

as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. See *N.J.S.A. 52:14B-10(c)*; *Cavalieri u. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). In the instant matter, the exceptions filed by the appellant are not persuasive in demonstrating that the ALJ's credibility determinations, or his findings and conclusions based on those determinations, were arbitrary, capricious or unreasonable. The appellant admitted to touching the pouch on a duty belt of one of the complainants and the touching of their backs which the ALJ found unnecessary, unwarranted, and unprofessional. Further, there were incidences where the appellant made "crude" and "crass" remarks or gestures to the complainants, who were his subordinate officers. These actions were supported by credible evidence.

Regarding the penalty, similar to its assessment of the charges, 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 determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. 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). The conduct is even more egregious when a supervisory law enforcement officer commits such an offense. In this regard, the Commission emphasizes that County Correctional Police Sergeants are supervisory law enforcement officers who, by the very nature of their job duties, are held to a higher standard of conduct than other public employees. See *Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied*, 47 *N.J.* 80 (1966). See also, *In re Phillips*, 117 *N.J.* 567 (1990). In this case, a review of the appellant's past disciplinary history is unnecessary since it is clear that the penalty of a 10 working day suspension and demotion is supportable for the appellant's egregious behavior. Additionally, if the appellant is reappointed from his layoff, he must undergo sexual harassment training. His actions fell short of what is expected of a County Correctional Police Sergeant, let alone an employee. Therefore, the Commission finds this penalty not shocking to one's conscious.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending and demoting P.S. was justified and dismisses his appeal. The Commission further orders that the appellant, if reappointed from his layoff, shall undergo sexual harassment training.

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
THE 12TH DAY OF JUNE, 2024

Allison Chris Myers

Allison Chris Myers
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 05222-21

AGENCY REF. NO.2021-1692

IN THE MATTER OF P [REDACTED] S [REDACTED],
UNION COUNTY, DEPARTMENT OF
CORRECTIONS.

Michael P. DeRose, Esq., for appellant, P [REDACTED] S [REDACTED] (Crivelli & Barbati,
attorneys),

Brian P. Trelease Esq, for respondent, Union County Department of
Corrections (Rainone, Coughlin and Mincho, attorneys)

Record Closed: February 2, 2024

Decided: May 3, 2024

BEFORE **ERNEST M. BONGIOVANNI, ALJ:**

STATEMENT OF THE CASE

Appellant, P [REDACTED] S [REDACTED] (appellant/S [REDACTED]) challenges the Final Notice of Disciplinary Action (FNDA) of May 14, 2021 which determined that S [REDACTED] engaged in conduct unbecoming a public employee, discrimination that affects equal employment opportunity, N.J.A.C. 4A7.1.1, Other Sufficient cause, being violation of Union County's

Policy against Workplace Discrimination and Harassment, and Other Sufficient Cause, being Violation of Union County's Employee Handbook, warranting a ten-day suspension, and Demotion from his position as Sergeant to County Correction Officer.

The Civil Service Commission transmitted the contested case 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, where it was filed on June 15, 2021. Hearings were held on October 2, 3, 5 and 16, 2023. Transcripts were made and the parties given until February 2, 2024, to file written summations, at which time the record was closed. On March 19, 2024, owing to voluminous caseload, the time for filing an initial decision was extended until May 3, 2024. An extension of time to May 3, 2024, in which to issue the decision was obtained.

ISSUE PRESENTED

The issue in this case is whether there is sufficient credible evidence to sustain the charges of conduct unbecoming, N.J.A.C. 4A:2-2.3 (6), Discrimination that affects Equal Employment Opportunity, N.J.A.C. 4A7.1.1, N.J.A.C. 4A:2-2.3 (9), Other sufficient cause, Violation of County of Union's Policy against Workplace Discrimination and Harassment, and Violation of County of Union's Employee Handbook, N.J.A.C. 4A:2-2.3 (11), and if sustained, whether a penalty of a ten days suspension and demotion from Sergeant to Corrections Officer was appropriate.

SUMMARY OF RELEVANT TESTIMONY

The Respondent's Case

C [REDACTED] D [REDACTED] (Ms. D [REDACTED])

Ms. D [REDACTED] worked as a Corrections officer at the Union County Correctional Facility (Union Jail/jail) in 2019 and 2020. D [REDACTED] offered to testify, as she had quit working for Union County (for reasons unrelated to S [REDACTED]). From early September, 2019 to

late October S█████ was her direct supervisor. They worked the 4 to 12 shift along with Probationary Corrections Officer G████ L█████ on 10A pod within the facility. Their job was the "safety and security of all inmates and staff involved." Among other things, as described by D████, would count the inmates check that any possible items that could be weaponized such as barber tools were accounted for, do security checks on rooms to check for contraband, escort inmates, e.g. to medical facilities. S█████ was her and L█████' direct supervisor. As a sergeant, S█████ was responsible for conducting tours two or three times per shift. He would also assist when calls for assistance were made and receive reports of the Corrections Officers movements (lunch, other breaks).

Not long after D████ began working on 10A Pod, she had a series of disturbing interactions with S█████. As detailed in an Operations report, dated October 29, 2019 (R-1), she complained that since her starting at 10A Pod on September 11, 2019, S█████ made inappropriate comments to her and "invaded her private space." More specifically, he referred to his knowledge that she previously worked in juvenile (she worked at the Union juvenile detention facility from 2016-2019 as a corrections officer then as a Seargent until that facility closed in February 2019). S█████ referenced a former coworker of hers there who now worked at the jail on the 2nd floor and was a "transgender faggot." S█████ discussed a female Officer C█████ who got transferred to light duty when she became pregnant, but was not required to return back to normal duty wince returning. He told D████ that "pretty girls here get taken care of." He said at the Jail. "[I]t all depends on who you know or who [you] are with;" that D████ "could be his friend, coworker, or I could have a long career". In addition to in those earlier inappropriate comments, and as further detailed in her testimony, on one occasion, while on the platform, with L█████, S█████ accessed the platform and inappropriately grabbed onto D████'s utility belt, situated on her waist with one hand and simultaneously "caressed" her lower back with the other. In response, she said "What?" and backed up a little bit. She said L█████ witnessed this. On another occasion, D████ also witnessed S█████ inappropriately touch Officer L█████' back. He would come on to the platform where L█████ and D████ were seated and stand behind them for no apparent reason

despite the platform (used primarily to operate the mechanical opening of cellmates' doors) being a tight fit.

Further, S█████ commented about a rape prevention training D█████ and L█████ advised him they had just seen, and which featured an audio of a rape by saying that "[S]ome girls like that shit, come on, you and your man never get rough[?]" S█████ told D█████ if she wasn't engaged, he would buy her dinner "but I don't know how your man would feel about that."

D█████ also testified that S█████ had at one point stopped talking to her partner L█████ and would only visit 10A Pod when D█████ was alone. She and L█████ had different days off and S█████ had knowledge of when L█████ was taking breaks such as being in the basement floor. She testified that S█████ comments about D█████'s career was a direct threat that she had to play his "game" or else it could "become a problem." His other comments were "disgusting," unprofessional, and made her feel either uncomfortable or very uncomfortable. She was also made uncomfortable as he unnecessarily got too close to her and made unwanted physical advances e.g. grabbing her belt and caressing her lower back, and touching L█████'s back. He made the "atrocious" comment about rape after D█████ and L█████ had just been through a four-hour training seminar and made to listen to an audio depicting rape. He suggested he buy her dinner although knowing D█████ was engaged. She was made aware by L█████ of several attempts of S█████ to date L█████.

