

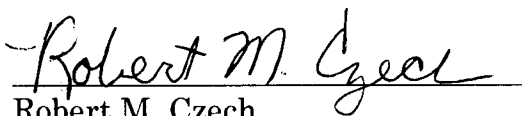
ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Horacio Lorenzo. The Commission further orders that appellant be granted 6 days back pay, benefits, and seniority. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C. 4A:2-2.12*. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of counsel fees.

The parties must inform the Commission, in writing, if there is any dispute as to counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*. After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION
NOVEMBER 10, 2016



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
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attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 09473-15

CSC Docket No. 2015-3212

HORACIO LORENZO,

Appellant,

v.

CITY OF NEWARK POLICE DEPARTMENT,

Respondent.

Anthony J. Fusco, Esq., for Appellant (Fusco & Macaluso, LLC, attorneys)

Corinne E. Rivers, Esq., Assistant Corporation Counsel for respondent (Willie L. Parker, Corporation Counsel)

Record Closed: July 25, 2016

Decided: September 19, 2016

BEFORE **JOHN P. SCOLLO, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The respondent, City of Newark (respondent or City), brings a major disciplinary action against appellant, Horacio Lorenzo (appellant or Lorenzo), a police officer and detective. Respondent seeks affirmance of its findings that Lorenzo was guilty of

conduct unbecoming a police officer and disobedience of orders. Specifically, the charges arise out of Lorenzo's posting on his personal Facebook page certain crime scene photographs depicting marijuana plants, electric lights and other apparatus used for growing marijuana on his private Facebook page.

On March 12, 2015, respondent issued a Preliminary Notice of Disciplinary Action (served April 1, 2015) against appellant charging him with violating Newark Police Department Rules and Regulations: Chapter 18:14 (Disobedience of Orders) [specifically Newark Police Department General Order 99-05 (hereinafter "G.O. 99-05") governing Crime Scene Procedures] and Chapter 5:1:1 (Conduct Unbecoming) along with coordinating Civil Service regulations: N.J.A.C. 4A:2-2.3. A Final Notice of Disciplinary Action was filed on June 2, 2015 and a hearing was held that day at which Lorenzo was found guilty of violating both of the aforesaid charges. Thereupon, he was suspended from work for six days (from June 29, 2015 and ending on July 6, 2015). On June 10, 2015 Lorenzo's appeal was filed with the Civil Service Commission and on June 26, 2015 the matter was transmitted to the Office of Administrative Law and filed as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. This tribunal heard the matter on June 16, 2016. The parties were given time to submit their respective written summations and Attorney Fusco was given additional time due to having undergone back surgery in the interim. Thus the record closed on July 25, 2016. An Order of Extension was requested by the undersigned to allow additional time to complete the Initial Decision by October 21, 2016.

FACTUAL DISCUSSION

Summary of Testimony and Documentary Evidence

Testimony of Sergeant Gary Bean

Newark Police sergeant Gary Bean was the Respondent's only witness against Detective Lorenzo. Bean is a 23-year veteran of the Newark Police Department (NPD). He was assigned as an investigator in the Office of Professional Standards when the subject charges were brought against Lorenzo. He testified that Lorenzo was

interviewed and investigated for posting photographs on his Facebook page, which were taken at a crime scene during a warrant execution on April 17, 2015. The relevant photograph (referred to as "K-1 in Exhibit Newark-7) depicts Newark police officers (including Lorenzo) examining live, potted Marijuana plants in a "grow house", an improvised nursery where plants are grown using various apparatus and electric lamps. Bean recommended that the matter be referred for a Departmental hearing to determine whether Lorenzo was guilty of violating NPD Rules & Regulations Chapter 18:14 (Disobedience of Orders), specifically G.O. 99-05 and/or Chapter 5:1.1 (Conduct Unbecoming a Police Officer).

Using Newark-4, Newark-6 and Newark-7, Bean testified that Lorenzo admitted to him that he posted the subject photograph and others on his Facebook page, adding that he did so in order to use the photos as potential learning tools to assist officers in deterring criminal activity and in recognizing various types of controlled dangerous substances.

