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STATE OF NEW JERSEY

In the Matter of Charles Lindsey
Northern State Prison
Department of Corrections

CSC DKT. NO. 2014-2595
OAL DKT. NO. CSV 07642-14

Corrected Copy

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: March 2, 2015 PM

The appeal of Charles Lindsey, a Correction Officer Recruit with Northern State Prison, Department of Corrections, removal effective April 17, 2014, on charges, was heard by Administrative Law Judge Evelyn J. Marose, who rendered her initial decision on December 9, 2014. Exceptions were filed on behalf of the appellant and cross-exceptions were filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on February 4, 2015, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

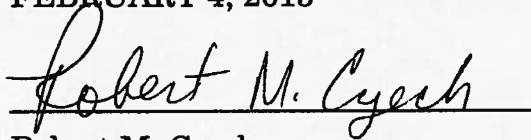
ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore grants the motion for summary decision, upholds the removal and dismisses the appeal of Charles Lindsey.

Re: Charles Lindsey

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 4, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. CSV 07642-14
AGENCY DKT. NO. 2014-2595

IN THE MATTER OF CHARLES LINDSEY,
NORTHERN STATE PRISON,
DEPARTMENT OF CORRECTIONS.

James V. Heise, Executive Vice President #4, PBA Local 105, for appellant Charles Lindsey pursuant to N.J.A.C. 1:1-5.4(a)(7)

Peter H. Jenkins, Deputy Attorney General, for respondent Northern State Prison (John J. Hoffman, Acting Attorney General of New Jersey)

Record Closed: September 17, 2014 Decided: December 9, 2014

BEFORE **EVELYN J. MAROSE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On March 31, 2014, a Preliminary Notice of Disciplinary Action (PNDA) was issued. The New Jersey Department of Corrections (DOC), Northern State Prison, charged correction officer recruit Charles Lindsey with violations of (1) N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; (2) N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause; (3) HRB 84-17, as amended, C.11 conduct unbecoming an employee;

and (4) HRB 84-17, as amended, E.1 violation of a rule, regulation, policy, procedure or administrative order. The penalty was removal, at a date to be determined. Petitioner did not request a departmental hearing, and on April 16, 2014, a Final Notice of Disciplinary Action (FNDA) was issued wherein appellant was removed effective April 17, 2014. On April 24, 2014, appellant filed an appeal.

The matter was transmitted, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, to the Office of Administrative Law (OAL) on June 18, 2014, where it was filed. The DOC filed a Motion for Summary Decision on July 29, 2014. Appellant filed Opposition to Summary Decision on September 19, 2014. The DOC filed a Reply to Opposition.

STANDARD FOR SUMMARY DECISION

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b).

The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995). In Brill, the Court looked at the precedents established in Matsushita Electrical Industrial Co. v. Zenith Radio Corporation, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), and Celotex Corporation v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), wherein the Supreme Court adopted a standard that "requires the motion judge to engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brill, supra, 142 N.J. at 533 (quoting Liberty Lobby, supra, 477 U.S. at 251-52, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214). The Court stated that under the new standard,

> a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."
>
> [Brill, supra, 142 N.J. at 540 (quoting Liberty Lobby, supra, 477 U.S. at 249, 106 S. Ct. at 2511, 91 L. Ed. 2d at 212).]

The Brill standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to trial. "To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed 'worthless' and will 'serve no useful purpose.'" Brill, supra, 142 N.J. at 541.

In addressing whether the Brill standard has been met in this case, further guidance is found in R. 4:46-2(c):

> An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

STATEMENT OF FACTS

I **FIND** that the following **FACTS** are not in dispute:

1.) In February 2014, the DOC received a referral alleging that DOC correction officers had placed inappropriate photographs on the social media network, Instagram.

2.) The DOC Special Investigation Division (SID) conducted an investigation, wherein, among other things, it determined that one of the two correction officers depicted in the photographs was the appellant.

3.) Appellant was hired by the DCO on February 3, 2014, graduated from the DOC Training, and was assigned to Northern State Prison.

4.) The two photographs at issue were posted on Instagram, for simultaneous viewing, from appellant's account. In the photograph at the top of the Instagram screen, appellant and another recruit were photographed in their Dress A uniforms. In the photograph in the lower portion of the Instagram screen, both recruits were photographed holding guns. Appellant was holding his gun in an upward position in his right hand. The other recruit was pointing the gun, that he held in his right hand, at the camera. Appellant was wearing a DOC baseball cap and sweatshirt and his face was covered from the nose down with a scarf. The other recruit was wearing a DOC hooded sweatshirt, with the hood over his head. Appellant posted a message below both photographs, "Hope You Got A Shooter!! I Got One!!" Following those words were two animated figures. The first animated figure was a policeman and the second animated picture was a gun, whose barrel was pointed in the direction of the police figure. In response to the transmittal, there were 17 "likes" noted and one reply which stated, "Laughing out Loud (LOL) Uh u [sic] might not want your job seein [sic] that bottom pic bro lol."

