STATE OF NEW JERSEY

In the Matter of Rome Smith Cumberland County, Department of Corrections	**DECISION OF THE CIVIL SERVICE COMMISSION**
CSC Docket No. 2021-342 OAL Docket No. CSV 11241-20	

ISSUED: MAY 3, 2022

The appeal of Rome Smith, Senior Juvenile Detention Officer, Cumberland County, Department of Corrections, removal, effective September 15, 2020, on charges, was heard by Administrative Law Judge Judith Lieberman (ALJ), who rendered her initial decision on March 23, 2023. No exceptions were filed.

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 3, 2023, the Commission adopted the ALJ's Findings of Fact and Conclusions and her recommendation to modify the removal to a six-month suspension with the addition of workplace and public demeanor, and social media training.

Since the removal has been modified, the appellant is entitled to be reinstated with mitigated back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10 from six months after the first date of separation until the date of actual reinstatement. However, he is not entitled to counsel fees. *N.J.A.C.* 4A:2-2.12(a) provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in the disciplinary appeal is the merits of the charges. See *Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121,128 (App. Div. 1995): *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, charges were sustained, and major discipline was imposed. Consequently, as appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, 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*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore modifies that action to a six-month suspension. The Commission further orders that the appellant be granted back pay, benefits, and seniority from six months after the first date of separation to the actual date of 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.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The Commission further orders that the appellant, upon his reinstatement, shall undergo and satisfactorily complete workplace and public demeanor, and social media training.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 3RD DAY OF MAY, 2023

Allison Chris Myers

Allison Chris Myers
Acting 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 11241-20
AGENCY DKT. NO. 2021-342

IN THE **MATTER OF ROME SMITH,**
CUMBERLAND COUNTY DEPARTMENT
OF CORRECTIONS.

Jeremy Meyer, Esq., for appellant, Rome Smith (Cleary, Josem & Trigiani, LLP, attorneys)

John G. Carr, Esq., for respondent, Cumberland County Department of Corrections (Cumberland County Counsel, attorney)

Record Closed: January 19, 2023 Decided: March 23, 2023

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE

Appellant Rome Smith (Smith or appellant) appeals his removal by respondent, Cumberland County Department of Corrections (Department, respondent or appointing authority), from his position Senior Juvenile Detention Officer due to a determination that he engaged in conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6), when he wrote comments on social media that were the subject of upset and debate. Respondent also charged appellant with violating N.J.A.C. 4A:2-2.3(a)(12), other

sufficient cause. The Department withdrew a charge that appellant violated County Policy 4.11, "Prohibited Discrimination and Harassment Policy." Smith contends that his social media comment was intended to be viewed by a limited, private group of individuals and was made public by a third party, without his knowledge or consent. He thus contends that he did not engage in behavior that warrants termination. He also contends that his comment is protected First Amendment speech.

PROCEDURAL HISTORY

On August 19, 2020, respondent issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications made against appellant. Appellant requested a departmental hearing. On September 15, 2020, respondent issued a Final Notice of Disciplinary Action (FNDA) sustaining the charges in the PNDA and removing appellant from his position effective September 15, 2020. Appellant filed a timely appeal, and the Office of Administrative Law received it on December 2, 2020, for a hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to N.J.S.A. 52:14B-15 and N.J.S.A. 52:14F-1 to N.J.S.A. 52:14F-13. The matter was assigned to Hon. Jeffrey R. Wilson, ALJ. The Department filed a motion for summary decision on August 27, 2021. Appellant filed a brief in opposition to the motion on November 1, 2021. The movant's reply brief was filed on November 9, 2021. Oral argument was conducted on April 27, 2022. Upon joint request of the parties, Judge Wilson reserved the issuance of his order on the motion until after a May 25, 2022, status conference. On June 10, 2022, Judge Wilson denied the motion. On August 12, 2022, the matter was transferred to me after Judge Wilson was appointed to the Superior Court. The hearing was conducted on December 5, 2022, by way of Zoom video technology. The record remained open to permit the parties to receive the hearing transcript and submit post-hearing briefs. All briefs were received by January 18, 2023, and the record closed that day. An extension of time to file this Initial Decision was granted on March 3, 2023.

