STATE OF NEW JERSEY

In the Matter of Donna Roche,
Judiciary, Monmouth Vicinage

CSC Docket No. 2018-3770
OAL Docket No. CSV 10038-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: April 15, 2020 (NFA)

The appeal of Donna Roche, Judiciary Clerk 3, Middlesex Vicinage, Judiciary, of her 10 working day suspension on charges, was heard by Administrative Law Judge Susan L. Olgiati (ALJ), who rendered her initial decision on January 27, 2020. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on April 15, 2020, did not adopt the ALJ's recommendation to uphold the 10 working day suspension. Rather, the Commission modified the 10 working day suspension to a two working day suspension.

DISCUSSION

The appellant was charged with violating the Judiciary's policies and directives relating to the use of social media. Specifically, the appointing authority asserted that in December 2017, the appellant made comments directly relating to the Judiciary and disclosed confidential information in a Facebook post. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

The ALJ set forth in her initial decision that the appellant did not substantively challenge that she made the comments in question. However, the appellant contended that the comments were meant to be "humorous" and she admitted that the posting was a lapse in judgment. The appellant also testified

that she took responsibility for her actions and never intended to impugn the Judiciary. The ALJ found this testimony credible. Regardless, the ALJ found the appellant guilty of the charges. Regarding the penalty, the ALJ stated that "despite the fact that appellant is a long time employee of the Judiciary, has positive performance evaluations, and a disciplinary-free employment history, the importance of preserving the integrity of the courts and maintaining the public's trust, esteem and confidence in same, justifies imposition of a ten-day suspension."

In her exceptions, the appellant contends, among other things, that the Judiciary failed to conduct a thorough investigation into the matter, the ALJ erred in finding the Judiciary's witness credible while finding portions of her testimony not credible, and erred in not making an adverse inference for the Judiciary's failure to call a witness.

In its reply to the exceptions, the appointing authority argues that the ALJ's credibility determinations were appropriate and supported by the evidence in the record, that its investigation into the matter was objective and thorough and that, given the infraction, the 10 working day suspension was the appropriate penalty.

Upon its *de novo* review of the record, the Commission initially notes that it is wholly unpersuaded by the appellant's exceptions as the issues presented were either already addressed by the ALJ of lack sufficient merit to warrant extended discussion. Moreover, the Commission agrees with the ALJ's determination regarding the charges. However, the Commission does not agree with the ALJ's recommendation to uphold the 10 working day suspension. In this regard, in determining the proper penalty, the Commission's review is *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 *N.J.* 571, 580 (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). Further, even when a law enforcement officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense may nevertheless warrant the penalty of removal where it is likely to undermine the public trust. *See Henry v. Rahway State Prison, supra*, 81 *N.J.* at 579-80.

In the instant matter, notwithstanding that the appellant's infraction was serious, several mitigating factors warrant the imposition of a lesser penalty.

Specifically, the record shows that, at the time of the infraction, the appellant had been employed with the Judiciary more than 20 years, had no prior disciplinary actions, had positive work evaluations and credibly testified regarding her lack of intent to impugn the Judiciary. Accordingly, while the appellant's misconduct and lapse in judgment were clearly inappropriate, the Commission does not find her actions so serious as to warrant the imposition of a 10 working day suspension. Rather, the Commission finds that a two working day suspension is the appropriate penalty. This penalty is sufficient to impress upon the appellant that her actions were improper and will not be condoned, and caution her that any future similar infractions will result in a more severe penalty.

As the suspension has been modified, the appellant is entitled to eight days of back pay, benefits and seniority. With regard to counsel fees, since the appellant has not prevailed on the primary issues on appeal, she is not entitled to an award of counsel fees. *See N.J.A.C.* 4A:2-2.12. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, while the penalty was modified, all the charges were upheld and discipline was imposed. Consequently, as the appellant has failed to meet the standard set forth in *N.J.A.C.* 4A:2-2.12, counsel fees must be denied.

