



STATE OF NEW JERSEY

DECISION OF THE CIVIL SERVICE COMMISSION

In the Matter of Anthony Herrera

CSC Docket No. 2018-1192
OAL Docket No. CSV 16600-17

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ISSUED: JUNE 6, 2018 (DASV)

The appeal of Anthony Herrera, a Police Aide with the City of East Orange, of his removal, on charges, was heard by Administrative Law Judge Susana E. Guerrero (ALJ), who rendered her initial decision on April 19, 2018. No exceptions were filed by the parties.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on May 23, 2018, accepted and adopted the Findings of Fact as contained in the attached initial decision but did not adopt the ALJ's recommendation to modify the removal to a 90 working day suspension. Rather, the Commission modified the penalty to a 30 working day suspension.

DISCUSSION

The appellant was removed, effective October 3, 2017, on charges of conduct unbecoming a public employee, neglect of duty, and other sufficient cause. Specifically, the appointing authority asserted that the appellant violated the East Orange Police Department (EOPD) General Order Social Media Policy (Social Media Policy), which indicated in part that "Department personnel shall not post, transmit, or otherwise disseminate any information to which they have access as a result of their employment without written permission from the Chief of Police or his or her designee." It was alleged that the appellant admitted to taking unauthorized photographs of the inside of jail cells, hallways leading to the intake area and cellblocks, an EOPD "authorized document," and a van to transport

detainees while on duty and then publishing them on social media in video format. Upon the appellant's appeal to the Commission, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In the initial decision, the ALJ set forth the testimony of the witnesses and found that the appellant while on break from duty took pictures on his cell phone of the EOPD's intake cells, hallways, and the sally port. He also photographed an EOPD transport vehicle. The appellant then published these pictures on social media in video format and titled the video, "East Orange Police Jail Graffiti." During an investigation of this matter, the appellant admitted in his interview that he took the photographs and placed them on YouTube. He took down the post immediately after being directed to do so on the same day of his interview. There were 12 pictures in all, with seven images of graffiti on the walls, doors, and a bench inside of the jail cells. Another photograph was taken of a sign which read: "DO NOT ENTER UNLESS YOU HAVE A PRISONER OR IT IS APPROVED BY THE DESK SERGEANT." The other pictures were of the transport van and a "dimly lit hallway outside of the jail cells leading into the intake area." There were no pictures of inmates or employees and the video did not identify where the photographs were specifically taken in the EOPD. The ALJ further found that the appellant has an interest in graffiti artwork and prison culture. There was no evidence that the photographs were intended to disclose confidential information, place the EOPD in a negative light, or jeopardize the safety of staff or inmates. Additionally, the ALJ found that, although the appellant was subject to the Social Media Policy, he was not familiar with the policy and the appointing authority had not demonstrated that the appellant received the policy or was trained on it.

Based on these findings, the ALJ determined that in taking the photographs inside the EOPD and publishing them on YouTube without authorization, the appellant had violated the Social Media Policy. Therefore, the charges against him, namely conduct unbecoming a public employee, neglect of duty, and other sufficient cause, had been sustained. Regarding the penalty, the ALJ indicated that seven photographs depicted "close-up images" of graffiti, and although the "DO NOT ENTER" sign hung in a restricted area, there was no evidence that the images of the graffiti or disclosure of the sign compromised safety or contained sensitive or confidential information. Moreover, the picture of the transport van also did not disclose confidential information. The van could be seen on the road by the public. Furthermore, the ALJ stated that while the other photographs were in a restricted area, the images were of a dimly lit hallway and the location was not identified. The ALJ was not persuaded that the publishing of these photographs presented an actual threat to the safety of the staff and inmates of the EOPD, as argued by the appointing authority. Therefore, the ALJ concluded that while the appellant "undoubtedly exhibited poor judgment," his misconduct was not so severe under the circumstances to warrant his removal. The appellant had only a minor discipline of a written reprimand in 2012 for a sick leave violation in his 11 years of

employment.<sup>1</sup> Nonetheless, major discipline was appropriate considering the seriousness of the appellant's actions. Therefore, the ALJ recommended that the appellant's removal be modified to a 90 working day suspension.