FACTUAL DISCUSSION AND FINDINGS

The parties stipulated to the following facts. I therefore **FIND** the following as **FACT**:

1. Appellant Rome Smith had been employed by the Cumberland County Juvenile Detention Center ("Center") since May 5, 1993.

2. Smith was initially hired as a part-time, as needed, Juvenile Detention Officer but was made a permanent employee on October 16, 1993. He was promoted to Senior Juvenile Detention Officer on June 22, 1997. On August 31, 2000, he was demoted to Juvenile Detention Officer, but then promoted provisionally to Senior Juvenile Detention Officer on November 9, 2011. On October 8, 2012, he was made permanent in the Senior Juvenile Detention Officer title.

3. The Center became a Division of the Cumberland County Department of Corrections following the Cumberland County Board of Commissioners' adoption of Resolution 2013-5 on January 8, 2013.

4. On August 13, 2020, Smith was involved in an off-duty, off site conversation on the popular social media website Facebook, regarding the August 9, 2020, shooting of Cannon Hinnant, a 5-year-old child in North Carolina.

5. The conversation occurred in response to a post by Jeff French, a friend of Smith. French was not, nor has he ever been, employed by the County of Cumberland.

6. Smith and French regularly engaged in conversations in the comments to each other's Facebook posts in the spring and summer of 2020.

7. In the summer of 2020, the killing of George Floyd in Minnesota led to protests across the United States and triggered widespread public debate about racial justice and the role of police.

8. On August 13, 2020, French shared a public post by Facebook user Dan Jones. Jones' post included an image with a caption stating "On the left is

George Floyd; a drug addicted criminal who overdosed on meth and fentanyl. On the right is Cannon Hinnant; an innocent 5-year-old who was shot in the back of the head by a black man. You'll never guess which story the media gave more attention to."

9. French's August 13, 2020, post was only visible to and could only be commented on by French and the people who French had designated as "friends" on Facebook. Smith was among French's friends on Facebook.

10. After several comments that were critical of George Floyd and the media, Smith left the following comment: "He should've ducked (shrug emoji) FOH!!! Y'all always trying to sneak diss and discredit a black person being killed innocently by police. Blame cannon's parents for not watching him!!! F Y'ALL"

11. Smith's comment generated more comments, most of which were critical to what Smith wrote.

12. French responded to Smith's comment by accusing him of being "rude . . . disgusting" to which Smith agreed saying "Yep sure is!!!"

13. Smith left a later comment that said: "it is truly sad that little boy was murdered, and I hope justice prevails in that incident, but it still doesn't excuse the correlation to Floyd's untimely death to get media coverage of the crime, that Floyd being deceased has nothing to do with."

14. Gary Mazza, one of French's friends on Facebook commented: "My point is.. NO KID.. no matter race.. should be shot in the head.. should be killed or in this case executed.. NEVER.. in no way should a baby be the recipient of that much hate." To which Smith replied "Garry Mazza, I AGREE."

15. Although French's privacy settings on his post was set so that only his Facebook friends could view the post or its comments, Andrew Wells, one

of French's Facebook friends, took a screen shot of Smith's "he should've ducked" comment. Wells then posted the screen shot image with the privacy settings set to "public," so any Internet user in the world could view his post on Facebook. Wells added the following caption to his screen shot: "Make this turd famous. This is his response of the 5 yr kid in Wilson North Carolina getting his brains blown out while riding his bike. Come on peeps. What is wrong is wrong no matter what color skin suit you're wearing. Rome Smith lives in Bridgeton NJ and works for Cumberland County Corrections. #njdoc #cumberlandcounty #cumberlandcountycorrection #NewJerseyStatePolice #CnnNews #FoxNews #actionnews #northcarolina"

16. Wells' screen shot and public post was made without Smith's knowledge or consent.

17. Wells' post prompted a large number of angry comments from the general public, including death threats against Smith and attempts to determine where he lived and worked.

18. Wells' post also generated news coverage, which further publicized the post and intensified the public's reaction to the post, including threats directed towards Smith and other employees and agents of Cumberland County.

19. On August 14, 2020, Smith submitted a letter to Deputy Warden Charles Warren, explaining the August 13, 2020, Facebook conversation between him and Jeff French and apologizing "to anyone that my hastedly [sic] comment offended and except [sic] my humblest apology."