Although Bean admitted under cross-examination several times that before and during the investigation and charging of Lorenzo that there were no specific NPD Rules and Regulations governing the use of the Internet; particularly social media by NPD personnel, he maintained throughout the hearing that G.O. 99-05 (Newark-10) prohibited Lorenzo from posting photographs taken at crime scenes on social media like Facebook. Bean maintained that G.O. 99-05, Section VIII; (A) (3), stating "No one should be working within the scene at the time of the photo nor should extraneous subjects and equipment be in the scene picture" conveys the prohibition. Bean maintained that any photographs taken by any police personnel at the crime scene become the property of the NPD Crime Scene unit and can only be used for NPD's investigations and for the eventual prosecution of the case against the perpetrators.

On cross-examination, Bean admitted that Lorenzo appears in K-1 with another police officer. Bean admitted that Lorenzo was charged, but the other officer was not charged. Bean did not refer to other sections of G.O. 99-05, which may also have served as a basis for the charges, namely Section VIII, (A) (5) dealing with custody of photos, and Section IX, (B) dealing with accounting for evidence collected using a

Property Form. Nor did Bean comment on Section X (B) (3) dealing with the Crime Scene Response Unit Supervisor's duty to take control of all evidence detectives and identification officers and to coordinate the evidence operation with the activities of other NPD Units and outside Agencies.

Under cross-examination, while admitting that there was no specific prohibition imposed on NPD personnel from posting crime scene photographs on social media, he also admitted that he had heard about police officers taking photographs at crime scenes even though the Crime Scene Unit was already present at the scene. Bean testified that the general language of G.O. 99-05 made it clear to NPD personnel that any evidence, including photographs taken at a crime scene, were to be turned over to the Crime Scene Unit and not be used for any other reason. Bean testified that failure to do so would constitute disobedience of G.O. 99-05.

Bean testified that the posting of crime scene photos on an officer's personal Facebook page had the potential for unauthorized (i.e. non-police) people for gaining access to said photographs, which could undermine the NPD's crime-fighting efforts. He noted that the person arrested by Lorenzo and Blount somehow gained knowledge about the fact that K-1 was on the Internet and that Lorenzo was depicted in that photograph.

On cross-examination, Bean was questioned about whether the NPD was "on notice" of Lorenzo's posting of photographs on his Facebook page. Bean responded that he had no such knowledge until this investigation took place.

On cross-examination, Bean testified that General Order 15-02 (hereinafter "G.O. 15-02") went into effect on May 14, 2015. Bean acknowledged that this is the NPD's social media policy, which now governs the conduct of NPD personnel, whether on-duty and off-duty, when using social media as it may relate to the NPD. Bean acknowledged that with the implementation of G.O. 15-02, specifically Section V (A) (3) the posting of photographs related to NPD activities is now clearly prohibited, unless authorization is first obtained from the Police Director. Bean also testified that it was likely that the drafting of G.O. 15-02 was taking place during the period while Lorenzo was being

investigated and brought up on Departmental charges, however, he refused to speculate whether or not the drafting of G.O. 15-02 was because of Lorenzo's case.

Testimony of Johnny Whittaker

Sergeant Johnny Whittaker was called to the witness stand by Lorenzo's counsel. Whittaker is a 20-year veteran of the NPD, serving in the Narcotics Enforcement Section. He has known Lorenzo for 15+ years and is currently his supervisor.

Whittaker testified that from his experience in the Narcotics Enforcement Section he has known about and seen photographs of crime scenes that have been posted by NPD police officers on the Internet. He testified that, to his knowledge, no one was ever charged with any wrongdoing for doing so until charges were brought against Lorenzo. When asked if he had ever directed Lorenzo not to post crime scene photographs on the Internet, Whittaker responded that he had never done so. He testified that the purpose of such postings were for police training purposes, i.e. to educate officers about drugs, weapons, etc. Whittaker testified that he did not know of any rule which prohibited NPD personnel from posting crime scene photos on the Internet, and pointed-out that the NPD itself used actual crime scene photographs in its training sessions. He also testified that such photographs could be used to let the general public know about the NPD's efforts to fight drug trafficking.

When questioned about general order 15-02, Whittaker testified that this order went into effect on May 14, 2015, shortly after Lorenzo was charged. He stated that G.O. 15-02 clarifies what police officers can and cannot do on social media.

On cross-examination, Whittaker conceded that if a member of the public (i.e. a non-police person) were to get onto Lorenzo's Facebook page, the activities of the NPD could be compromised. Whittaker stated that he learned that someone outside the NPD had gained access to information on Lorenzo's Facebook page. Whittaker testified that he never saw K-1 until after Lorenzo was charged, but stated that the photograph did not compromise any investigations.