Upon its *de novo* review of the record, the Commission agrees with the ALJ regarding the charges. The appellant's conduct, in taking unauthorized pictures and then publishing them on YouTube, which he admitted, is clearly a violation of the Social Media Policy and sustains the charges against him. However, as discussed further below, the Commission does not adopt the ALJ's recommendation to modify the appellant's removal to a 90 working day suspension. Rather, a more appropriate penalty is a 30 working day suspension.

In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). In assessing the penalty in relation to the employee's conduct, it is important to emphasize that the nature of the offense must be balanced against mitigating circumstances, including any prior disciplinary history. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 N.J. 474 (2007).

In the instant matter, the record reveals that the appellant was a relatively long-term employee of 11 years with only one minor discipline of a written reprimand for an unrelated charge. His conduct, while serious in nature, is not sufficiently severe to disregard progressive discipline principles and remove him from employment given his employment history. The Commission is mindful of the society we now live in where so much of our lives are depicted in social media. Nonetheless, a public employee must show discretion as to what he or she posts, especially when it touches upon employment. In this case, there is no doubt that the appellant exercised poor judgment when he took pictures at his worksite. What is more troubling is he took pictures of restricted areas of a jail. However, the record does not indicate that the appellant received the Social Media Policy or was trained on it. Moreover, the evidence does not demonstrate that the photographs actually compromised safety or revealed sensitive or confidential information. Indeed, many of the pictures were close-up images of graffiti and the transport van

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<sup>1</sup> Agency records indicate that the appellant was provisionally appointed pending open competitive examination procedures as a Police Aide on March 13, 2006. He received a regular appointment to the title effective January 22, 2007.

was on the road, visible to the public. The Commission emphasizes that it does not condone the appellant's misconduct. However, given the totality of the circumstances, the Commission finds that neither removal nor a 90 working day suspension is proportionate to the offense. It is also noted that the appellant cooperated in the investigation and immediately took down his post as directed. The Commission is satisfied that a major discipline of a 30 working day suspension will impress upon the appellant that his conduct was improper and serve as a warning to the appellant that future offenses may result in a more serious penalty, up to and including removal. Accordingly, the foregoing circumstances provide a sufficient basis to modify the removal imposed by the appointing authority to a 30 working day suspension. See *N.J.S.A.* 11A:2-19 and *N.J.A.C.* 4A:2-2.9(d).

Since the penalty has been modified, the appellant is entitled to back pay, benefits and seniority following the 30 working day suspension up to his date of reinstatement. With regard to counsel fees, the record does not indicate that the appellant is represented by an attorney. Rather, he is represented by his union. Nonetheless, it is noted that the charges against the appellant were sustained and the penalty has only been modified. In that regard, the primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See *Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). As such, the appellant has not prevailed on the primary issue of his appeal. Therefore, an award of counsel fees would be improper. See *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips, supra*, the appointing authority shall immediately reinstate the appellant to his permanent position.

### ORDER

The Civil Service Commission finds that the appointing authority's action in removing the appellant was not justified. Therefore, the Commission modifies the removal to a 30 working day suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority for the period after the imposition of the 30 working day suspension through the date of his actual reinstatement. 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 and an affidavit of

mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

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

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 23<sup>RD</sup> DAY OF MAY, 2018



Deirdre L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
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Attachment



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. CSV 16600-17

AGENCY DKT. NO. 2018-1192

**IN THE MATTER OF ANTHONY  
HERRERA, CITY OF EAST ORANGE  
POLICE DEPARTMENT.**

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**Jenelle Blackmon**, Union Representative, Communications Workers of America, for appellant Anthony Herrera pursuant to N.J.A.C. 1:1-5.4(a)(6)