On March 12, 2014, a SID investigator interviewed appellant. An audio copy of the interview was submitted with the motion papers, wherein appellant stated:

a. The upper photograph was taken by one of his parents on their graduation day from the academy.

b. The other recruit was appellant's "training buddy." Training buddies encouraged and supported each other during training.

c. Appellant took the lower photograph at the conclusion of a day of training.

d. Recruits are not permitted to have their cellular telephones with them during training.

e. Appellant and the other recruit were warming up in the other recruit's car, while they waited for information to be available regarding their next week of training. It was a cold day and appellant and the other recruit were wearing the same clothing that they wore while on the range for training that day. Both wore DOC sweatshirts and had their heads covered. Appellant wore a DOC hat and his buddy had the hood of his sweatshirt over his head. Appellant was also wearing goggles and had a neck scarf pulled up under nose that covered the bottom of his face and neck.

f. The guns that appeared in the second photograph were not "real" but "fake" red guns that were used for training.

g. Appellant snapped the lower photograph of himself and his training buddy recruit "as a memory" that they both qualified on the shooting range that day.

h. Appellant decided to post the photograph that he took the day they qualified along with a photograph of both recruits on the day they graduated to those persons on his Instagram account. He saw nothing wrong with the two recruits holding guns in one of the pictures. He analogized the photo where the recruits were holding training guns to photographs frequently taken by soldiers proudly standing in front of or holding such things as M-16's or grenade launchers. He noted that such photographs never subjected those soldiers to discipline. Appellant asserted that the guns that he and other recruit his "training buddy" could not be mistaken for "real" guns because of their red color.

i. When one of appellant's friends from the military, in response to seeing the Instagram posting, commented that appellant might not want his DOC job to see the bottom picture, appellant immediately took the photograph off Instagram. In this interview, appellant said the two photographs at issue were on Instagram at most forty-five minutes.

j. Appellant disagreed with the SID investigator, when the investigator commented that the recruits appeared to be posing like gangsters. Appellant said that he was not a member of a gang and he was not portraying himself as a gangster in the lower photograph. He denied that the recruits' appearance was "gang like." He said their appearance merely reflected how they had to dress in layers all week because of the cold weather and noted that the guns that they held would not be mistaken as "real" since they were red in color.

k. Although petitioner did not personally believe that the lower photograph was inappropriate, he acknowledged that others might see it as inappropriate. Appellant acknowledged the comment made by his military friend, who opined appellant might not want his job to see that bottom photograph.

l. Appellant stated that he was concerned about his job. He promised to use better judgment in the future, and said that he was deeply sorry.

In opposing summary decision, appellant submitted a Certification dated August 22, 2014. Some of the statements made by appellant in his certification differ from the statements that appellant made during his recorded interview on March 12, 2004. Among other things, in his later Certification, appellant states:

a. The lower photograph was taken during a break in training, with appellant's cell phone that he had with him during training.

b. The photograph was taken as an inside joke between him and the other photographed recruit.

c. The lower photograph was not posted in color, but rather was posted "black and white."

d. The other recruit in the lower photograph was the "Shooter" to whom appellant was referring when he wrote, "Hope You Got a Shooter!! I Got One!!" Appellant referred to the recruit as a Shooter as a tribute, since he assisted petitioner in firearms qualifying that day.

e. It became clear to appellant, almost immediately upon posting the lower photograph, that it could convey a different and far less positive message.

f. Shortly after appellant's friend in the military commented that petitioner might not want his DOC job to see the bottom picture, the military friend called appellant and explained "how the picture could be interpreted by others not understanding appellant's thought process at the time." Appellant agreed with his friend and recognized how foolish the posting was and immediately took down the posting.

g. At most the lower photograph was posted on Instagram for twenty-five minutes.

Following the Brill standard, after considering all papers and evidence filed in support of and if opposition to summary decision, I **CONCLUDE** that there are no issues of fact that require a plenary hearing and that this matter is ripe for summary decision.

LEGAL ARGUMENT

Appellant was charged with violations of (1) N.J.A.C. 4A:2-2.3(a)(6) conduct unbecoming a public employee; (2) N.J.A.C. 4A:2-2.3(a)(12) other sufficient cause; (3) HRB 84-17 as amended, C.11 conduct unbecoming an employee; and (4) HRB 84-17, as amended, E.1 violation of a rule, regulation, policy, procedure or administrative order. State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998).

"Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Correction officers are also subject to the DOC Law Enforcement Personnel Rules and Regulations, which states in pertinent part, "No officer shall act or behave, either in an official or private capacity, to the officer's discredit or to the discredit of the Department. Officers are public servants twenty-four hours a day and will be held to the law enforcement higher standard both on and off duty."