20. On August 19, 2020, Cumberland County issued a Preliminary Notice of Disciplinary Action (PNDA) to Smith, charging him with 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)12 Other sufficient causes and County Policy 4.11, which is the County's "Prohibited Discrimination and Harassment Policy."

21. The disciplinary action was based entirely upon the off-duty comments Smith made on Facebook on August 13, 2020. It was not based on any other allegations of misconduct.

22. On September 11, 2020, a hearing was held concerning Smith and the Hearing Officer recommended termination.

23. On September 15, 2020, a Final Notice of Disciplinary Action was issued terminating Smith's employment.

24. On September 21, 2020, Smith submitted a timely appeal of his termination.

Testimony

The following is not a verbatim recitation of the testimony but a summary of the testimonial and documentary evidence that I found relevant to the above-described issue.

For respondent

Director Veronica Surrency testified that appellant received training concerning the Department's anti-harassment and discrimination policy on May 19, 2014. R-1. At the time of the incident, the Department did not have a policy concerning the off-duty use of social media and did not provide training concerning the off-duty use of social media. However, officers were told that their off-duty behavior reflected upon the Department because they were public employees.

Surrency was not familiar with Smith's Facebook comment and was not involved with the charges or the disciplinary proceedings. She neither discussed the post with him nor knew what he intended when he made the post. She was aware of a few voicemail messages on county phone lines, complaining about appellant and the Facebook post and saying he should be fired. She forwarded the messages to the warden's office. One person said they would protest if Smith were not fired. Many of the complaints came from

outside of Cumberland County and New Jersey. She did not know whether these complaints were considered when it was determined that Smith would be terminated. She also observed vehicles parked outside the Center, which was unusual, and possibly associated with the people who were agitating for appellant's termination.

Craig Atkinson was the Cumberland County Director of Human Resources and Personnel for eight years. He retired in February 2021. He was responsible for training all county employees and oversaw disciplinary actions. County employees were trained on County Policy 4.11, as well as state and federal laws concerning discrimination and harassment, including the New Jersey Law Against Discrimination.

Atkinson was the hearing officer for Smith's departmental hearing on the disciplinary charges. Termination was appropriate in this case, notwithstanding Smith's disciplinary history. In reaching this conclusion, Atkinson was not influenced by county officials, newspaper articles or other sources of information. He relied solely upon the evidence presented during the departmental hearing and was not influenced by a statement issued by the Freeholder Director.

The fact that the Facebook post was made public was "very important" and a "large part" of his decision. T[1] 74:18; 75:23. Although the public nature of the post was not the sole factor that he considered, had the post been private, "it may have affected the decision." T 75:20-21.

On cross-examination, Atkinson acknowledged that he was not familiar with Facebook's privacy settings. He was shown an icon on the relevant posts that indicated that Smith's post was made visible only to the friends of Jeff French. In response, he stated, "I don't really understand Facebook, to be honest with you." T 78:18-19. He also testified that he did not know how Smith's post was made public. He was shown a post by Andrew Wells, which included Smith's comment. He was asked whether Wells intended to publicize the comment. He replied, "I don't know whether that's right or not

[1] "T" refers to the transcript of the December 5, 2022, hearing. It is followed by the referenced page and line numbers.

because I don't know anything about Facebook." T 79:24-25. He acknowledged that, in determining that termination was appropriate, he did not take into consideration whether Smith's comment was made public by a third-party and not by Smith.

For appellant

Rome Smith was employed by the Department for approximately twenty-seven years and was a senior juvenile detention officer when he was terminated.

Smith has been friends with Jeff French since high school, which was over thirty years ago. French, like Smith, resided in Cumberland County. They interacted often via Facebook and discussed "every day, friend things" such as sports and politics, and they also joked with each other. T 91:15. Their views on politics and other matters differed, and they "agree[d] to disagree on some things." T 91:17-18. Despite this, they did not argue about politics online. Rather they just exchanged in a "back and forth." T 91:23.

