1T187.9-18; 1T181.1-4). Likewise, the DOC

investigation's unit did not question or investigate Officer Minivich. (1T192.7 to 193.24). Mr. Gales performed his duties to the same standard as Officers McDowell and Minivich who were not disciplined.

Despite each following these protocols, only Mr. Gales was investigated and, ultimately and unfairly, punished.

CONCLUSION

The State failed to prove, by a preponderance of the competent evidence, that Mr. Gales failed to perform his duties or that he deviated from the protocols established by the DOC staff during the night shift.

For these reasons, the decisions of the ALJ and the Civil Service Commission should be reversed and Mr. Gales should be reinstated to his position as Senior Corrections Officer at the Edna Mahan Correctional Facility.

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