On October 27, 2019, S█████ observed D█████ eating sunflower seeds and putting the shells in an envelope and taping the envelope shut. S█████ asked why she was doing that and D█████ replied her father was a printer and told her not to lick envelopes because you didn't know what was in the glue. S█████ replied, "Come on you never licked anything that piss came out of [?]"

L█████ and D█████ met soon thereafter and D█████ discussed in detail with L█████, they agreed they had enough and would both report to S█████. That sunflower

seeds/licking envelope incident, D■■ said, served as the catalyst that caused her to complain (and L■■) to complain of S■■' conduct. D■■ first reported S■■ to PBA President Ross. He gave her a form operations report and told her to put these events in writing. She did so and handed the report to Ross. Ross told her not to talk about these complaints to anyone, until they told her what specific steps to take. As a result, she met with "S■■," the county's affirmative action officer. She was told that pending further investigation, she would work at a different pod under a different supervisor, and she did so.

On October 27, 2019, S■■ observed D■■ eating sunflower seeds and putting the shells in an envelope and taping the envelope shut. S■■ asked why she was doing that and D■■ replied her father was a printer and told her not to lick envelopes because you didn't know what was in the glue. S■■ replied, "Come on you never licked anything that piss came out of [?]" L■■ and D■■ met soon thereafter and D■■ discussed in detail with L■■, they agreed they had enough and would both report to S■■.

D■■ said that S■■' conduct was so inappropriate, atrocious and disgusting, that she voluntarily testified. She thought S■■ should not be a supervisor or wear the uniform of the Department of Corrections or as a law enforcement official of any kind. She concluded that in her opinion S■■ was "a poor excuse for a human being."

On cross examination and redirect, D■■ characterized S■■ as having "grabbed" her belt rather than a "touch." She also denied that the area he grabbed on the belt held her Narcan supply, and reiterated it was at the glove pouch. She did not remember S■■ saying anything about Narcan, but she didn't believe so. Just prior to the grabbing incident she rose up "To try to get off the panel; because he was coming up to it, and there's no reason for him to be on the panel." She said she did not remember saying in response to S■■ grabbing her belt and caressing her back "Bro, what the F are you doing?" She also agreed with the calculation that all the events she

claimed occurred must have been over a period of 14 days, as she and S [REDACTED] only worked at the same time, Saturdays and Sundays, between the time they were both in 10A Pod, September 11 through October 27, 2019. She did not solicit S [REDACTED]' comments about other people like C [REDACTED] or her friend on the second floor. She did not believe S [REDACTED]' coming on the panel when L [REDACTED] was not on 1-A Pod was coincidental. "After in my opinion he made a pass at L [REDACTED] and L [REDACTED] put him in his place, I was the next person he was going to try that to."

G [REDACTED] L [REDACTED] (L [REDACTED])

Corrections Officer G [REDACTED] L [REDACTED] began working for the County of Union Sheriff's Department in May, 2019. She was a "probationary" officer until completing the Police Academy in March 2020. She worked at the Jail and was assigned Pod 10A where her partner was C [REDACTED] D [REDACTED], beginning in September 2019. She knew D [REDACTED] from training together, being hired on the same date, working 10A Pod in 2019-2020 and have remained friends even after working at different locations. She identified the Panel in 10A as a small two step up platform. Two seats are placed on opposite sides of the panel so that each side of the area can be patrolled simultaneously. When three people are on the panel, it's tight and the officers might be too close to each other. She described S [REDACTED], in part, as "touchy."

Although initially, things with S [REDACTED] as her supervisor were fine, within the short span of the time they worked together, he made her feel uncomfortable. He had asked her to go out for a date or some food and she politely said no she was fine. Soon after, when he was sitting on one of the chairs on the panel S [REDACTED] invited her by gesturing to sit on his lap. On another day, while she was standing, he put his hand on her back and rubbed downward. Later that day in the recreation area he again asked her to go on a date.

L [REDACTED] recounted the same incidents as D [REDACTED] regarding the discussion about the rape prevention training and video and S [REDACTED]' remark that females "like stuff like that "

and "don't you get rough with your man?" She began thinking the situation with S [REDACTED] was "too much." She observed S [REDACTED] "touch [D [REDACTED]] on the front of her duty belt." S [REDACTED] asked her out several times. After she rejected S [REDACTED] firmly saying "hey you know like I don't know you, don't touch me, none of that," S [REDACTED] refused speaking to her at all and only spoke to D [REDACTED].

After complaining about S [REDACTED], L [REDACTED] met with Affirmative Action Officer S [REDACTED] M [REDACTED] who told her to write a report, which she did, on October 30, 2020, (R-2) and which recounted the aforesaid events in almost exactly the same terms as her direct testimony. The report noted that she finally decided to make a complaint when D [REDACTED] told her about the sunflower seeds/envelope incident.

L [REDACTED] further testified she didn't think it appropriate for a supervisor to ask a subordinate for a date, that it was inappropriate and made her feel uncomfortable. Regarding S [REDACTED] touching D [REDACTED]'s utility belt, she did not see any reason S [REDACTED] did that, and did not recall S [REDACTED] saying anything about D [REDACTED]'s Narcan supply in her utility belt. She felt "disgusted" by his comments about rape, and rough sex. She explained that S [REDACTED] was "touchy" in that when talking to her he would "put his hand on you" and "touch your arm," although the only specific instance she described was when they were on the panel together and he touched her lower back. She noted that she had gone to the basement, then S [REDACTED] arrived and made the inappropriate remarks during the sunflower seeds/envelope incident. She had noted D [REDACTED] eating the sunflower seeds before she left and when she came back, she immediately noticed how really upset D [REDACTED] was. She noted it "wasn't the first time that I like went to the basement and I came back, and she was upset about something that happened." She surmised that since she had to report when she was leaving for the basement, he could be with D [REDACTED] without her (L [REDACTED]) seeing anything.

L [REDACTED] noted that she is still employed at the Jail, and that if S [REDACTED] were to return to that facility¹, she would feel uncomfortable.

In cross examination, L [REDACTED], like D [REDACTED], was told to write only the essential details about the incidents she complained of. She admitted that except for October 27, 2019, the only dates she specified in the reports were the beginning and end dates of her working with S [REDACTED], Sept 9 and October 30, 2019, and thought she had been specific in giving the correct time frame of all the incidents. She said that although S [REDACTED] asked her to join him for a lunch in his office, she said no, and that although she offered him some chicken salad, she did the same with D [REDACTED] and another girl R [REDACTED]

In explaining that she herself had no prior disciplinary record, when challenged that S [REDACTED] had given her a verbal counseling, she said at different points, she had not recollection or no knowledge of that or "it didn't happen." Regarding S [REDACTED]' touching D [REDACTED]'s back, at the same time he grabbed her utility belt, she said she could not see what was going on behind D [REDACTED] because D [REDACTED] and S [REDACTED] were in front of her. Although she said there really was no reason for S [REDACTED] to be on the panel when she and D [REDACTED] were on it, she admitted S [REDACTED] would access the panel to use the phone but that most of the sergeants who use the phone use it from the floor and don't physically step up to the panel.