ORDER

The Civil Service Commission finds that the appointing authority's actions in imposing a 10 working day suspension was not justified. Therefore, the Commission modifies the 10 working day suspension to a two working day suspension. The Commission further orders that the appellant be granted eight days of back pay, benefits and seniority as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

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

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 15TH DAY OF APRIL, 2020

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 10038-18
AGENCY DKT. NO. 2018-3770

IN THE MATTER OF DONNA ROCHE,
SUPERIOR COURT OF NEW JERSEY,
MIDDLESEX VICINAGE.

Jason L. Jones, Esq., for appellant, Donna Roche (Weissman and Mintz, LLC, attorneys)

Susanna J. Morris, Counsel to the Administrative Director, for respondent, Superior Court of New Jersey, Middlesex Vicinage, pursuant to N.J.A.C. 1:1-5.4(a)(8)

Record Closed: October 29, 2019 Decided: January 27, 2020

BEFORE **SUSAN L. OLGIATI**, ALJ:

STATEMENT OF THE CASE

Appellant, Donna Roche, appeals the action of the respondent, Superior Court of New Jersey, Middlesex Vicinage (vicinage or respondent) imposing a ten (10) day suspension based on charges of Other Sufficient Cause in violation of N.J.A.C 4A:2-2.3(a), specifically, Violation of Judiciary Policies and Directives relating to a Facebook

posting. Appellant contends that her comments, in response to a Facebook posting made by a fellow co-worker/friend, were meant to be humorous. She further contends that the penalty imposed by respondent is too harsh.

PROCEDURAL HISTORY

On February 27, 2018, respondent served appellant with a Preliminary Notice of Disciplinary Action (PNDA). J-2. On June 15, 2018, the respondent served appellant with a Final Notice of Disciplinary Action (FNDA) for Other Sufficient Cause in violation of N.J.A.C 4A:2-2.3(a)12,[1] specifically, Violation of Judiciary Policies and Directives: 1). Code of Conduct for Judicial Employees, Canon 2- Protection of Confidential Information and Canon 3 - Avoiding Actual or Apparent Impropriety, and 2). Policy for the Use of Social Media for Judiciary Employees. J-3. The incident(s) giving rise to the charges were listed as:

> On or about December 21, 2017, management became aware of a communication thread on Facebook that included comments made by you that referred directly to the Judiciary, the Sheriff's Department and our case processing, which was shed in a negative light (see attached print out of the Facebook posting). This post constitutes a code of conduct violation as you publicly disclosed confidential information acquired in the course of employment and failed to observe high standards of conduct so that the integrity of the court may be preserved. This is also a violation of the Policy on the Use of Social Media for Judiciary Employees. Upon inquiry, you did not deny your involvement in the Facebook posting.

Id.

Appellant timely filed a notice of appeal, and on July 12, 2018, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case. N.J.S.A. 52:14-1 to -15 and N.J.S.A. 52: 14F-1 to -13. A hearing in this matter was held on July 27, 2019. The record remained open for the parties to receive transcripts and submit written summations. Upon receipt of the transcripts, the parties requested that post-hearing submissions be filed by October 4, 2019. Thereafter, two requests for extensions

[1] Both the FNDA and the PNDA listed N.J.A.C. 4A:2-2.3(a)11, as the regulatory citation for the charge of Other Sufficient Cause. The correct citation for this charge is N.J.A.C. 4A:2-2.3(a)12.

to file the post-hearing submissions were requested and granted. The written summations were received and the record closed on October 29, 2019. On December 12, 2019, an Order of Extension was granted giving the undersigned until January 27, 2019, to complete the Initial Decision.

FACTUAL DISCUSSION AND FINDINGS

I. Undisputed facts:

The facts in this matter are largely undisputed.

Appellant has been employed with the Judiciary, in the Criminal Division, of the Middlesex Vicinage for approximately twenty-four years.

Her current title is a Judiciary Clerk 3. In this position, appellant has responsibilities relating to various court matters including bench warrants, violations of probation (VOP), trials, sentencing, and data entry.

Appellant is friends with fellow Judiciary, Middlesex Vicinage, employees Kaleema Robinson, Andrea Grant, and Katie Geraghty (aka Katherine Replinger). On December 19, 2017, Geraghty, who was returning from her honeymoon, posted a status and message on Facebook. The posting generated a communication thread (discussion) amongst appellant, Geraghty, Robinson, Grant, and Geraghty's sister, Tara Geraghty Tucker. Tucker is not a Judiciary employee.