Because French and Smith were Facebook friends, French's posts were shared on Smith's timeline. He disapproved of French's August 13, 2020, Facebook post. He acknowledged that his response to French's post was "very harsh and inconsiderate" and he "very much" regretted having made the comment. T 93:16-18. When French replied that the comment was "rude and disgusting," Smith responded that he agreed. T 94:1. Smith explained that while the murder of the child was in fact, "truly sad" and that he hopes "justice prevails in that incident," there is no relationship between George Floyd's death and the lack of media coverage of the child's murder. T 94:10-14.

Smith understood that his comment to French was visible to only French and French's friends. He had no reason to believe that it would be shared publicly, and he does not know Andrew Wells, the person who shared it publicly. He noted that Wells did not post any of Smith's subsequent posts or comments, in which he attempted to clarify his point and noted that his initial statement was inappropriate. After the initial post was made public, he received death threats in the mail and via phone. He changed his phone number and deactivated his Facebook page.

The day after the incident, Smith was directed to report to the county jail and to write a report. In his report, he acknowledged that his comment was written hastily, and that it was offensive. He also apologized. J-4. Deputy Warden Charles Warren told appellant that the county did not have a social media policy.

On cross-examination, Smith acknowledged that he was a law enforcement officer and that he worked with juveniles who were involved in the juvenile justice system. He clarified that his son, who shares his name, also received threats via his social media accounts. Their personal information was posted on social media, and he feared for their safety. He also reiterated that he made the Facebook post issue "hastily . . . [w]ithout thinking about the ramifications" and he accepted responsibility for having made the statement. T 108:20-24. Smith also acknowledged that he understood that a screenshot could be taken of social media pages and shared with others.

ADDITIONAL FACTUAL FINDINGS

It is the obligation of the fact finder to weigh the credibility of the witnesses before making a decision. Credibility is the value that a fact finder gives to a witness' testimony. Credibility is best described as that quality of testimony or evidence that makes it worthy of belief. "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Estate of Perrone, 5 N.J. 514, 522 (1950). To assess credibility, the fact finder should consider the witness' interest in the outcome, motive, or bias. A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). In addition to considering each witness' interest in the outcome of the matter, I observed their demeanor, tone, and physical actions. I also considered the accuracy of their recollection; their ability to know and recall relevant facts and information; the reasonableness of their testimony; their demeanor, willingness, or reluctance to testify; their candor or evasiveness; any inconsistent or contradictory statements; and the inherent believability of their testimony.

I had the ability to observe the demeanor, tone and physical actions of appellant and the other witnesses during the hearing. Smith's demeanor during his testimony was pleasant and conveyed sincerity. He testified clearly, directly and consistently. I find his testimony to be credible. Surrency and Atkinson testified clearly and professionally. They acknowledged when they did not possess relevant information. Surrency had little in the way of firsthand knowledge of the facts at issue. Atkinson acknowledged that he did not understand how Facebook functioned. I find both witness' testimony to be credible.

ADDITIONAL FINDINGS OF FACT

Based upon the testimonial and documentary evidence, and having had the opportunity to observe the appearance and demeanor of the witnesses, I **FIND** the following as **FACT**:

Smith wrote the comment at issue in his capacity as a private citizen, not in his capacity as a law enforcement officer. He did not intend for his comment to be viewed publicly. However, he knew that French's Facebook friends were able to see what he posted in response to French's post. He understood that anyone with access to his comment could record it by taking a screenshot of the Facebook page. He also understood that screenshots can be disseminated via social media, text messages and other methods. However, his employer neither had a policy nor offered training concerning the use of social media.

I further **FIND** as **FACT** that a third party, whom Smith does not know, publicized his comment and called for other members of the public to agitate in favor of Smith's discipline. While Smith was upset that the murder of George Floyd appeared to have been diminished in the original post, he acknowledged, within the subsequent Facebook dialogue, that his response was "rude" and "disgusting" and agreed that a child should never be harmed. The third party did not include any of the subsequent discussion or Smith's acknowledgements when he publicly posted Smith's original comment and called for the public to widely disseminate it.

I further **FIND** as **FACT** that Smith's comment was written in the context of a complaint about the public attention paid to the murder of George Floyd. It was thus borne out of the racial tension associated with the murder. Although he attempted to clarify his intent, his original statement was incendiary, crass and inappropriate, as it harshly dismissed the import of a criminal act against a child and used profanity toward his audience.