Testimony of Horacio Lorenzo

Horacio Lorenzo (Lorenzo) took the witness stand on his own behalf. He testified that he has been a member of the NPD for 21.5 years and has been a detective with the Narcotics Unit. He identified the photograph known as K-1 (Newark-7) and stated that it was taken at a crime scene during a warrant execution on April 17, 2014. He testified that another officer at the crime scene, using Lorenzo's cell phone camera, took that photograph depicting him and Sergeant Miguel Nunez (one of his superiors) as they examined marijuana plants in a "grow house." He also recalled that Sergeant Johnny Whittaker, another one of his superiors, was present at the "grow house" crime scene on April 17, 2014.

Lorenzo testified that he cooperated with the NPD's investigation of the charges and that he told Sergeant Bean that he posted K-1 on his Facebook account. Lorenzo testified that his Facebook account is personal, private, and secure. He stated that only fellow police officers, his wife, his son and his daughter had access to this Facebook account. Lorenzo testified that there was no prohibition on posting crime scene photographs on social media, that posting was a common practice at NPD and is still a common practice at other police departments. He testified that his superiors were aware that he and other officers posted crime scene photographs on Facebook as well as other police-related information such as information about the types of ammunition criminals were using, body armor information and trends in drug trafficking. He testified that the purpose of posting was to share useful information with other officers so that all officers could benefit from each other's knowledge and experience. He testified that he was never told by his superiors that he should not post crime scene photographs on Facebook. He testified that his superiors were his "Facebook friends" (meaning that they were people who he allowed to have access to his Facebook page) at the time that K-1 was taken and posted. He testified that officers from his Narcotics Unit shared information on Facebook with officers from other NPD units, such as the Gang Unit.

Lorenzo testified that General Order 15-02 was implemented on May 14, 2015, shortly after the charges (see Newark-1, the PNDA) were filed against him. He stated

that he understood that G.O. 15-02 codifies the NPD's social media policy, which regulates NPD personnel's use of social media pertaining to NPD activities. He acknowledges that G.O. 15-02 and forbids the posting of items such as police-related photographs on social media, unless permission is first obtained from the Police Director. He testified that as a result of G.O. 15-02 NPD he no longer posts on social media regarding NPD activities.

On cross-examination, Lorenzo admitted that Facebook accounts can be hacked or otherwise compromised and attributed the access that occurred to his Facebook page to the action of a fellow officer.

Credibility Determinations

In assessing a witness's credibility, an Administrative Law Judge must consider his/her testimony in "light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder may reject a witness's testimony "when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521-22 (1950); see Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958) (rejecting testimony "inconsistent with other testimony or with common experience" or "overborne by other testimony."); D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). An ALJ may consider the "interest, motive, bias, or prejudice of a witness" but "where such choice is reasonably made, it is conclusive on appeal." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952); Renan Realty Corp. v. State, Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

FINDINGS OF FACT

After considering the testimony and having reviewed the documentary evidence presented, and having had the opportunity to assess the demeanor of the witnesses, I **FIND** the following as **FACTS**:

- (1) On April 17, 2014 a search warrant was executed at a crime scene known as a "grow house" in Newark, New Jersey, where a photograph known as K-1 (Newark-7) was taken by a member of the Newark Police Department (NPD). The photograph depicts Detective Horacio Lorenzo and Sergeant Miguel Nunez examining potted marijuana plants and various apparatus used for the raising of plants indoors.
- (2) Lorenzo admitted that he posted K-1 (Newark-7) on his personal Facebook page.
- (3) Lorenzo's Facebook page was accessible to his fellow NPD officers, his wife, his son, and his daughter.
- (4) The purpose of Lorenzo's posting of K-1 (Newark-7) was for police training and for sharing useful information with his fellow officers from his own Narcotics Unit and from other NPD units, such as the Gang Unit, so that they could benefit from each other's knowledge and experience.
- (5) G.O. 99-05 (Newark 10) dated February 10, 2012 is a set of Rules and Regulations governing Crime Scene Procedures, i.e. procedures for the collection and preservation of evidence (including photographs) from crime scenes.
- (6) The text of G.O. 99-05 does not prohibit the taking of photographs by NPD personnel who are not part of the NPD Crime Scene Unit (hereinafter "CSU").
- (7) The text of G.O. 99-05 does not compel NPD personnel, who are not members of the Crime Scene Unit, to give all or any photographs they take at a crime scene to the NPD CSU.
- (8) The text of G.O. 99-05 does not state that all or any photographs taken at a crime scene are or become the property of the NPD CSU.