S [REDACTED] M [REDACTED] (M [REDACTED])

M [REDACTED] is a 30-year veteran with Union County and since 2018 has been the County's Affirmative Action Officer. Her duties include investigating allegations of harassment, discrimination "and any other County Policy what might have, workplace violence" in order to make a determination as to whether it rises to the level of violations of the county's policies. She had done approximately 60 investigations before S [REDACTED]. She followed her usual procedure after interviewing, the complainant first, identified witnesses next and finally the target of the investigation, she would write a report with recommendations.to the Director of the Department of Corrections.

¹ After S [REDACTED] was demoted, he was at a point laid off and has not been able to work for the County as a Sheriff's officer since.

Regarding S█████, M█████' s memo report to the Director made a finding that S█████ violated the County's anti-harassment policies. She first interviewed D█████ whom she found to be "credible", by not refusing to answer certain questions recalling events clearly and without hesitation and providing reasonable explanations -she was new and didn't want to be perceived as "problem employee" -for not reporting S█████ earlier. She found L█████ to be "honest" and "truthful." L█████ spoke to her in a matter-of-fact manner, showed concern for Officer D█████, and was strong but not superficially emotional on the surface. She was credible and again not evasive. M█████ testified that she thought D█████ and L█████ made their complaints about S█████ without any indication of malice or retaliation. In fact, she remembered D█████ in particular saying she did not want S█████ fired and that he just needed someone to talk to him to get him to stop.

Under cross examination, it was pointed out that at least two of the statements made by D█████ and L█████ as described in their testimony differed to the information, they supplied to M█████ at least as M█████ described it in her report. One, that the incident where S█████ supposedly caressed D█████'s lower back at the same time he grabbed her utility belt were two different occasions, not one occasion as stated by D█████ and two, when S█████ grabbed the utility belt, she told M█████ she said, "bro what the F are you doing," whereas D█████ testified she just said "what?" and L█████ did not recall D█████ saying anything. Also, when M█████ was told that D█████ testified that S█████ was a poor excuse for a human being and was asked if D█████ said that during her interview with her would she have the same opinion (as to her ack of malice and retaliation) she replied, "Probably not." M█████ also said S█████ statement that another female (C█████) officer had been transferred to another duty (a form of promotion) because she had gotten pregnant but that after the baby, she still hadn't been, to her old (presumably more demanding job) was not, as alleged by D█████ to be an inappropriate and did not constitute a violation of the anti-harassment policies.

On redirect, M█████ noted that many victims of sexual harassment will not when initially interviewed remember specific dates and times of incidents, just as D████ and L████ did not. She stated the reason is usually "they are not looking to file a complaint; It is usually because things have progressed and added up to a problem," (that such details as dates would be remembered).

M█████ also testified that she spoke to a Sergeant H████ who had previously spoken to D████ and L████ about their allegations. M█████ described his evidence as being mostly about "rumors" concerning S█████. She found him to be evasive in not giving any details. While credible, she thought he was hiding the truth about his knowledge of the details of the rumors and who made them. She therefore disregarded his information as irrelevant.

She finally interviewed the target S█████. She explained that she had previously counseled S█████ on a harassment allegation, where the facts were "substantiated", but his actions had not risen to the level of a violation of policy. In that incident a female employee of the Prosecutor's office had been trying to move through security and after saving put her bag down to be inspected, S█████ tapped her cellphone that had been hanging from her back pocket. hanging from her. She complained that he could have told her she was not allowed to bring the phone in without touching it. S█████ had received M█████'s counseling that unnecessary touching of anything on someone would be inappropriate. This incident, which occurred a year earlier while S█████ was still a Corrections Officer, was raised by S█████ himself while interviewed by M█████, with S█████ reasoning, why would he inappropriately touch D████ and L████ when he been told only recently not to do such things. S█████ had expressed remorse for that incident.

As to these events which M█████ explained that D████ and L████ complained of, outright and complete denials that he denied each and every allegation they made. He made no attempt to explain why they would tell such stories if they weren't true. While she could not specifically recall all his responses specifically he denied a) touching

Officer L [REDACTED] on her back, b) saying that D [REDACTED]'s friend on the 2nd floor was "a transgender faggot" c) commenting that "pretty girls get taken care of here, it depends on who you know," d) that he said to D [REDACTED] "you can be my friend coworker and have a long career here" e) that he said to both L [REDACTED] and D [REDACTED], regarding rap that "some girls like that shit, you and your men never get rough" f) that he told D [REDACTED] "if you weren't engaged, I would buy you dinner but I don't know if your man would like it" g) regarding the sunflower seeds/envelope incident when D [REDACTED] said she didn't lick envelopes he replied "You never licked anything piss came from?", h) that he invited Officer L [REDACTED] to sit on his lap while he was in one of the to chairs on the platform i) that the incident with him touching D [REDACTED]'s utility belt "didn't happen." However, M [REDACTED] did not recall his response to the allegation by L [REDACTED] that he asked her out, although she assumed he denied it as that is the way he concluded the interview by denying all the allegations. She did not find him credible because she believed there had to be some truth to these numerous allegations so that S [REDACTED] could have suggested that something had been misconstrued or misunderstood but flat denials didn't seem credible. However, S [REDACTED] did volunteer that L [REDACTED] might have been motivated by the fact he gave her a verbal counseling when L [REDACTED] had been confrontational and questioned his authority by saying "you're a Sergeant, you do it." M [REDACTED] believed S [REDACTED] was setting up a defense by claiming that in fact L [REDACTED] was trying to intimidate him.

Captain R [REDACTED] C [REDACTED] (C [REDACTED] /Cpt.)

C [REDACTED] is a 29-year veteran of the Union County Department of Corrections. He is also in charge of the Divisions of Corrections, under the Sheriff, making him the highest-ranking Officer at the jail. He described the jail today as "just a processing unit...the booking and releasing aspects," and it does not house inmates. Once arrested an offender is processed and usually in a few hours is transported to Essex County or to Hudson County drug treatment program for residency. At the time he testified, there were fifty officers working there -37 corrections officers, 6 sergeants, five lieutenants, and 2 captains. There are currently three shifts, 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., and 11:00 p.m. to 7:00 a.m. There have been layoffs in recent

times and two eligible individuals are still left on the layoff list with one current available position.

C [REDACTED] presented pictures of the platform previously described by D [REDACTED] and L [REDACTED]. (R-14A and R 14B). He described it as "an elevated platform that gives the officer like a command position in the pods or housing unit of 10A." The officer of the day uses the panel to turn lights on and off to check smoke detectors, to open the cell doors either individually or all at once. The panel, about 6' long and 4' wide was designed to fit two chairs on the platform for the two officers assigned there. He said the sergeant of the shift is required to "make a round, looking for wear and tear, any sign of anything going on, address and problems from the inmates, address problems from the officers and sign the logbook." He said the Sergeant could enter the panel to sign the logbook, or he could sign it from the floor. With three people on the elevated platform, it would be a tight fit and to maneuver around each other without touching "you'd be dancing around each other."

C [REDACTED] explained that, at the time, the jail was under the Department of Corrections and Internal Affairs investigated criminal matters or "policy matters within the unit" but not harassment. That was why such complaints were the province of the affirmative action office. He explained that after the investigation is complete if the charges are sustained by the Affirmative Action officer, he would meet with the Director C [REDACTED] and possibly Ms. M [REDACTED] would weigh in and decide what disciplinary action should be taken. In this case they settled on bringing the charges as noted in the PDNA which both he and Director C [REDACTED] signed. From memory he recalled that the suspension was either for ten or fifteen days and "obviously a demotion."