Geraghty's initial post stated: "Can't stay in paradise forever." R-5. Appellant responded, "You have been gone long enough, the judiciary needs you, lol."

Robinson responded to the communication thread by stating: "Don't listen to her!!! Stay in paradise." Id.

Appellant thereafter commented, "Shit we got Hooper putting in bench warrants, vop's are being completed without being heard, hurry the hell back." Id.

Thereafter, Grant responded: "DONNA" [followed by six laughing face emojis]. Id.

Geraghty responded: "Omg I can only imagine the crap that went on while I was gone. I'm ready for a good laugh when I get back. At least I still have a few more days of staycation now." [followed by a smiling face emjoi]. Id.

Tucker, responded to the communication thread; "Oh noooooooooo." Id.

On December 21, 2017, a screen shot of a portion of the Facebook post was anonymously provided to the Middlesex Vicinage Trial Court Administrator (TCA). The TCA referred the matter to Laura Schweitzer and asked her to investigate the matter.

After reviewing the Facebook posting and communication thread, Schweitzer contacted the Judiciary employees involved and scheduled a meeting with each. Schweitzer requested each of the employees to provide her with a written statement regarding their involvement in the posting.

In response to the request, appellant emailed Schweitzer on January 17, 2018, stating, "I was asked to give a statement in reference to the Facebook post attached and what my involvement was in the matter, not really sure what I am expected to write as my response is pretty self-explanatory." R-6.

Grant and Robinson provided responses similar to appellant's noting that their comments to the Facebook posting were "self explanatory." See R-7, R-8.

Geraghty (aka Replinger) responded: "On December 19, 2017, I posted a Facebook status, subsequently I replied to a comment on my Facebook status. Please see attached for the referenced Facebook post in its entirety." See R-9.

II. Testimony

The following is a summary of the relevant and material testimony given at hearing.

For respondent:

Laura Schweitzer has been employed by the Judiciary for approximately twenty-three years. She is the Criminal Division Manager in the Middlesex Vicinage. She has served in this position for the past two and one half years. She reports directly to the TCA.

Schweitzer is familiar with the appellant. Appellant is one of the vicinage's most experienced clerks. She is a good employee. Schweitzer has a good relationship with appellant.

The Judiciary's social media policy was adopted in 2011. The policy is posted on the Judiciary's learning system. Employees are required to acknowledge that they have read and received the policy.

Appellant acknowledged and agreed to abide by the Social Media Policy in years 2013, 2014, and 2016.

Appellant attended in-person classroom training on the Code of Conduct for Judiciary Employees in years 2012 through 2017. Each training session was one and a half hours long.

Upon reviewing the Facebook posting, Schweitzer was concerned because appellant's comments directly mentioned the Judiciary. Her comments also referenced "Hooper" (a sheriff officer) putting in bench warrants and suggested that VOPs were being completed without being heard. This would not be a fair or just proceeding. Schweitzer viewed these comments as impairing the integrity of the courts and the public's trust. Five people were involved in the posting. One person, Tara Geraghty Tucker, was not a Judiciary employee.

In addition to asking appellant about her involvement in the posting, Schweitzer also asked about the alleged processing of the bench warrants (by a sheriff's officer) and the processing of the VOPs without hearing. Such processing would be inappropriate and

Schweitzer wanted to know if that was happening. Appellant didn't provide Schweitzer with any information regarding the conduct alleged.

Neither appellant nor any of the other employees involved denied participating in the Facebook posting. Appellant was the only employee involved in the posting who was found to have violated Judiciary policy. The penalty imposed was based on a number of factors. Appellant's lack of a disciplinary history was taken into consideration. Schweitzer and Natalie Myers in Human Resources (HR) arrived at the appropriate penalty by looking at the infraction itself--which was very serious. It was determined that a ten-day suspension was an appropriate penalty as appellant disregarded her repeated training on the Code of Conduct.