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to N.J.S.A. 11A:1-12.6, governs a civil service employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2 2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). 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 (1958); Loew v. Union Beach, 56 N.J Super. 93,104 (App. Div. 1959). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933).

First Amendment Protection

Appellant argues that his discharge constitutes a violation of the First Amendment of the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceable to assemble, and to petition the government for a redress of grievances.

In Pickering v. Board of Education, 391 U.S. 593 (1968), the U.S. Supreme Court noted that a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment. Id. at 568. However, the Court also recognized that the State's interests as an employer in regulating its employees' speech differs significantly from its regulation of citizen speech. Id. The goal is to balance the interests of the employee, as a citizen, in commenting on matters of public concern, with the State's interest, as an employer, in promoting the efficiency of its public services. Id.

In Garcetti v. Ceballos, 547 U.S. 410 (2006), the Court found that the controlling factor in determining if speech is a matter of public concern is whether it is made pursuant to the employee's official duties. Id. at 421. When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their speech from employer discipline. Id. at 421. In Lane v. Franks, 573 U.S. 228 (2014) the Court distinguished speech based on information acquired during one's public employment from speech made pursuant to carrying out official employment duties. Id. at 239. Thus, the critical question under Garcetti is whether the speech at issue is ordinarily within the scope of an employee's duties, not whether it merely concerns those duties. Id. at 240.

If an employee speaks as a citizen on a matter of public concern, then the possibility of a First Amendment claim arises. Garcetti, 547 U.S. at 418. The question is

whether the relevant government entity had adequate justification for treating the employee differently from other members of the general public, based on a balancing of both employee and employer interests. The Court noted that employers may restrict employee speech if it has the potential to affect employer operations: "[a] government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." Ibid.

Here, it is undisputed that Smith made the comments at issue in his capacity as a private citizen. His job duties were unrelated to the public events that were the subject of his comments. Further, it is undisputed that the subjects of his comments were matters of public concern: the murder of George Floyd, which received international attention and was the subject of widespread protest and debate, and the murder of a young child.

With respect to respondent's interest, as an employer, in regulating Smith's speech, it is clear that his status as a law enforcement officer subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1980). Law enforcement officers represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Our courts have clearly held that maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967).

The Appellate Division recently underscored the relevance and import of the private behavior of law enforcement personnel:

> "There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of City of Newark v. Gaines, 309 N.J. Super. 327, 334, 707 A.2d 165 (App. Div. 1998). N.J.A.C. 4A:2-2.3 provides for employee discipline for both "conduct unbecoming a public employee" and "other sufficient

> cause." The regulation applies to discipline off-duty behavior or speech. See Karins v. City of Atlantic City, 152 N.J. 532, 543, 546, 706 A.2d 706 (1998). Police officials are held to a higher standard of conduct than other public employees, and a finding of misconduct by an officer need not be predicated on the violation of a departmental rule or regulation. In re Phillips, 117 N.J. 567, 576, 569 A.2d 807 (1990). Officers are "constantly called upon to exercise tact, restraint and good judgment in [their] relationship with the public." Ibid. (quoting Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560, 566, 215 A.2d 775 (App. Div. 1965), certif. denied, 47 N.J. 80, 219 A.2d 417 (1966)).
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> [In re Chirichello, 2023 N.J. Super. Unpub. LEXIS 101, *8-9 (App. Div. January 25, 2023).][2]

Smith argues that any disruption that respondent experienced as a result of his speech was "inadvertent" as he made his comments in a private forum and he "could not foresee that someone would take a screen shot of his remarks and post them publicly to the world at large." App. Brf. at 13. He thus argues, "[t]o the extent [respondent's] operations were disrupted, the disruption was not directly caused by [his] online comments, but rather by Andrew Wells' decision to re-post his comments and share them out of the context of the overall discussion with the public at large." Ibid. Respondent contends that, given the training it provided to Smith, he "had advanced warning about ill-advised conduct and communication." Resp. Brf. at 3. His actions, notwithstanding his training, "created a security concern" that was demonstrated by the "intensity and the volume of the public response."[3] Ibid.