**Allan C. Roth, Esq.**, for respondent City of East Orange (Roth D'Aquanni, attorneys)

Record Closed: March 13, 2018

Decided: April 19, 2018

**BEFORE SUSANA E. GUERRERO, ALJ:**

**STATEMENT OF THE CASE**

Appellant Anthony Herrera (Herrera or appellant) appeals the determination of the respondent City of East Orange Police Department (EOPD or respondent) that found appellant took unauthorized photographs of the EOPD's intake and cell area, of an EOPD authorized document, and of the EOPD van used to transport detainees; and

posted these photographs in video format on the appellant's YouTube channel. Respondent terminated Herrera based on these actions, and while appellant does not dispute that he took the photographs and posted them to his YouTube channel, he asserts that termination is not warranted, and he seeks reinstatement to his prior position as police aide.

### **PROCEDURAL HISTORY**

On April 5, 2017, respondent served Herrera, a police aide, with a Preliminary Notice of Disciplinary Action (PNDA) informing him of the charges made against him for taking several photographs of the EOPD's property while on duty and posting the photographs on social media without authorization. An internal disciplinary hearing took place on September 7, 2017 pursuant to Herrera's request. On October 14, 2017, Herrera was served with a Final Notice of Disciplinary Action (FNDA), dated October 2, 2017, which sustained all charges set forth in the PNDA. The disciplinary action taken against Herrera was removal, effective October 3, 2017.

On November 8, 2017, the New Jersey Civil Service Commission, Division of Appeals and Regulatory Affairs, transmitted the within matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to B-15 and N.J.S.A. 52:14F-1 to F-13. This matter was assigned to the undersigned and the hearing was held on February 23, 2018. Following receipt on March 13, 2018 of color copies of the photographs presented at the hearing, the record closed.

### **CHARGES**

The charges in the FNDA include violations of: N.J.A.C. 4A:2-2.3(a)(6), Conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), Neglect of duty; and N.J.A.C. 4A:2-2.3(a)(12), Other sufficient cause.

The specification of the charges sustained in the FNDA reads as follows:

Mr. Herrera admitted to taking photos of the intake and cell area in the EOPD including the graffiti on the cell walls, benches and doors of the jail cell, of hallways leading to intake and the cellblock, an EOPD authorized document and the EOPD van used to transport detainees. Mr. Herrera further admitted that the photos were put into video format and uploaded publicly onto the social media site YouTube on Herrera's channel known as "elgordowon" on or about December 6, 2016. On or about January 26, 2017, Herrera admitted to the Professional Standards Unit of EOPD that he took the photos, without authorization and posted the video to YouTube without authorization in violation of the EOPD General Order Social Media policy.

### **Summary of Testimony**

#### **Appellant's Witnesses**

Herrera was employed as a police aide for the EOPD for eleven years. His responsibilities included processing bails and prisoner releases, working the information desk, taking calls, directing civilians, feeding and checking on prisoners, cleaning cells, taking DNA swabs, fingerprints and mugshots. In his eleven years at the EOPD, Herrera's disciplinary history consisted of one written reprimand in 2012 for "sick leave violation-chronic and/or excessive absenteeism." (R-1.)

Herrera has always admitted to having taken the photographs at issue, and fully cooperated with the EOPD's investigation of the matter. He admits that he did not receive any authorization from his supervisor to take these photographs, and that taking the photographs was outside the scope of his job duties. Herrera took the photographs with his personal cell phone while on break from duty at the EOPD. The photographs contain images of graffiti taken inside several EOPD cell blocks; three photographs of a hallway outside the cell blocks; a picture of a EOPD prisoner transport van; and a picture of a typed sign/notice posted inside the EOPD. On December 6, 2016, Herrera posted these pictures onto YouTube to document graffiti artwork in the prison. Herrera testified credibly that he took the photographs because he has an interest in prison culture and graffiti artwork, and has taken and posted images of other graffiti online in



the past. During cross-examination, he confirmed that the three photographs of the EOPD hallway outside the intake cells do not contain any graffiti.

Appellant was first confronted about the video/photographs by Detective Adkins in January 2017, and Herrera removed the online post that same day. Detective Adkins conducted an investigation of the matter and told Herrera that he would just get a "slap on the wrist" for his actions.