C [REDACTED] thought the penalty was appropriate in part because S [REDACTED] had only been promoted recently and noted that presently "this is a time ...the most women we've ever seen in our facility wise." He expressed his concern that "if this is occurring and lets say it occurs again, who's going to answer that to , right me, or the director or the county itself [?]" He noted the kind of behavior exhibited by S [REDACTED], is "hammered

home to us regularly in training, this type of behavior, zero” He said the penalty was “normal” for this type of conduct, for escapes, for failure to supervise, a hefty suspension, demotion or both.” He noted his familiarity with D■■■■’s experience both as a sergeant in juvenile and as a corrections officer at the jail, and L■■■■’s experience as well, describing them as “good” and “fine” employees. He believed neither of them to be untruthful but instead “forthcoming.”

On cross examination, C■■■■ said it would not be uncommon if there were three people on the platform at once there could be some incidental touching. C■■■■ noted that between January 2020 when the M■■■■ investigation was completed and May 2021, when the FNDA was issued, S■■■■ remained in his position as Seargent at the jail. No charges or any other complaints were made against S■■■■ during that time.

The Appellant’s Case

F■■ S■■■ (S■■■)

Former Seargent S■■■■ first testified about his background, currently he is a long shoreman working for APM Terminals and immediately prior to that worked as for Union local 472 as an operating engineer/traffic coordinator. Prior to that he worked for nine years 11 months for the Union County Department of Correction (DOC). That ended with a lay off on June 30, 2021, for which he has not yet been rehired. He’s been married for 23 years, and the couple have an adult son. S■■■■ was a Corporal in the U.S. Marine Corp from 1998 to 2006 and was deployed overseas on September 16, 2001. He received at least three medals for good conduct for his work during Operation Enduring Freedom.

While he had no prior law enforcement experience when hired by the DOC in July 2020, he advanced to a promotion as Sergeant in May of 2019. He described his duties as ensuring that the 10A Administrative Code were adhered to, also to ensure the safety and orderly running of the installation. He was required to know all the

policies and procedures of the installation, make sure that the officers were aware of any policy changes, and “especially make sure that nobody’s civil rights were being violated...[.]”

As a direct supervisor he was to maintain that orderly running by all officers all the way down to the inmates. One aspect of that part of his job was taking corrective action with respect to subordinates. One such action was counseling which could either be verbal which would not go into that subordinate’s file, and another would be a written counseling which would go into the file.

He recalled being D■■■■’s director supervisor for “roughly 8 or 9 weeks” beginning September 2019. He recalled she came from a midnight post where she had no direct supervision and inmates were always locked in their cells. He also recalled working as L■■■■’ direct supervisor for that time. S■■■■ recalled that at first his relationship with D■■■ and L■■■ very professional, but that “people start getting comfortable...things start getting lax, a lot of things you know are not taken as serious...[.]” D■■■ and L■■■ were “still a little green” coming from different experience than at the jail, where they expected to watch and care for 96 inmates who were typically maximum custody.

As S■■■■ worked a 3-11 shift, his time lapsed between the 8:00 a.m.- 4:00, p.m. and 4:00 p.m.- midnight shifts. The floor L■■■ and D■■■ worked on was just one of three floors that S■■■■ supervised, and overall, he was supervising about ten or twelve officers. Another way he described or summarized his duties was to ensure “the basic orderly running of a housing unit...to ensure that the policies were being kept.” As to his presence on the panel on 10A Pod there were “absolutely” reasons for him to be there. He listed ensuring the panel functioned correctly, what there wasn’t contraband laying around like pencils or pens the inmates could access while walking around the panel. Typically, both officers would be on the panel 90% of the time. It was important to know that prisoners would reach for items of personal effects that might be left on the panel. In the rare events if he saw both officers off the panels tending to other matters, he would try to be on it.

With D█ and L█, S█ would have work related discussions on or near the panel. S█ thought it important that the inmates not pick up on their conversations so he would “stand close to the officer and speak in a very low monotone.” At the panel, you would have to be aware that sometimes inmates might be walking behind you and S█ felt vulnerable if signing the logbook from the floor. However, about 60% of the time he signed if from the floor rather than accessing the panel. He continued that sometimes it was important to work from the panel. Aside from it having the best vantage point of the entire unit, it was the “best location to portray any type of authority” to the inmates.

Regarding the many allegations made by D█ and L█, S█ offered flat denials of the existence for some of them and possible explanations or alternate versions of the facts regarding some others. Regarding D█’s utility belt, Simones said he “grabbed” her belt to call her attention having her Narcan pouch (Narcan had only recently been issued to all officers to deal with possible overdoses of narcotics that might occur) on the front of her belt instead of the belt alongside her. S█ said he noticed it when lockdown had ended around 4:00 p.m. D█ was standing in front of him and noticed the Narcan in the front, which he said is not the right position for it. “I grabbed it, I talked to her and said hey do me a favor, grab this Narcan pouch put it on your support side towards the back of your belt. He explained “I didn’t do it maliciously [meaning maliciously]. I was correcting an action that I believed needed to be on the spot.” He also said he grabbed the Narcan pouch, not the belt. He also said the glove pouch D█ wore was not on the front of the belt as she claimed, but on her support side. In any case, D█ complied and said “OK.” Finally, he explained that he simply denied the utility belt incident when he was interviewed by M█ because she had asked him if he touched her utility belt and caressed her back. He hadn’t realized the allegation concerned when he grabbed the Narcan pouch until D█ herself mentioned the Narcan during her testimony during the departmental hearing.²

² No transcript or findings of that hearing on this point were offered to show prior inconsistency. Nor was D█ asked in direct or cross about the Narcan pouch.

While firmly denying he caressed or touched her back inappropriately, he acknowledged he might have touched her back in making space between them while all three were on the panel. He explained "If I'm walking behind somebody I would place my hand on the small of their back and just kind of create space to walk alongside of them." S█████ definitely ruled out the possibility of any touching of the back between he and L█████ and he D█████ unless it was inadvertent. Again, in his interview with M█████ he didn't discuss possible inadvertent touching because M█████ presented the touching as inappropriate as being in a sensual or romantic way.

He admitted that in being on the panel with the two officers the two chairs and their personal belongings and desk chairs on it, he might have stood close to them but not to try to intimidate or harass them.

S█████ said D█████ initiated the conversation about her friend on the second floor, and denied that he called him a "transgender faggot." He also flatly denied making the statements that "pretty girls get taken care of" but regarding the statement that "[Y]ou can be my friend, co-worker or have a long career here", he admitted:

I'm not saying it's something I wouldn't say. I think I would probably try to give her the advice that in a facility like this or, you know in the corporate world, you got to be careful who you befriend, sometimes you need to burn a couple bridges in order to make, you know your way to the top...[,] You're going to see who your friends are and who they're not... That would be something I would say along those lines but word for word if that's what she claims I said I do not, you know, reflect saying something like that.

S█████ said D█████ and L█████ brought up the rape audio in a conversation "that was amongst themselves" while telling him about the rape prevention training, and merely sympathized recalling saying "[I]ts got to be tough for females to hear that shit."

As to offering to buying D■■ dinner, he claimed, "I think I offered all my subordinates to purchase them dinner," and "It's just a normal thing you do in that work environment or I think in any environment really." He said it was a way of building rapport. He didn't even know she was engaged at the time, and he didn't ask her out for romantic reasons.