The Civil Service Commission has addressed the misuse of social media by law enforcement officers, including correctional police officers. In In the Matter of Samantha Chirichello, Edna Mahan Correctional Facility, CSR 02414-21, modified, 2021 N.J. AGEN LEXIS 346 (Comm'r, October 6, 2021), a senior correctional officer was removed from

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[2] Unpublished and administrative decisions are not binding. They are referenced here because they provide relevant guidance.

[3] In support of this argument, respondent references its development of a "policy governing Social Media Use and Harassment and Computer Acceptable Use." Id. at 4. Respondent did not offer the policy as an exhibit and did not provide the date it was promulgated; however, it was clearly promulgated after the issuance of the FNDA in this matter. Similarly, respondent referenced changes to the law governing requirements for law enforcement personnel that were made after the FNDA was issued. Ibid. As these documents are not in the record for this matter, nor were they in effect during the times relevant to this matter, they are not material to this analysis.

her position due to the manner in which she used social media to express her opinion about multiple issues of public concern. The Commission explained the impact of such practices:

> [S]he reposted and made many offensive and inflammatory comments and posts about those supporting defunding the police, those receiving public assistance, criminals, rioters, George Floyd's criminal history and one with confederate flags on her public Facebook page. . . . [R]egardless of her intent in making the posts, [her] posts expose and tie [her], her employment and the sentiment reflected in the posts, to which she added no comment or context, for countless people to see. The Commission agrees that any viewer not familiar with the appellant or her personal views on the sentiment or intention in posting could reasonably presume that the sentiment expressed in the posts were a good measure of her ability to treat the people she serves in a fair and impartial manner. Cleary, the appellant's behavior in making these multiple posts could adversely affect the more and safety of the facility and undermine the public respect in the services provided.
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> [2021 N.J. AGEN LEXIS 346 at *9.]

The Appellate Division sustained the Commission's determination that removal was the appropriate sanction, noting that appellant's posts were "inappropriate, inflammatory, and discriminatory, and fell short of the high standards required of her office." In re Chirichello, 2023 N.J. Super. Unpub. LEXIS at *9. The court added that the Commission's conclusion about the impact of the posts upon the safety of the correctional facility and the public's respect for it "underscores the gravity of appellant's misconduct and reasonableness of the discipline imposed." Id. at *10.

In In the Matter of Douglas Burkholder, South Woods State Prison, Department of Corrections, 2021 N.J. AGEN LEXIS 600 (Initial Decision, May 25, 2021), aff'd, Comm'r, 2021 N.J. AGEN LEXIS 215 (Final Decision, July 2, 2021). Burkholder, a senior correctional police officer for over twenty-three years, wrote a Facebook post in which he complained about "black people beating up mostly white" people and threatening violence in response. 2021 N.J. AGEN LEXIS 600 at *3. He was not working when he wrote the post and used his personal computer. A coworker became aware of the post and reported

it to their employer. His employer sought to remove him from his position. The ALJ found that Burkholder demonstrated a "lack of judgment and understanding of the sensitive nature of his position and his responsibility to uphold the public trust. [His] act of posting a racially offensive and inflammatory comment knowing it could be read by his Facebook friends, who were [Department of Correction] employees, and viewed by members of the public, including inmates [at the prison where he worked], was sufficiently egregious to serve as the basis for the respondent to pursue disciplinary charges[.]" Id. at 10. Further, the Facebook post "impacted his workplace by creating a perception that [he] holds racially derogatory views and may be incapable of impartially fulfilling his duties." Ibid.

It is well established that respondent has a substantial and legitimate interest in maintaining order, decorum and professionalism among its staff and in preserving the public's trust. It must strive to demonstrate to the public that it performs its functions fairly and justly, without bias and animus, and, in turn, addresses wrongdoing by its employees. Smith's post, while addressing issues of public concern, was incendiary, callous and derogatory. He demonstrated a lack of judgment, with respect to both the impact his post would have and the fact that it could easily be distributed publicly. He further demonstrated a failed understanding of his obligation to comport himself in a manner that would help preserve the public's trust and respect in the institution he served. For these reasons, I **CONCLUDE** that respondent's interest outweighs appellant's and, thus, that respondent could properly impose discipline in response to appellant's speech.