Herrera testified credibly that he was unaware of the EOPD General Order on Social Media Policy in effect at the time he took the photographs and published them on YouTube, and that he never received any training on the Social Media Policy or any EOPD General Orders, which he believed only apply to police officers. He appeared remorseful at the hearing and stated that he would never take photographs inside the EOPD again if he were to be reinstated.

Nicole Walters (Walters) is employed as a Community Service Clerk 2 at the EOPD, where she has been employed for approximately fifteen years. She is also a union shop steward and Secretary for the CWA Executive Board. Walters was appellant's co-worker at EOPD, and she represented him at the departmental hearing. She testified as a CWA union representative in this matter and asserted that the EOPD General Orders are given to new sworn officers only. She did not know whether the EOPD provides any General Orders or policies to police aides or other civilian employees.

### **Respondent's Witness**

Detective Hewlett S. Adkins Jr. (Detective Adkins) has been employed with the EOPD for fourteen and a half years. For the past four years, he has been assigned to the Professional Standards Unit, where he investigates police misconduct and ensures that all employees adhere to the EOPD's rules and regulations. Detective Adkins investigated this matter and prepared an administrative report with a summary of his

investigation, findings and recommendation, dated February 10, 2017. (R-1.) He also prepared the PNDA, dated March 28, 2017. (J-2.)

Detective Adkins' investigation consisted of his review of the YouTube video created by Herrera which lasted three minutes and twenty-one seconds, and contained approximately twelve photographs. (R-3.) The first photograph shown on the video depicts a typed sign/notice located in a restricted area of the EOPD that reads: "DO NOT ENTER UNLESS YOU HAVE A PRISONER OR IT IS APPROVED BY THE DESK SERGEANT." This sign is not visible by the general public, only by EOPD employees and inmates taken into that area of the police department. Detective Adkins also identified three photographs of a hallway outside the jail cells which shows the closed door leading to the police intake area. When a prisoner is processed, he is taken down this hallway and into his cell. Seven photographs contain images of graffiti found on the walls, doors and a bench found in EOPD jail cells, and one photograph depicts the exterior of the EOPD prisoner transport van, which is on the road and observable by the public.

After initially viewing the video and speaking with Herrera, Detective Adkins informed Herrera that he would "probably just get a slap on the wrist" for his actions, and that it was "not a big deal." Herrera was initially charged with a thirty-day suspension, as documented in the PNDA, but he was later removed following his departmental hearing. While Detective Adkins testified that he does not determine the discipline to be imposed on EOPD employees, he was unable to explain why Herrera was initially charged with a thirty-day suspension in the PNDA and later removed in the FNDA. Although he mentioned that a thirty-day suspension was proposed before the investigation was fully concluded, he did not testify as to what, if any, additional information was discovered during the investigation to cause the respondent to change the recommended discipline of a thirty-day suspension to a removal. When he prepared the PNDA, Detective Adkins had already reviewed the core piece of evidence --the video-- and questioned Herrera, who admitted to taking the pictures.

The EOPD General Order - Social Media Policy addresses prohibitions on the use of social media by EOPD personnel. The Social Media Policy prohibits divulging: “confidential information, including photographs or videos, related to department training, activities, or work-related assignments without express written permission” from the Chief of Police. Herrera never received permission from the Chief of Police to post any information on social media, and he is not an EOPD employee authorized or designated to post on behalf of the department. While respondent asserts that Herrera was subject to the Social Media Policy as an EOPD employee, there was no signed receipt of the General Order on Social Media Policy by Herrera, and no evidence was offered to suggest that Herrera was ever trained on the Social Media Policy.

The Social Media Policy also contains a section addressing the personal use of social media by all EOPD personnel. It states in relevant part that “Department personnel shall not post, transmit, or otherwise disseminate any information to which they have access as a result of their employment without written permission from the Chief of Police or his or her designee.” Detective Adkins testified that Herrera did not have permission from the Chief of Police or his designee to post pictures of the EOPD and, therefore, acted in violation of the Social Media Policy. Respondent also maintains that it is common knowledge that taking pictures inside the EOPD is prohibited.