Regarding the sunflower seeds, S■■ said he was walking from one side of the panel to another, and he noticed D■■ "just sitting there going away with a roll of scotch tape taping an envelope...and I'm thinking to myself what the F" and then asked D■■ what she was doing. D■■ told him she was taping an envelope that she was using as a spit cup for sunflower seeds. S■■ replied "Why not just lick the envelope?" As she testified, D■■ told S■■ her father told her you don't know what's in the glue so doesn't do that. S■■ explained that what he picked up was that scotch tape is contraband and there was no reason for her to have scotch tape as D■■ wasn't a clerical worker, and told D■■ to put it away. He further explained in 2007 a prison break started by prisoners covering up a hole in the wall he was making by putting up a poster with scotch tape. After that incident, when checking the cells the rule was that there would be nothing stuck to the wall and that "Scotch tape would be a no no." He never made a "stupid" the comment to D■■ that "you never licked things that piss came out of." which he characterized as "stupid."

As for repeatedly asking Officer L■■ out on dates, he denied it citing his 20-year marriage and there was "no reason to" ask her out. Again, as with D■■, he "probably offered to buy everybody food." He noticed L■■ bringing in at that time four or five containers of salads and telling her "damn those salads look pretty good" and "you guys are eating well." L■■ responded that if you want one, I'll bring you one and the next day she did just that, and S■■ appreciated the nice gesture. He said, "All I really wanted to do was repay the gesture." Further when employees do something like pay for something for a supervisor, they are going to expect you to owe them something. That is why he kept asking L■■ several times if she wanted him to get her some food. He never asked her out for romantic reasons, and he would have had the

food brought in. He remembered, however that around that time, a good friend, Sergeant H [REDACTED] had told him something about things being said about him, he didn't know who, but gave him friendly advice like "[D]o me a favor dude, I don't if it's true or not true, but like, you know, take it easy on asking people if they want dinner."

S [REDACTED] denied completely the incident of his inviting L [REDACTED] by gesture or words with sitting on his lap when they were on the panel. He might have asked her if there were no available chair if he could sit down. He noted the area is on constant video surveillance³.

S [REDACTED] gave a lengthy and detailed description of an incident with L [REDACTED], who was always "combative," where she refused to read a fire drill policy, telling him in front of others what she knew the policy and as the commanding officer he is supposed to conduct the fire drill not her. He conducted the fire drill and after told L [REDACTED] to read the policy right in front of him. She repeated that she knew the policy and he said to her consider this a verbal counseling. He didn't make mention of this in his Supervisor Tour Report of October 6, 2019 (A-5) because "I didn't want to effect their job performance...I didn't want to put anything on paper that would hurt or affect them in the long run..."

S [REDACTED] also detailed his 2020 Supervisor evaluation, (A-1), 2019 evaluation as a corrections officer and Seargent (A-6) and his two 2017 Commendations (A-2 and (A-3). He talked at length about being demoted after the departmental hearing, that since that time his peers would be laughing at him, picking on him, that he couldn't work overtime and about how hard he worked to earn the promotion. The entire affair had caused a strain on his family and his son might look at him as a "perv or what not." He felt this was something he could never live down. He reasoned "If I said something out of place, I'm a sailor, I'm a Marine...if you're going to be sensitive to the fact you might hear a curse word here or there, maybe this is the wrong career choice for you." He said he apologized during his interview with Ms. M [REDACTED] "if he did anything or touched anybody inappropriately."

³ M [REDACTED] had testified she couldn't get video evidence regarding the allegations as they are only preserved for a short time.

S█████ noted that he was made to serve the ten-day suspension soon before the layoffs of corrections officers, so it was losing a month's pay (having to wait 15 days to be get his regular pay minus the 10 days) and was then laid off. He has not been rehired yet. Although other sergeants were also laid off, if he had not been demoted, he believed he would still be employed with the County.

In cross examination, S█████ was briefly questioned about prior supervisory jobs. He noted he was a Corporal in the Marine Corp between 1998 and 2006 he supervised a company of 120 Marines. He applied to become a corrections officer in 2011 because his civilian job experiences weren't meaningful.

Although his work as a Corrections Officer was not the same as many other employees of Union County, he acknowledged that he would have to adhere to any employee handbook and be compelled to abide by them. He agreed that part of his responsibilities as a sergeant at the Department. of Corrections would be to ensure there is no workplace sexual harassment or discrimination. While he participated in a sexual harassment 90-minute-long seminar in 2015, (R-5) he couldn't recall specific details of it. He also participated in another such seminar in 2014 concerning gender equity (R-6) and another 2018 training on Workplace Sensitivity, discrimination and harassment, (R-7). He acknowledged his signature being on a receipt of Union County Policies, the employee handbook, the drug and alcohol abuse policy, federally mandated CDL drug and alcohol testing policy and policy against workplace Discrimination and harassment. He said that before he was promoted and before any of the incidents alleged by D█████ and L█████ occurred, he knew the County had a prohibition against harassment and workplace discrimination.

S█████ agreed that a verbal counseling (such as he alleged occurred between him with L█████) was an act of discipline. S█████ said D█████ as an employee was "pretty much very locked on." Although she sometimes showed poor judgement, she was "a

good employee." Sometimes he would have to take her aside and instruct although he couldn't specifically recall an incident.

He first learned that allegations were being made against him when Captain O█████ called him and said he was the target of an investigation and not to have any contact with D█████ and L█████. He was "shocked," however he "didn't think it was his place" to ask any questions at that point, and he knew he would have an attorney present when he was questioned. He attended the interview with Ms. M█████ with his attorney. He acknowledged he could have advised D█████ not to have the Narcan pouch on the front of her belt without grabbing the pouch from her belt, but it would not have conveyed the same meaning. He reiterated he didn't give details or explanations to Ms. M█████ but added that "her mind was already premade up by the time I went upstairs to talk to her."

Again, regarding the Narcan pouch, S█████ admitted that his grabbing it was intentional, but as for touching her lower back, he now admitted he did to that "in order to create space, in order to walk behind them," and did likewise with L█████, but he didn't caress L█████'s lower back. Also, the back touching of D█████ did not occur at the same time as the utility belt/Narcan pouch grabbing. More specifically, while he couldn't actually recall such incidental touching of L█████' or D█████'s backs, "I can myself touching their lower back." Again, he reiterated there was nothing sexual or sexual innuendo intended. He did recall telling D█████ about O█████ being transferred to light duty when she became pregnant and not having to go back to her original job when she returned.

S█████ was asked on several points where his testimony or the narrative of it, differed with his answers to M█████'s questions. In most of those cases S█████ said his testimony differs because M█████'s questions weren't specific or lacked necessary context. For instance, he said M█████ asked him, did you ever make the statement to D█████ "you never licked anything that piss came out of?" without any context to the sunflower seeds/envelope incident. S█████ simply replied "No." to Ms. M█████. Thus, to the question, "Did you admit to S█████ (M█████) that you had a conversation with

Officer D [REDACTED] about licking envelopes?" S [REDACTED] testimony was "I wasn't asked." Likewise, he was asked by M [REDACTED] if he asked D [REDACTED] or L [REDACTED] to go out, or have a date, he gave a negative reply but never mentioned he offered to buy them dinner.

D [REDACTED] Z [REDACTED] (Z [REDACTED])

Corrections Officer Z [REDACTED] currently is employed by the Morris County Sheriff's Corrections Bureau. From May 2019 until June 2021, she worked as a Corrections Officer at the Union County Jail, until a layoff caused by downsizing of the facility. She stated that S [REDACTED] was her supervisor.