In this case appellant acknowledges that he posted, for at least twenty-five minutes, two photographs on Instagram to those individuals who he "friended" through his Instagram account. At least eighteen "friends" saw the photographs and commented about them. One of his friends immediately advised appellant that he might not want his job to see the lower photograph. In the lower photograph, appellant and another recruit are holding guns or pointing what appears to be real guns, black in color. Appellant and his friend are dressed in a manner that disguises their identity. Both recruits are wearing DOC sweatshirts and have their heads covered. Appellant's buddy has the hood of his sweatshirt over his head. Appellant is wearing a DOC hat, goggles, and a neck scarf pulled up under nose that covers his entire face from the nose down. Use of the guns for shooting is referenced in the comment made by appellant below the photographs, "Hope You Got A Shooter!! I Got One!!" The two animated figures, below the words indicate that the shooting of a gun relates to a police officer. The first

animated figure is of a policeman and the second animated picture is of a gun, whose barrel is pointed in the direction of the policeman figure. In the upper photograph, petitioner and his buddy recruit appear in their Dress "A" uniforms, thus clearly identifying them correction officers. The lower photograph could easily be interpreted in a negative way, for example as portraying an undisciplined, potentially violent individual, yet an individual who is employed by the DOC and charged with maintaining the safety of inmates, officers, and the public. I **CONCLUDE** that the charges of conduct unbecoming a public employee are sustained pursuant to N.J.A.C. 4A:2-2.3(a)(6) and HRB 84-17 as amended.

Since petitioner's actions relating to the posting on Instagram are contained in the sustained charges relating to conduct unbecoming a public employee, as detailed above, I **CONCLUDE** that the charge of other sufficient case pursuant to N.J.A.C. 4A:2-2.3(a)(12) and the charge of violation of a rule, regulation, policy, procedure, order or administrative decision pursuant to HRB 84-17, as amended, are not sustained.

PENALTY

"The New Jersey Department of Corrections, Human Resources Bulletin 84-17, As Amended, Disciplinary Action Policy" provides that a range of penalty, from three days suspension to removal, may be issued for the sustained charges of conduct unbecoming a public employee. The DOC in this manner has determined that the appropriate penalty is removal. Appellant's representative describes him as young and lacking experience. He argues that a lesser penalty is appropriate under the circumstances and with consideration of the principal of progressive discipline.

However, the principle of incremental, or progressive, discipline does not need to be applied in every disciplinary setting, particularly when the misconduct "is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest." In re Hermann, 192 N.J. 19, 33 (2007). New Jersey courts have repeatedly concluded that, even in the absence of a prior disciplinary record, removal may be imposed if the charges are serious enough in nature. Ibid.; Henry v. Rahway State Prison, 81 N.J. 571

(1980). While one error, even a serious one, does not necessarily require the ultimate penalty of removal, in cases involving correctional facilities, the evaluation of the seriousness of the offenses and the degree to which such offenses subvert discipline are matters peculiarly within the expertise of the corrections facilities. Bryant v. Cumberland County Welfare Agency, 94 N.J.A.R.2d (CSV) 369.

Although I am cognicent of appellant's age, lack of experience, and desire for his position, based upon all the facts detailed above, I **CONCLUDE** that the appropriate penalty is removal.

ORDER

It is hereby **ORDERED** that the respondent's motion for summary decision is **GRANTED**.

It is hereby **ORDERED** that the charge of conduct unbecoming a public employee, pursuant to N.J.A.C. 4A:2-2.3(a)(6) and HRB 84-17 as amended, C.11, are **SUSTAINED**.

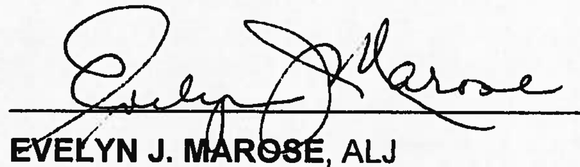
It is hereby **ORDERED** that the charge of other sufficient cause, pursuant to N.J.A.C. 4A:2-2.3(a)(12) and the charge of violation of a rule, regulation, policy, procedure or administrative order pursuant to HRB 84-17, as amended, E.1 are **NOT SUSTAINED**.

It is hereby **ORDERED** that the penalty of removal is **AFFIRMED**.

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

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

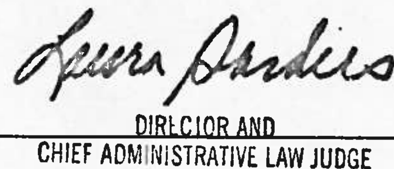
Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312**,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



December 9, 2014
DATE

EVELYN J. MAROSE, ALJ

Date Received at Agency: ____________________



Date Mailed to Parties: DEC 10 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

EJM/kep