On cross-examination, Schweitzer testified that she did not attempt to determine the identity of the anonymous source who provided the Facebook posting to the TCA. She explained that her investigation consisted of one meeting with each of the employees. She had a second meeting with appellant to present the discipline.

Schweitzer did not ascertain which post was the initial post because she did not believe it relevant. The other employees involved in the Facebook posting received written warnings. A written warning is counseling. It is not discipline. Schweitzer was not concerned about Geraghty's comments regarding the "crap" that had gone on while she was away because the comments did not directly mention the Judiciary or what it does.

As part of her investigation, Schweitzer did not determine whether the Facebook group involved in the posting was private or public. She did not believe that it was relevant because she was aware that at least one non-Judiciary employee had received a copy of the posting. The posting had also been forwarded to the TCA by an anonymous source. Schweitzer did not ask appellant why she made the posting or what was meant by it. However, she did ask appellant for a written statement regarding her involvement in the posting.

Schweitzer explained that the posting also raised concern regarding whether the sheriff's officer was putting in bench warrants and whether VOPs were being processed without hearing. The vicinage does not close out cases without hearing; that would be inappropriate.

Schweitzer spoke to Natalie Myers to determine what discipline the Judiciary had imposed for similar conduct. Myers did not provide Schweitzer with any written guidelines regarding the discipline or with examples of other similar discipline. Schweitzer could not recall whether she had ever disciplined someone for a violation of the social media policy. Myers advised that ten days was an appropriate discipline. Meyers did not indicate what this recommendation was based upon.

As a part of considering the discipline to be imposed, they looked at appellant's entire file. They also considered how the Judiciary, as a whole, approached this type of conduct. A ten-day suspension is a major discipline. Schweitzer acknowledged that discipline is typically progressive in nature.

For appellant:

Donna Roche testified that she has been employed by the Judiciary since 1995. She started in the typing pool and worked her way up through various positions. In 2004, she received a promotion and became a Judiciary Clerk 3 working in the drug court. In 2007, she began her current position working with Judge Nieves.

Appellant is familiar with the manner in which disciplinary action is to be imposed. She currently serves as the Chief Steward and Treasurer for the American Federation of State, County & Municipal Employees (AFSCME). Discipline is to be progressive and corrective in nature.

The other individuals involved in the posting were her fellow coworkers and friends. They ate lunch together every day and they often socialized together outside of work. She remains good friends with these individuals.

Appellant explained that her comments regarding Hooper putting in bench warrants referred to "things going on that shouldn't have been," it was an on-going joke amongst the individuals who perform this function. T78:17-21. Hooper was a sheriff's officer in the DNA or fingerprinting unit. Appellant clarified that Hooper was not actually putting in the bench warrants. Appellant made the comment to the Facebook posting because another person thought that Hooper was putting in bench warrants and removing them, but that was not the case. T79:8-10. Matters were being coded improperly, they were coded as completed when they should have been postponed. The majority of the court clerks knew this was happening. It was an ongoing joke among clerks. T80:3-9. Her comment regarding the VOPs being completed without being heard was meant to be "humorous." T80:10-17.

Schweitzer asked appellant for a written statement but she did not ask why she made the posting or what was meant by it.

During the course of her employment, appellant's performance evaluations always reflected a score of meeting expectations.

Appellant described the posting as a lapse in judgment. She explained that it was not her intent to impugn the integrity of the Judiciary. She takes pride in what she does. Her post was meant to be humorous. She would not do this again. Appellant testified that she never played this down, she took full responsibility for her actions. She believes that a ten-day discipline is too harsh. She has never seen discipline go straight to a "major."

On cross-examination appellant acknowledged that a reasonable person reading her comments could understand them to mean that cases were not being heard in court.

Appellant also acknowledged that her comments regarding Hooper putting in bench warrants and VOPs being processed without hearing were not accurate.

She further acknowledged that the posting went beyond her coworkers. It also went to Tara Geraghty Tucker who was not a Judiciary employee. Additionally, she

acknowledged that neither she nor any of the others involved provided the posting to the TCA.

Appellant testified that she "clicked" on the social media policy but did not read it, no one did. T98:25 - 99:1-3. Appellant explained that she does not always have time to go through and read the policies each time she is required to do so. She later explained that she likely "breezed" through the policy. T100:13-20.