Z [REDACTED] had been interviewed by Ms. M [REDACTED] during her investigation of the allegations against S [REDACTED]. Her relationship with S [REDACTED] was professional. However, as she told M [REDACTED] she was not present at the jail during any of the times the incidents alleged occurred as she was at the Police Academy from August 30, 2019, to November 14, 2019. She never described S [REDACTED] as "weird" to M [REDACTED]. When S [REDACTED] was her Supervisor, he would do checks of her floor-12A and during his tour, like other supervisors, he would sign the logbook and would spend a few minutes talking to her and her partner. Their experience was "always professional." During cross, she also stated she knew Officers D [REDACTED] and L [REDACTED]. They had trained together as part of a larger group and at that time did the most socializing with them. After that they worked at the Jail. In her interactions with D [REDACTED] and with L [REDACTED] she never experienced an incident or situation where she believed either of them had been untruthful. Z [REDACTED] said Ms. M [REDACTED] had not asked her if S [REDACTED] ever made any inappropriate remarks in her presence.

FACTUAL FINDINGS AND ANALYSIS

When witnesses present conflicting testimony, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. Credibility is the value that a fact finder assigns to the testimony of a witness, and it incorporates the overall

assessment of the witness's story considering its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2D 718 (9TH Cir. 1963); see In Re Polk, 90 N.J. 550 (1982). Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1999). A fact finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 847, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973).

The finder of fact is not bound to believe the testimony of any witnesses, and credibility does not automatically rest on the party with more witnesses. In Re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middleton Twp. V. Murdoch, 73 N.J. Super 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of a credible witness, but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 554-555 (1954).

In this case, I found Ms. M [REDACTED] testimony to be direct and unmotivated by any illegitimate reason, and corroborate both L [REDACTED] and D [REDACTED]'s complaint and was consistent with their testimony. Her testimony was largely factual rather than opinion and was also supported by all the documentary evidence. I found L [REDACTED] most credible in her descriptions of her dealings with S [REDACTED] and his boorish behavior to her. She did not exaggerate her emotional reactions towards his insistent demands that she should share a meal with him, or date him, whether it be in his office or out of the facility.

D [REDACTED] was believable in her natural reactions to the difficult situation she was in to begin with, being a former Sergeant in a juvenile facility and now a Corrections Officer in a facility with maximum security inmates. and working under directly under a Supervisor who became a Sergeant within days of she and L [REDACTED] being assigned to 10A Pod. While her current somewhat malicious attitude toward S [REDACTED] was apparent, she didn't try to hide it. Further her feelings toward S [REDACTED] weren't inconsistent with her telling M [REDACTED] four years earlier that she didn't want S [REDACTED] to be fired as a result of

his conduct. She no longer works at the Jail or for the county. According to S█████, D█████ testified at the departmental hearing. Now two or three years later she learned there was to be another hearing, which she called a "joke." It is quite understandable her attitude toward S█████ might have hardened. But in 2019, as a new officer at the Jail, it was quite reasonable for her to be concerned about causing that kind of "trouble" at the facility, just as it was believable that she would withstand S█████' inappropriate behavior until it became too much to take. Thus, her attitude towards S█████ then and now is understandable and does not indicate she had an ill motive in bringing these allegations against S█████. More importantly, with her detailed recollections of the events and recollection of the specific words and actions she described concerning S█████, both during the M█████ interview and during her testimony, and the consistency in her and L█████'s version of the essential facts, her testimony was highly credible.

While S█████ was a somewhat sympathetic witness, I found some of his testimony not credible. For example, while there might have been another reason for not giving explanations or different versions of the facts during his interview with M█████, I did not find it credible that S█████, who testified four years after the events that he remembered saying to D█████ "I lick envelopes" during the sunflower seeds incident, which occurred October 27, 2019, would not have recalled that incident and discussed his version of it during the interview which occurred just several days or at most a few weeks after the incident.⁴

I also found it not credible for him to say more than once during his testimony that he was "exonerated" in a prior instance where he "touched" an attorney from the Prosecutors office in order to get her to remove her phone, when actually the facts of that interview were "substantiated," as testified by M█████, i.e. it happened. Further, he had been verbally counseled by M█████ as a result, and in S█████ own testimony he believed that to be a form of discipline. In fact, it was S█████, in his interview with

⁴ M█████ did not record the date of her interview of S█████ and S█████ did not mention the date in his testimony. However, from M█████'s description of the interviews and reporting process, S█████ interview probably happened no later than mid-November.

M [REDACTED] who brought up the prior incident for which he had been verbally counseled, giving it as a reason why he would not be inappropriate to Officers L [REDACTED] or D [REDACTED]. I **FIND as FACT** that S [REDACTED] was previously verbally counseled by M [REDACTED] concerning what could easily be perceived as inappropriate touching, notwithstanding that event did not result in harassment or any other charge. Conversely, I disbelieve his version of the alleged fire drill and his verbal counseling of L [REDACTED]. I think even if L [REDACTED] had been disrespectful as described by S [REDACTED], his demanding she read the policy aloud in front of D [REDACTED] and the inmates would have been extreme, and if anything provided reinforcement of L [REDACTED] complaints about harassment, because it gives additional motivation for S [REDACTED]' conduct towards her as possible retaliation for refusing to date or dine with him. I further **FIND as FACT** that L [REDACTED] would not have believed she was verbally counseled as a result of the fire drill incident and therefore her testimony that she had no disciplinary history was credible and truthful.

Regarding the Narcan/utility belt incident, since S [REDACTED] admitted he "grabbed" her Narcan pouch that was inside her utility belt whether it was in front of the belt or left of center of her waist, I **FIND as a FACT** that S [REDACTED] grabbed a part of her utility belt at her waist. I further **FIND as FACT** that the act was intentional as S [REDACTED] admitted it was. Further I **FIND as FACT**, that whatever S [REDACTED] was thinking at the time, S [REDACTED] reached around from behind D [REDACTED] to grab the front of her utility belt, whether it be her gloves pouch or Narcan pouch, while simultaneously touching her lower back, whether there was caressing involved or not. Likewise, I **FIND as FACTS**, that on the occasions described by D [REDACTED] and Lewis, and also partly by S [REDACTED]' own admissions, that he touched their lower backs, whether it was to make space on the platform to get around them as he said or whether it was sexual, romantic touching as said by D [REDACTED] and Lewis. I **FIND as FACT** that S [REDACTED], regardless of his motivation, since S [REDACTED] never described any emergency involved, such touching of their backs was unnecessary. By all indications he could have accomplished any legitimate making space between them, with a simple "excuse me" to them, or even, given his superior rank, a lesser polite "would you get out of my way?"

Moreover, there is ample evidence that while his intention may have been to get closer to either or both of them for an inappropriate reason, it is unnecessary that there be any certainty on that point. The burden of proof is by the preponderance of evidence not, as in a criminal case beyond a reasonable doubt. Because D█ was not entirely clear in what is meant by caressing her back, which she said took one second or two and which happened simultaneously with reaching for and grabbing the utility belt, I do not deem it necessary to find S█ caressed D█'s lower back, but rather I **FIND as FACT**, he unnecessarily on that occasion touched her lower back for a second or two while unnecessarily reaching and grabbing her utility belt. I **FIND as FACT** that S█ possessed sufficient knowledge and experience including training while a corrections officer and sergeant, knew the policies of the County of Union against harassment and workplace discrimination knew the County employee's handbook, had been counseled as recently as about a year earlier by the affirmative actions officer to be more sensitive. Moreover, as a corporal in the military, he probably knew that in a military or in a paramilitary organization at the Department of Corrections a superior officer doesn't put his hands on a subordinate without sufficient cause, and no such sufficient cause was present during any of these incidents.