(9) The portion of the text of G.O. 99-05 cited by the Respondent as creating a prohibition against posting photographs posted on social media was quoted as:

“No one should be working within the scene at the time of the photo nor should extraneous subjects and equipment be in the scene picture.”

This sentence is an instruction to a photographer regarding how to de-clutter the crime scene. It is not a prohibition against the taking of photographs by non-Crime Scene Unit members (hereinafter “non-CSU”); and it is not an instruction dealing with what can be done or what can’t be done with a photograph once it has been taken.

(10) The text of G.O. 99-05, Section VIII (A) (1) says: “For the photograph to be of value it must be admissible in court.” Section VIII (A) (5) says: “A custody record of the photos and negatives should be kept.” Section IX (B) says: “All evidence collected will be accounted for in the following manner on a Property Form (DP 1:152).” These three sections, when read together, make it clear that all photos that the police and prosecution intend to be used in court must be taken, catalogued, and preserved so as to meet the standards governing the admissibility of photographs under the Rules of Evidence. However, the text itself does not state that all photos must follow this Rule, but only those taken, presumably by the CSU, for use in court. The text does not prohibit the taking of photographs that are not intended for use in court.

(11) All of the witnesses agreed in their testimony that prior to the implementation of G.O. 15-02, there were no NPD Rules and Regulations dealing with the specific subject of NPD personnel’s use of social media.

(12) Testimony was taken on the issue of whether NPD officials were “on notice” of its officers’ practice of posting and sharing information, including crime scene photographs, on social media. Sergeant Bean testified on cross-examination that he had no knowledge of ongoing social media posting until the

investigation of Lorenzo took place. On the other hand, Lorenzo testified that posting on social media was “a common practice”. Whittaker was aware that posting were being placed on social media. Lorenzo stated that several of his superiors were his “Facebook friends”. I **FIND** that, even though some members of the NPD may not have been aware of ongoing posting, the greater weight of the credible evidence supports the proposition that significant numbers of NPD personnel, including those higher in rank than Lorenzo, were aware that information and crime scene photographs were being posted and shared on social media by NPD personnel, including people from different Units, and therefore the NPD was “on notice” of this ongoing practice.

(13) Lorenzo testified on direct that his Facebook page was personal, private, and secure. He testified that the only people who had access to his page were police officers whom he had “friended” (a social media term for those he allowed to have access to his Facebook page), his wife, his son and his daughter. On cross-examination he admitted that Facebook pages can be hacked or otherwise compromised so as to give access to others whom he would not want to have access to his page. He admitted that, somehow (suspecting a lapse by a fellow officer), someone accessed his Facebook page and was able to print a copy of K-1 and used it to make certain accusations against him. I **FIND** that Lorenzo’s Facebook page was compromised and that NPD investigative material (i.e. K-1) was thereby obtained by a non-NPD person.

(14) Unauthorized posting of NPD information, including crime scene photographs, is now prohibited by NPD’s G.O. 15-02. Due to the close proximity of the date of the warrant execution on April 17, 2014, the filing of the PNDA on March 12, 2015, and the Implementation of G.O. 15-02, I **FIND** that the implementation of G.O. 15-02 was NPD’s response to its lack of guidance to its personnel concerning the use of social media.

ANALYSIS AND CONCLUSIONS OF LAW

Applicable Standard

The Civil Service Act and the implementing regulations govern the rights and duties of public employees. N.J.S.A. 11A:1-1 to 12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. An employee who commits a wrongful act related to his or her duties or who gives other just cause may be subject to major discipline. N.J.S.A. 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). In a civil service disciplinary case, the employer bears the burden of sufficient, competent and credible evidence of facts essential to the charge. N.J.S.A. 11A:2-6(a)(2), -21; N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-2.1, "burden of proof", N.J.A.C. 4A:2-1.4. That burden is to establish by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982).