Disciplinary Charges

Conduct Unbecoming a Public Officer

Appellant was charged with violating N.J.A.C. 4A:2-2.3(a)(6), "conduct unbecoming a public employee," which is an elastic phrase which encompasses conduct that adversely affects the morale or efficiency of a governmental unit, or that tends to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. at 554; 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, 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)).

Here, as discussed above, Smith's post was inappropriate, insensitive, crass and derogatory. That he believed it would be viewed by only the friends of his friend is of no moment, as the size of his audience does not diminish the impropriety of the statement. However, he knew that the post could easily be disseminated and discussed. Moreover, although there was not a social media policy, he clearly violated the implicit standard of good behavior to which he and his colleagues must abide. I therefore **CONCLUDE** that that the appointing authority has demonstrated by a preponderance of the competent, relevant, and credible evidence that appellant violated this regulation. Accordingly, I **CONCLUDE** that the charge of a violation of N.J.A.C. 4A:2-2.3(a)(6) (conduct unbecoming a public employee) must be and is hereby **AFFIRMED**.

Other sufficient cause

Appellant has also been charged with a violation of N.J.A.C. 4A:2-2.3(a)(12) (other sufficient cause). Because respondent withdrew the charge that he violated Cumberland County Policy 4.11, and no other basis for this charge has been provided, this charge is based upon the same facts as presented for the prior charge. I **CONCLUDE** that the appointing authority has not demonstrated by a preponderance of the competent, relevant, and credible evidence that appellant committed a separate violation. Accordingly, I **CONCLUDE** that the charge of a violation of N.J.A.C. 4A:2-2.3(a)(12) (other sufficient cause) must be and is hereby **REVERSED**.

Penalty

A civil service employee who commits a wrongful act related to his duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-

2.2, -2.3(a). This requires a de novo review of appellant's disciplinary action. 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., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). Thus, "consideration of past record is inherently relevant" in a disciplinary proceeding. West New York v. Bock, 38 N.J. 522. An employee's "past record" includes the "reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Id., 38 N.J. at 523–24.

Notwithstanding the general principal of progressive discipline, the New Jersey Supreme Court explained that some offenses may warrant severe discipline notwithstanding limited or no prior disciplinary history:

> [T]hat is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when . . . the misconduct is severe, when it 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.
>
> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property.
>
> [In re Herrmann, 192 N.J. 19, 33 (2007).]

Consideration must also be given to the purpose of the civil service laws, which "are designed to promote efficient public service, not to benefit errant employees . . . The welfare of the people as a whole, and not exclusively the welfare of the civil servant, is the basic policy underlining the statutory scheme." State Operated School District v.

Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). "The overriding concern in assessing the propriety of the penalty is the public good." George v. North Princeton Developmental Center, 96 N.J.A.R. 2d. (CSV) at 465.

Mitigation can be appropriate when a law enforcement officer has made inappropriate public statements. In Chirichello, the Commission noted that a penalty other than removal could be appropriate, if sufficient mitigating factors are present. For example, if Chirichello had "a lengthy and relatively unblemished record of service," a penalty other than removal could have been appropriate. In the Matter of Samantha Chirichello, 2021 N.J. AGEN LEXIS 346 at *4–5.

Mitigating circumstances were found in Burkholder. The ALJ found that mitigating circumstances compelled a reduction in the penalty from removal to a 180-day suspension. The officer had an "unremarkable" disciplinary record, which consisted of three prior minor disciplines for time and attendance, and this was his "first allegation of discriminatory conduct toward members of protected classes who worked for the [Department] or who were incarcerated within its facilities." 2021 N.J. AGEN LEXIS 600 at *16. Also, there was neither a policy nor training concerning social media use. Further, he "committed one act, while at home on a personal computer[,]" and "accepted responsibility and submits to major discipline." Id. at 17. The ALJ thus imposed a 180-day suspension without pay, conditioned upon his successful completion of diversity and tolerance training and a fitness for duty psychological examination. The Commission affirmed the ALJ's penalty.

Here, appellant's disciplinary history documents that he was disciplined eleven times, between November 28, 1994, and January 11, 2013, prior to the proposed discipline at issue. The infractions and disciplines are summarized as follows:

- November 28, 1994 — Failure to secure resident's room; formal written reprimand.
- December 6, 1995 — Conduct unbecoming a public employee; three-day suspension.