The photographs taken by Herrera were deemed by the respondent to be confidential in nature because they depict actual jail cells where inmates are held that are not accessible by the public. Detective Adkins testified that the posting of the photographs of the transport van, the hallway, and exit areas compromised the safety of inmates, personnel and visitors and that this warrants Herrera’s removal. He also briefly referenced the risk of inmate escape by the publishing of these photographs. While Detective Adkins repeated multiple times that safety had been compromised by Herrera’s posting of the photographs, he did not explain or expand upon this assertion.

Herrera was charged with violating N.J.A.C. 4A:2-2.3(a)(6), Conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), Neglect of duty; and N.J.A.C. 4A:2-

2.3(a)(12), Other sufficient cause, because he admitted to taking the photographs during his shift as a reserve man at the EOPD when he was not authorized to do so.

### **FINDINGS OF FACT**

The parties stipulated the following facts and I, therefore, **FIND** them as **FACTS**:

1. Anthony Herrera was a police aide with the City of East Orange.
2. Anthony Herrera, while on break from duty, took still pictures of the inside of the East Orange Police Department Intake cells, hallways and sally port.
3. Anthony Herrera, while on break from duty, took still pictures of the East Orange Police Department Police Transport vehicle.
4. On or about December 6, 2016, Anthony Herrera published these pictures by placing them on the social media site YouTube.
5. On January 26, 2017, during the interview with Detective Adkins, of the East Orange Police Department Professional Standards Unit, Anthony Herrera admitted to Detective Adkins that he took the aforementioned photographs and placed them on his social media site that is hosted by YouTube.

Based on the documentary and testimonial evidence presented, and having had the opportunity to observe the demeanor of the witnesses and to assess credibility, I make the following additional **FINDINGS of FACT**:

1. Herrera was not authorized to take the photographs and publish them onto a social media website, nor did he receive permission from the Acting Chief of Police or any other authorized agent to do so.

2. As an employee of the EOPD, Herrera was subject to the EOPD General Order – Social Media Policy.
3. The EOPD General Order – Social Media Policy reads, in part: “Department personnel shall not post, transmit, or otherwise disseminate any information to which they had access as a result of their employment without written permission from the Chief of Police or his or her designee.”
4. As an EOPD civilian employee, Herrera was not familiar with the General Order - Social Media Policy, and respondent was unable to substantiate that Herrera ever received a copy of, or received training on, the General Order - Social Media Policy.
5. Herrera posted onto his YouTube channel twelve photographs depicting the following:
  - Seven photographs depicting images of graffiti found on the walls, doors and a bench inside the EOPD jail cells;
  - A photograph of a typed sign/notice that appears in a restricted area of the EOPD that reads: “DO NOT ENTER UNLESS YOU HAVE A PRISONER OR IT IS APPROVED BY THE DESK SERGEANT.”
  - A photograph depicting the exterior of the EOPD transport van used to transport detainees.
  - Three photographs of a dimly lit hallway outside the jail cells leading into the intake area. (R-3.)
6. The photographs do not contain images of any inmates, EOPD officers/employees, or any individual. Not all of the images depict graffiti. The video is labeled “East Orange Police Jail Graffiti,” but the individual pictures in the video are not labeled, and the video does not identify where in the EOPD the photographs were taken.

7. Appellant took the photographs to document graffiti in the prison because he has an interest in graffiti artwork and prison culture, and no evidence was presented to suggest that appellant took or posted the photographs intending to disclose confidential information, to jeopardize the safety of EOPD staff or inmates, or to place the EOPD in a negative light.<sup>1</sup>
8. Herrera's prior disciplinary history consisted of one written reprimand in 2012 for a sick leave violation and/or excessive absenteeism.
9. Herrera cooperated with the EOPD's investigation of this matter, and removed the online posting of his video immediately after being directed to do so.