An appointing authority may discipline an employee on various grounds, including inability to perform duties, conduct unbecoming a public employee, insubordination, and other sufficient cause. N.J.A.C. 4A:2-2.3(a). Such action is subject to review by the Merit System Board, which after a de novo hearing makes an independent determination as to both guilt and the "propriety of the penalty imposed below." W. New York v. Bock, 38 N.J. 500, 519 (1962). In an administrative proceeding concerning a major disciplinary action, the appointing authority must prove its case by a "fair preponderance of the believable evidence." N.J.A.C. 4A:2-1.4(a); Polk, supra, 90 N.J. at 560; Atkinson, supra, 37 N.J. at 149.

The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958.) Greater weight of credible evidence in the case – preponderance – depends not only on the number of witnesses, but "greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975). Similarly, credible testimony "must not only proceed from the mouth of a credible witness, but it must be credible in itself." Perrone, supra, 5 N.J. at 522.

Conduct Unbecoming a Public Employee

“Unbecoming conduct” is broadly defined as “any conduct which adverse affects the morale or efficiency of the [governmental unit] [or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services.” Karins v. City of Atl. City, 152 N.J. 532, 554 (1998) (citations omitted); In re Nicosia, A-5285-04T5 (App. Div. May 17, 2007), <<http://njlaw.rutgers.edu/collections/courts/>>. The conduct 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.” In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

Under N.J.A.C. 4A:2-2.3(a)(6), an employee may be subject to major discipline for conduct unbecoming a public employee. Although not strictly defined by the Administrative Code, “conduct unbecoming” has been described as that “which adversely affects the morale or efficiency” of the public entity or tends “to destroy public respect for . . . [public] employees and confidence in the operation of . . . [public] services.” Emmons, supra, 63 N.J. Super. at 140 (citation omitted); see Karins, supra, 152 N.J. 532.

Insubordination (or Disobedience of Orders)

Black’s Law Dictionary 802 (7th Ed. 1999) defines insubordination as a “willful disregard of an employer’s instructions” or an “act of disobedience to proper authority.”

Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. Insubordination is always a serious matter, especially in a paramilitary context. “Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department.” Rivell v. Civil Serv. Comm’n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

Legal Issues Presented

(1) Does the scope G.O. 99-05 encompass regulation of NPD personnel's use of social media?

(2) Did NPD have a social media policy in place in March, 2014, which prohibited the posting of crime scene photographs on social media? If so, where was it codified and what were its provisions? If not, did the lack of such a policy create confusion?

(3) In March, 2014, were high officials of the NPD on notice that some NPD police officers and units of the NPD were posting NPD-related information and photographs on social media?

(4) Was "D.Z.'s" access to Lorenzo's Facebook page due to some misconduct on Lorenzo's part?

In regard to the first issue, the factual analysis of the text of G.O. 99-05, set forth above, demonstrates that while G.O. 99-05 sets forth procedures for the collection, cataloguing, and preservation of crime scene evidence. G.O. 99-05 does not prohibit non-CSU NPD personnel from taking photographs at crime scenes. It does not compel non-CSU NPD personnel to give all or any photographs to the CSU. It does not state that all or any photographs taken at a crime scene are or become the property of the NPD CSU. In short, G.O. 99-05 does not cover what NPD personnel can do or cannot do with photographs which they take at a crime scene. The Respondent specifically relies upon certain wording as its basis for bringing charges against Detective Lorenzo. That wording is as follows:

"No one should be working within the scene at the time of the photo nor should extraneous subjects and equipment be in the scene picture."

As noted above, this wording is merely an instruction to the photographer to de-clutter the crime scene. I **CONCLUDE** that the wording of G.O.99-05 relied upon by the respondent as the basis of its case does not prohibit the taking of photographs by NPD

non-CSU personnel, nor does it set forth any prohibition against the posting of said photographs on social media. I further **CONCLUDE** that inasmuch as the wording of G.O. 99-05 does not set forth a prohibition against the posting of crime scene photographs on social media, it follows that Lorenzo's posting of K-1 on his Facebook page was not prohibited and therefore cannot be considered as disobedience to G.O. 99-05. I further **CONCLUDE** that the above-quoted wording of G.O. 99-05 does not indicate that the posting of crime scene photos by NPD personnel on social media is in any way conduct that is unbecoming to a police officer. It follows that Lorenzo did not engage in conduct unbecoming to a police officer when he posted K-1 on his Facebook page.

In regard to the second issue, from the legal analysis set forth above it is clear that G.O. 99-05 was not a policy governing NPD personnel's use of social media. Indeed, I **CONCLUDE** that NPD did not have a social media policy until it implemented G.O. 15-02 on May 14, 2015, a date well after Lorenzo's posting of K-1.