Likewise, I find that S█ version of the events and the statement he made to the effect of "you can be my friend my coworker or have a long career" when taken in the context of having also admitting making the statement about the favorable treatment of another female officer who had gotten pregnant was sufficiently consistent with D█'s versions, and essentially validated D█'s impressions of S█' intentions. To be more specific I **FIND as FACT** that S█ made the statements to D█ that "you can be my friend my coworker or have a long career" and "pretty girls get taken care of here." Similarly, I find it not credible, that given the sheer number of S█" subordinates (10 or 12), and the lack of corroborative evidence, that S█ offered on numerous occasions to L█ to get something to eat or go out with him because he does that with all his subordinates. Nor would an officer normally ask to buy food or dine with a subordinate officer after he had been turned down more than once. Moreover, L█'s version about what she had to do to get him to stop D█'s

knowledge of that, and S█████ admission that he finally gave up asking after doing so multiple times makes it more credible that he wanted to spend time with L█████ in a manner that was unprofessional and reasonably made the subordinate L█████ and given the dynamic and events, D█████ fell uncomfortable because of it. Thus, I **FIND** as a **FACT** that for an inordinate number of times and in an unprofessional manner, S█████ persistently asked L█████ to dine with him until she had to avoid him altogether.

Regarding the statement about the rape training, I believe S█████ initiated the conversation because he knew he had the training the next day and asked L█████ and D█████ about it, and they commented about the rape audio. L█████ and D█████ gave consistent statements about how S█████ replied to that in both their interviews with M█████ and in their testimony. D█████, L█████ and S█████ all said that S█████ referred to "that shit" while talking about rape. The preponderance of the evidence and the meshing together of the other credible facts as testified to convincingly by L█████ and D█████, and the lack of credibility on other parts of S█████ testimony convinces me, that rather than sympathizing with L█████ and D█████ about having to listen to a rape audio, S█████ instead made a crass and insulting remark about some females, such as D█████ and L█████, like rape, or men getting rough with them and I so **FIND** as **FACT**.

Finally, D█████'s depiction of the incredibly crude remark made by S█████ to D█████ rings true. Both she and S█████ say it occurred at a time when L█████ was on another floor and was avoiding him. Both say it may have looked odd to see her taping the envelope. Both say that S█████ asked for an explanation of the tape. S█████ testified that he said he "licks envelopes." Both say that D█████ said her father was a printer and told her not to lick envelopes because of what might be in the glue. S█████ says he told D█████ scotch tape at that location where inmates might access it is contraband. Whether or not scotch tape was contraband, a fact of which I am not convinced, it again provides another motivation (other than sexual) for S█████, who also testified, in a self-described "rant" that maybe the jail is not the right place to work if you are easily offended by curse words, to make the strongly crude and crass comment to D█████ "you never licked something that piss came out of?" Further, soon thereafter L█████ found

D ■ distraught, and they both testified that this turning point of "catalyst" made them agree to report S ■ behavior to other authorities to get him to stop it. Their credibility outweighs the fact that S ■' choice of words in this crude remark is certainly odd. However, that is part of the nature of crass, insulting remarks. One can't expect such comments to be well thought out. Specifically, I **FIND** as **FACT** that S ■ deliberately and intentionally made the crude, and in the context obscene, statement to D ■ whether his motivation was sexual or not. I disbelieve that he told D ■ tape was contraband, as implied by his version, and that in any case he insufficiently proved in light of the preponderance of all the other evidence that he engaged D ■ in this conversation because of his concern for contraband. Again, as in the Narcan explanation these appear to be somewhat desperate, unsupported self-serving stories. Further I **FIND** as **FACT**, whether it was a crude joke or a sexual invitation, that S ■ invited L ■, by gesture, to sit on his lap while on the panel at 10A Pod. Similarly, I **FIND** as **FACT**, that whether he was joking or not, and whether or not he knew D ■ was engaged, he said to her "I'd date you but I don't know how your man would feel about it."

I also believe that aside from these incidents, S ■ had a good record as Corrections officer and had until mid-2021 when he was laid off, again with these incidents aside, had a good record as a Seargent, however brief that tenure, and I so **FIND** as **FACTS**.

I **FIND** as **FACT** that S ■ is alone responsible for causing both D ■ and L ■ to believe his intentions were inappropriate and unprofessional, whether his real intention was to harass either for a sexual reason, an invitation to get more friendly or merely to exert his authority over them.

LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6 governs a civil service employee's rights and duties. The act is an important inducement to attract qualified

personnel to public service. It is to be liberally constructed 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 New Jersey 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. 11A1-2 (b). To carry out this policy, the Act also includes provisions authorizing the discipline of public employees. Consistent with public policy and civil service law, a civil service employee may be subject to major discipline. N.J.S.A. 11A:1-2(a). As noted, the Board has adopted, for its non-instructional staff, the Rules and Regulations of the Civil Service Commission and the Office of Administrative Law with respect to disciplinary procedures. Major discipline may include removal, disciplinary demotion, a fine or suspension no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. Hearings at the Office of Administrative Law are conducted de novo and determine the appellant's guilt or innocence as well as the appropriate penalty. In the Matter of Morrison, 216 N.J. Super. 143 (App. Div. 1987). Ennslin v. Twp. Of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994) cert. den., 142 N.J. 446 (1995).

In an appeal from a disciplinary action, 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); Polk, 90 N.J. 550. 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). 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).

Preponderance may be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). The evidence needed to satisfy the standard must be decided on a case-by-case basis.

On such appeals, the Civil Service Commission may increase or decrease the penalty, N.J.S.A. 11A:2-19, and the concept of progressive discipline guides that determination, In re Carter, 191 N.J. 474, 483–86 (2007). Thus, an employee's prior disciplinary record is inherently relevant to determining an appropriate penalty for a subsequent offense, Id. at 483, and the question upon appellate review is whether such punishment is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness," Id. at 484 (quoting In re Polk, 90 N.J. 550, 578 (1982) (internal quotes omitted)).

Police Officers are held to a higher standard of conduct than ordinary citizens and other public employees. In Re Phillips, 117 NJ 567, 576-77 (1990). See also In Re Emmons, 63 N.J. Super (App. Div. 1960).

There is no precise definition for conduct unbecoming a public employee, and the question of whether conduct is unbecoming is made on a case-by-case basis. King v. County of Mercer, CSV 2768-02, Initial Decision (February 24, 2003), adopted, Merit Sys. Bd. (April 9, 2003), <http://njlaw.rutgers.edu/collections/oal/>. In Jones v. Essex County, CSV 3552-98, Initial Decision (May 16, 2001), adopted, Merit Sys.Bd. (June 26, 2001), <http://njlaw.rutgers.edu/collections/oal/>, it was observed that conduct unbecoming a public employee is conduct that adversely affects morale or efficiency or has a tendency to destroy public respect for governmental employees and confidence in the operation of public services. In Karins v. City of Atlantic City, 152 N.J. 532 (1998), an off-duty firefighter directed a racial epithet at an on-duty police officer during a traffic stop. The Court noted that the phrase "unbecoming conduct" is an elastic one that includes any conduct that adversely affects morale or efficiency by destroying public respect for municipal employees and confidence in the operation of municipal services."