### **LEGAL ANALYSIS AND CONCLUSIONS**

Public employees' rights and duties are governed and protected by the provisions of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and the regulations promulgated pursuant thereto, N.J.A.C. 4A:1-1.1 to 4A:2-6.2. However, public employees may be disciplined for a variety of offenses involving their employment, including the general causes for discipline as set forth in N.J.A.C. 4A:2-2.3(a). An appointing authority may discipline an employee for sufficient cause, including failure to obey laws, rules and regulations of the appointing authority. N.J.A.C. 4A:2-2.3(a)(11).

In disciplinary cases, the appointing authority has both the burden of persuasion and production and must demonstrate by a preponderance of the competent, relevant and credible evidence that it had just cause to discipline the employee and lodge the charges. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958).

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<sup>1</sup> Respondent did not allege that Herrera intentionally violated any rule or policy, or that he took or published the photographs for any purpose other than to document graffiti artwork.

The first issue in this proceeding is whether a preponderance of the credible evidence establishes that the charges set forth in the FNDA as a result of appellant's taking of several photographs at the EOPD and publishing the photographs on a social media website warrant disciplinary action. If so, the issue to be addressed is whether termination is the appropriate disciplinary action. The parties stipulated as to the underlying action—i.e., that the appellant took the photographs and posted them online—but the appellant maintains that he was unaware of, and never received, the respondent's Social Media Policy, and that his removal is an excessive measure that falls outside the scope of progressive discipline.

Herrera is charged with Conduct Unbecoming a Public Employee, pursuant to N.J.A.C. 4A:2-2.3(a)(6). "Conduct Unbecoming" is an "elastic" phrase that encompasses conduct that "adversely affects the morale or efficiency of a governmental unit . . . [or] which 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) (citing In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960)). 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)).

Here, the appellant's actions in taking photographs inside the EOPD and publishing them onto YouTube without the required authorization constitute a violation of the EOPD General Order – Social Media Policy. Therefore, based on my findings, I **CONCLUDE** that respondent has demonstrated, by a preponderance of credible evidence, that appellant's conduct constitutes a violation of N.J.A.C. 4A:2-2.3(a)(6) (Conduct Unbecoming a Public Employee), N.J.A.C. 4A:2-2.3(a)(7) (Neglect of Duty), and N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause), and that such charges must be **SUSTAINED**.

When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and “penalty” on appeal based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); W.N.Y. v. Bock, 38 N.J. 500 (1962). In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee’s offense, the concept of progressive discipline, and the employee’s prior record. George v. N. Princeton Developmental Ctr., 1996 N.J. AGEN LEXIS 467 (April 16, 1996). Pursuant to Bock, concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). Depending upon the incident complained of and the employee’s past record, major discipline may include suspension, removal, etc. Bock, 38 N.J. at 522-24

Progressive discipline may only be bypassed when the misconduct is severe, when it renders the employee unsuitable for continuation in the position, or when the application of progressive discipline would be contrary to the public interest. In re Herrmann, 192 N.J. 19, 33 (2007). Termination of employment is the penalty of last resort reserved for the most severe infractions or habitual negative conduct unresponsive to intervention. Rotundi v. Dep’t of Health and Human Services, OAL Dkt. No. CSV 385-88 (Sept. 29, 1988)

Here, respondent argues that Herrera’s misconduct was so severe that it falls outside of progressive discipline. Respondent asserts that removal is appropriate because Herrera compromised the safety of EOPD staff and inmates when he published on social media photographs taken inside restricted areas of the EOPD. This, respondent argues, not only violated the EOPD’s Social Media Policy, but a broader, unwritten “general rule” that is common knowledge at the EOPD. Herrera maintains that removal is an excessive penalty, that he was unaware of the Social Media Policy and that his “mistake” should not cost him his job.