In regard to the third issue, I **CONCLUDE** that there is sufficient, credible evidence in the record to establish that NPD personnel, who were of a higher rank than Lorenzo, not only knew about the fact that NPD personnel were posting and sharing information and crime scene photographs on social media, but they also were "friended" by Lorenzo and therefore participated in the viewing of said materials on social media. While this does not indicate that the Police Director or other police officials at the very top of the chain of command knew about the postings, it demonstrates that NPD personnel higher in rank than Lorenzo (i.e. his superiors) knew about Lorenzo's posting of K-1, likely knew about postings by other NPD officers and units. There is no evidence in the case that anyone contacted Lorenzo to order him to take down his posting of K-1 or to otherwise advise him that posting of same was against the NPD Rules and regulations or against G.O. 99-05. Nor is there any evidence in the case showing that anyone ordered any other officers or units to take down postings or advised that said postings were contrary to the NPD's Rules and regulations or to G.O. 99-05. From this, I **CONCLUDE**, that there were sufficient numbers of NPD personnel above Lorenzo's rank to indicate that NPD's higher officials were on notice of the

practice of posting by NPD personnel. I further **CONCLUDE** that their silence and/or inaction indicated ambivalence or perhaps even approval.

In regard to the fourth issue, which concerns access to the Facebook page by a non-police individual (indeed, by a person Lorenzo arrested for drug possession) the question is whether this person obtained access to Lorenzo's Facebook page due to some misconduct of Lorenzo. Lorenzo acknowledged that he knew that if his Facebook page were to become compromised, it could give access to people whom he would not want to have access. This is what actually happened despite Lorenzo's limitation of access to all but fellow police officers whom he "friended" and his own wife, son and daughter. Lorenzo explained that the arrestee could only have been given access by a fellow officer whom Lorenzo had "friended", who would normally be considered as a trustworthy colleague. Perhaps it was this incident, rather than the posting of K-1 itself that prompted the NPD to draft and implement G.O.15-02. That aside, I **CONCLUDE**, that the breach of security in this case arose out of the failure of one of Lorenzo's colleagues to safeguard access to the Facebook page. I **CONCLUDE** that the breach did not come about due to Lorenzo's conduct, despite the fact that Lorenzo allowed three non-police people, namely his wife and his two children access to the page. I **CONCLUDE**, following my earlier-stated reasoning, that where and when there was no prohibition against the posting of crime scene photographs, it must follow that no misconduct can be said to exist and no guilt can attach.

Considering the foregoing, I **CONCLUDE** that Appellant Lorenzo did not disobey orders (i.e. he did not commit insubordination) and he did not engage in conduct unbecoming a police officer. I **CONCLUDE** that G.O. 99-05 was an insufficient basis for bringing the aforesaid charges against Appellant Lorenzo.

ORDER

It is **ORDERED** that the findings of guilt and suspension of six days is **REVERSED**.

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

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

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

September 19, 2016
DATE

John P. Scollo
JOHN P. SCOLLO, ALJ

Date Received at Agency:

September 19, 2016

Date Mailed to Parties:

September 19, 2016

db

APPENDIX

LIST OF WITNESSES

For Appellant:

Sergeant Johnny Whitaker, Newark Police Department
Detective Horacio Lorenzo, Newark Police Department

For Respondent:

Sergeant Gary Bean, Newark Police Department

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

App-1 Newark Police Department's General Order 15-02, dated May 14, 2015

For Respondent:

Newark-1 PNDA dated March 12, 2015
Newark-2 FNDA dated June 2, 2015
Newark-3 Disciplinary History of Horacio Lorenzo
Newark-4 Newark Police Department Professional Standards – Investigation Disposition Summary dated March 18, 2015 (Marked, but not in evidence)
Newark-5 Newark Police Department – Investigation of Personnel Report dated February 18, 2015
Newark-6 Police Department Administrative Submission and Pre-Interview Advisement Form dated March 3, 2015
Newark-7 Photograph "K-1" (Items "K-2, K-3 & K-4 marked, but withdrawn)
Newark-8 Portions of Newark Police Department's "Rules and Regulations" (Cover page, page 5-1; and page 18-4)
Newark-9 N.J.A.C. 4A:2-2.3
Newark-10 Newark Police Department's February 16, 2012 Memorandum and fifteen-page General Order 99-05, as revised.