• February 23, 1999	Insubordination; three-day suspension.
• June 8, 1999	Incompetency, insufficiency or failure to perform duties; one-day suspension.
• August 29, 2000	Discrimination, conduct unbecoming a public employee; demotion from senior juvenile detention officer to juvenile detention officer.
• August 6, 2002	Insubordination; one-day suspension.
• December 22, 2006	Conduct unbecoming a public employee; five-day suspension.
• December 16, 2008	Chronic absenteeism or lateness; one-day suspension.
• December 18, 2008	Other sufficient cause, fighting or creating a disturbance in the workplace; one-day suspension.
• January 13, 2011	Chronic and excessive absenteeism, County Policy 4.02(ii)c.1.
• January 11, 2013	Chronic absenteeism or lateness; written reprimand.

[OAL-1.]

Appellant has a rather lengthy disciplinary history. However, with the exception of his demotion in August 2000, none involved a major discipline. Moreover, he was subsequently promoted back to senior juvenile detention officer and was made permanent in the position. Further, he was last disciplined over ten years ago. As in Burkholder, his employer provided neither a policy nor training concerning social media use and he committed one inappropriate act, outside of the workplace. While he should have known that there was a risk that his comment would be disseminated, and that his entire discussion would not be shared, he clarified his intention and acknowledged his offensive comments, both on Facebook and during the hearing. Weighing the mitigating

and aggravating circumstances, including Smith's lack of any major discipline during his career, other than the demotion from which he recovered and giving due consideration to the concept of progressive discipline, I **CONCLUDE** that major discipline other than removal is warranted.

A six-month suspension without pay is the maximum alternative penalty. N.J.A.C. 4A:2-2.4. Accordingly, I **CONCLUDE** that a six-month penalty without pay is appropriate here and the penalty shall thus be **MODIFIED**. I also **FIND** and **CONCLUDE** that there is a reasonable basis for ordering that appellant shall also be required to complete an individualized training program about workplace and public demeanor, including use of social media.

Since the penalty has been modified, I **CONCLUDE** that appellant is entitled to back pay, benefits and seniority pursuant to N.J.A.C. 4A:2-2.10. I also **CONCLUDE** that appellant is not entitled to counsel fees. Pursuant to N.J.A.C. 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in 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, September 21, 1989). Here, while the penalty was modified and one set of charges was dismissed, the appointing authority has sustained the remaining charges and major discipline was imposed. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. See In the Matter of Bazyt Bergus (MSB, decided December 19, 2000), aff'd, Bazyt Bergus v. City of Newark, Docket No. A-3382-00T5 (App. Div. June 3, 2002); In the Matter of Mario Simmons (MSB, decided October 26, 1999). See also, In the Matter of Mario Simmons (MSB, October 26, 1999). See also, In the Matter of Kathleen Rhoads (MSB, decided September 10, 2002).

ORDER

I **ORDER** that the charges of conduct unbecoming a public employee, is **SUSTAINED**. I further **ORDER** the charges related to other sufficient cause is **DISMISSED**. I **ORDER** that the appointing authority's proposed penalty of removal is **MODIFIED** to a six-month unpaid suspension and satisfactory completion of individual training about workplace and public demeanor and use of social media. Since the penalty has been modified, I **ORDER** that appellant is entitled to back pay, benefits and seniority pursuant to N.J.A.C. 4A:2-2.10. I further **ORDER** that appellant is not entitled to counsel fees.

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.

March 23, 2023
DATE

JUDITH LIEBERMAN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

JL/jm

APPENDIX

WITNESSES

For appellant

Rome Smith

For respondent

Veronica Surrency

Craig Atkinson

EXHIBITS

OAL

OAL-1	Summary of appellant's disciplinary history

Joint

J-2	Post by French, with comments, August 13, 2020
J-3	Wells' post including screen shot of appellant's comment
J-4	Smith apology, August 19, 2020

For appellant

A-5	Hearing outcome report, September 15, 2020
A-8	Explanation of Facebook privacy settings

For respondent

R-1	Training log
R-4	Emails re "Cumberland County Response for Facebook Post"