I thoroughly examined the twelve photographs that appear on Herrera’s YouTube video. Seven of the twelve photographs depict close-up images of graffiti



found in various jail cells. The content of the graffiti was not raised as a concern; no individuals appear in the photographs; and respondent did not present any credible evidence to establish that these seven photographs of graffiti compromised safety at the EOPD. The one photograph of the "DO NOT ENTER" sign does hang in a restricted area of the EOPD and is directed to EOPD staff, however, the content of the sign itself does not contain any sensitive or confidential information. Moreover, the video does not disclose where in the EOPD the sign appears; and there is no evidence that the public disclosure of this sign compromises safety at the EOPD. Similarly, the photograph depicting the exterior of the EOPD transport van does not disclose any confidential information, as the van can be seen on the road by the general public, and no individual appears in the photograph. The respondent also did not sufficiently establish how the publishing of the exterior of the van jeopardizes the safety of EOPD staff or inmates. Finally, with regard to the three photographs of the hallway outside the jail cells, while they were taken in a restricted area generally accessible only by EOPD staff and inmates, I am not persuaded, based on my review of the photographs and testimonial evidence presented at the hearing, that the posting of these photographs presented an actual threat to the safety of the EOPD staff or inmates. These photographs contain images of a dimly lit hallway with unmarked closed doors, leading to an unmarked intake area. It is unclear to the viewer where these photographs were taken, and the location is not identified in the video/photographs. Moreover, respondent did not sufficiently explain how safety was compromised by publishing these photographs, nor how these photographs may create a risk of inmate escape, particularly when inmates are routinely brought through this area when they are taken to their cells. While Herrera undoubtedly exhibited poor judgment in publishing pictures taken inside an EOPD restricted area, I am not convinced that the publishing of these photographs online presented an actual threat to the safety of EOPD staff or inmates.

Herrera's actions in taking the photographs inside a restricted area of the EOPD was inappropriate and careless. However, I **CONCLUDE** that the misconduct here is insufficiently severe to render appellant unsuitable to continue in his position, and I further **CONCLUDE** that the penalty of removal is excessive, and that progressive discipline should apply.

Finally, it is undisputed that in his eleven years at the EOPD, appellant's disciplinary history consisted of one single written reprimand in 2012 for a sick leave violation and/or excessive absences. Nonetheless, the sustained charges against appellant are serious in nature and major disciplinary action is warranted. I, therefore, **CONCLUDE** that a ninety-day suspension is more appropriate and proportionate to the offense.

**ORDER**

It is **ORDERED** that the determination of the City of East Orange Police Department that Anthony Herrera be removed is **REVERSED**.

It is **ORDERED** that Anthony Herrera be suspended for ninety days and receive the return of appropriate benefits.

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

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

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

April 19, 2018  
DATE

  
SUSANA E. GUERRERO, ALJ

Date Received at Agency:

April 19, 2018

Date Mailed to Parties:  
jb

APR 24 2018



**DIRECTOR AND  
CHIEF ADMINISTRATIVE LAW JUDGE**

**APPENDIX**

**WITNESSES**

**Appellant:**

Anthony Herrera

Nicole Walters

**Respondent:**

Detective Adkins

**EXHIBITS**

**Joint:**

- J-1 Joint Stipulation of Facts
- J-2 Preliminary Notice of Disciplinary Action (31-A) dated March 28, 2017
- J-3 Final Notice of Disciplinary Action (31-B) dated October 2, 2017
- J-4 East Orange Police Department Internal Affairs Complaint Notification dated January 19, 2017
- J-5 East Orange Police Department Administrative Investigation Notice dated January 26, 2017
- J-6 Notice of Charges form dated March 28, 2017
- J-7 CWA 2005-2006 Collective Bargaining Agreement
- J-8 CWA 2006-2010 Memorandum of Agreement
- J-9 CWA 2010-2013 Memorandum of Agreement
- J-10 CWA 2014-2018 Memorandum of Agreement

**For Appellant:**

- A-1 2015 Anthony Herrera Performance Appraisal
- A-2 2017 Anthony Herrera Performance Appraisal

For Respondent:

- R-1 Report of Detective Hewlett Adkins dated February 10, 2017
- R-2 East Orange General Order – Social Media Policy
- R-3 Stills of YouTube video