Id. at 554. In Hartmann v. Police Department of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992), the court stated that a finding of misconduct need not “be predicated upon the violation of any particular rule or regulation but may be based merely upon the violation of the implicit standard of good behavior, which devolves upon one who stands in the public eye as an upholder of that, which is morally and legally correct.”

Here, on multiple occasions and by multiple layers S [REDACTED] certainly engaged in conduct unbecoming, in violation of N.J.A.C. 4A:2-2.3 (6). He admitted he intentionally grabbed D [REDACTED]’s utility belt. Whether it was precisely in the groin area as described by D [REDACTED] or whether it was where she kept her glove pouch as she described or the Narcan pouch as S [REDACTED] said, it was wholly unnecessary, and as S [REDACTED] admitted deliberate. S [REDACTED] could have and should have if he was concerned about the Narcan simply advised her or ordered her where it was to be properly positioned. He had recently been counseled on concerns of inappropriate and unnecessary counseling even though no charges had been brought. The distress caused to D [REDACTED] was obvious when she was first interviewed by M [REDACTED] and also in Court. Likewise, the unnecessary unwelcome touching of both L [REDACTED] and D [REDACTED] on their lower backs to which S [REDACTED] admitted regardless of specific intention was unwarranted and unprofessional.

There is no definition in the New Jersey Administrative Code for other sufficient cause. Other sufficient cause is generally defined in the charges against petitioner. The charge of other sufficient cause has been dismissed when “respondent has not given any substance to the allegation.” Simmons v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm’r (April 26, 2006), <http://njlaw.rutgers.edu/collections/oal/final/>. Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.

Union County Policy (R-9) prohibits “discriminatory action against a fellow employee, including activities described in its Policies against Workplace Discrimination and Harassment. The policy prohibits among other things “verbal or physical conduct,

gestures or communication express or implied, of a sexual nature.” (R-10 subsection 2A). Touching two subordinates’ lower backs at their workplace inviting one to sit on your lap, initiating conversation about rape and joking about it, persistent attempts to get a female subordinate to dine with you and saying under different circumstances he would date you to another are all examples among others described above of S [REDACTED] being in violation of that policy. The policy prohibits sexual flirtations or advances, pressures for sexual activity, verbal abuse of a sexual nature including teasing or kidding, comments about specific gender traits foul or obscene language or gestures and “any unwelcome touching including for example, patting, pinching hugging cornering and repeated brushing against another employee’s body...[.]”(R-10 subsection 2B) Even if, in his own mind, S [REDACTED] was not seriously in hopes or pursuit of intimacy, the touchings of both their persons and unwelcomed invitations to dine, and crude remarks about sex constituted harassment and were in violation of that policy. Said violations constitute “Other Sufficient Cause” N.J.A.C. 4A:2-2.3 (11) Because of a lack of specific evidence of conduct that would constitute the separate offense of Discrimination that affects Equal Employment Opportunity, in violation of N.J.A.C. 4A7-1.1, N.J.A.C. 4A2-2.3 (9), I cannot and do not sustain that charge.

PENALTY

On appeals, the Civil Service Commission may increase or decrease the penalty, N.J.S.A. 11A:2-19, and the concept of progressive discipline guides that determination, In re Carter, 191 N.J. 474, 483–86 (2007). Thus, an employee’s prior disciplinary record is inherently relevant to determining an appropriate penalty for a subsequent offense, Id. at 483, and the question upon appellate review is whether such punishment is “so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one’s sense of fairness,” Id. at 484 (quoting In re Polk, 90 N.J. 550, 578 (1982) (internal quotes omitted)).

A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment

decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. See Bock, 38 N.J. at 523-24. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of the concept of progressive discipline is the nature, number and proximity of prior disciplinary infractions that should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential. In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, a fine or suspension no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

Here the penalty assessed and under appeal is a ten-day suspension and demotion. Although S [REDACTED] has not returned to work as a corrections office two plus years after these penalties were imposed, this has little to do with the fairness and the purpose of the penalty. The penalty was a one-step demotion in rank and ten days suspension, not a long lay off which is beyond the control of the disciplinary process. Captain C [REDACTED] testified that "of course" the penalty included demotion. As a major disciplinary action for multiple infractions notwithstanding a past clear record, the penalty could have been 180 days suspension or dismissal. In any case even if a demotion did not reflect the goals of progressive discipline, that principle need not govern the penalty "when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in that position, or when application of the principle would be contrary to the public interest" In Re Stallworth 208 N.J. 182, 197 (2011) quoting In Re Hermann, 192 N.J. 19, 33 (2007) (emphasis supplied.)

While the penalty I might prefer in hindsight of the layoff (although there is no certainty that S [REDACTED] would not have been laid off as other sergeants were at the time) might not be as severe, I cannot find the penalty of ten days and a one rank demotion to be disproportionate nor shocking to the conscience, which is the appropriate standard. I therefore sustain the penalty.

ORDER

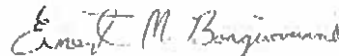
I **ORDER** that the charges of Conduct Unbecoming a Public Employee N.J.A.C. 4A:2-2.3, (6) Violation of County of Union's Employee Handbook, and Violation of the County of Union's Policy against Workplace Discrimination and Harassment, which constitute Other Sufficient Cause in violation of N.J.A.C. 4A:2-2.3(a)(11) are **SUSTAINED** and the ten-day suspension and one step demotion being reasonable and within the County's sound discretion are also **SUSTAINED**. I **REVERSE** the determination of the separate offense of Discrimination that affects Equal Employment Opportunity, in violation of N.J.A.C. 4A7-1.1, N.J.A.C. 4A2-2.3 (9)

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.

May 3, 2024



DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency:

05/03/24

Date Mailed to Parties:
id

05/03/24

APPENDIX

LIST OF WITNESSES

For Appellant

P ■ S ■

D ■ Z ■

For Respondent

C ■ D ■

G ■ L ■

S ■ M ■

R ■ C ■

LIST OF EXHIBITS IN EVIDENCE

For Appellant

- A-1 Supervisory Evaluation of S ■, 2020
- A-2 2017 Commendation Letter from R ■ C ■,
- A-3 2017 Merit Award
- A-4 Not in Evidence
- A-5 Supervisor Tour Report
- A-6 2019 Evaluation Performance

For Respondent

- R-1 Operations Report of C ■ D ■, undated
- R-2 Operations Report of G ■ L ■, undated
- R-3 Confidential Memorandum of S ■ M ■, dated December 5, 2019
- R-4 Preliminary Notice of Disciplinary Action, dated January 5, 2020

- R-5 Attendance Record, Sexual Harassment Seminar dated May 26, 2015
- R-6 Receipt of Gender Equity Notification, dated June 5, 2014
- R-7 Attendance Record Union County Workplace Sensitivity Training, dated May 1, 2018
- R-8 Policies Receipt Acknowledgement, dated April 5, 2019, of Union County policies and employee handbook
- R-9 Policy Against Workplace Discrimination and Harassment
- R-10 County of Union Employee Handbook, 2018
- R-11 Final Notice of Disciplinary Action, dated May 14, 2021
- R-12 Not in Evidence
- R-13 Memo of R [REDACTED] C [REDACTED], dated October 31, 2019
- R-14A Photo of 10A Pod
- R-14B Photo of panel of 10A Pod