Appellant acknowledged that she is familiar with the Judiciary's Code of Conduct and has received training regarding same.

Finally, appellant acknowledged that paragraph two of the cover letter to the social media policy contemplates inadvertent violations.

Credibility

For testimony to be believed, it must not only come from the mouth of a credible witness, it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness' story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

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).

As the finder of fact, I had the opportunity to listen to the testimony of the witnesses and to observe their demeanor, tone, and physical responses. Laura Schweitzer's testimony regarding her investigation of the Facebook posting was straightforward, reasonable, and rational. Additionally, her testimony regarding the scope of her investigation was reasonable and appropriate, particularly in light of the fact that none of the participants in the posting denied their involvement. Further, her testimony regarding the vicinage's efforts to determine the appropriate penalty to impose on appellant and the reason why appellant was the only employee to be disciplined was also rational and reasonable. Thus, I accept Schweitzer's testimony as credible.

As to appellant, her testimony that it was not her intent to impugn the integrity of the Judiciary, that her post was a lapse in judgment, and that she would not do it again was reasonable and appeared sincere. Thus, I accept it as credible. However, other portions of her testimony were at times internally inconsistent and/or not reasonable. Her contention that Schweitzer never asked why she made the comments to the Facebook posting and what was meant by them are in contrast with the undisputed fact that Schweitzer asked appellant, along with each of the other judiciary employees involved to provide a written statement. If appellant wished to provide an explanation for her action this was her opportunity to do so. No restriction or limitation was placed on appellant's ability to respond.

Similarly, her contention that she did not attempt to down play the incident and accepted full responsibility, is inconsistent with her claims that she was not given an opportunity to explain her comments. Additionally, this contention is in conflict with her attempt to minimize her familiarity with the social media policy by testifying that she only "clicked" on or "breezed" through the policy, but hadn't really read it.

Finally, in addition to being confusing, appellant's testimony that she made the comments to the Facebook posting, because court matters were being coded improperly and that this should not have been happening, appear somewhat inconsistent with her testimony that her comments were intended to be humorous. Thus, I do not accept these portions of her testimony as fully credible.

Additional Findings:

After having an opportunity to review the evidence and consider the testimony and the documentary evidence, I further **FIND as FACT:**

Appellant received the Code of Conduct for Judiciary Employees and attended multiple trainings on same.

Appellant received, acknowledged, and agreed to abide by the Policy on Use of Social Media for Judiciary Employees.

Appellant was given an opportunity to provide a written explanation regarding her involvement in the posting.

In attempting to arrive at the appropriate penalty to impose, Schweitzer consulted with Natalie Meyers of HR. Appellant's entire file, including her lack of prior disciplinary history was taken into consideration.

Appellant received satisfactory performance evaluations in years including 2016-2018. See A1 through A-4.

The decision to issue appellant a ten-day suspension resulted from a joint conversation with Schweitzer, Meyers, and the Trial Court Administrator.

LEGAL ANALYSIS AND CONCLUSION

The appellant's rights and duties are governed by laws including the Civil Service Act and the regulations promulgated there under. A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. In an appeal from such discipline, the appointing authority bears the burden of proving the charges by a preponderance of the credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). In

re Polk License Revocation, 90 N.J. 550, 560 (1982); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

Here, the Judiciary charged appellant with Other Sufficient Cause in violation of N.J.A.C 4A:2-2.3(a)12--Violation of Judiciary Policy and Directives: 1. Code of Conduct for Judiciary Employees, Cannon 2- Protection of Confidential Information and Canon 3- Avoiding Actual or Apparent Impropriety, and 2. Policy for the Use of Social Media for Judiciary Employees.

Canon 2 of the Code of Conduct for Judiciary Employees concerns Protection of Confidential Information and provides in pertinent part:

> A. A court employee may not disclose to any unauthorized person for any purpose any confidential information acquired in the course of employment, or knowingly acquired through unauthorized disclosure of another.

The comment to this Canon provides that:

> "Confidential information" includes information about pending matters that is not already a matter of public record and information concerning the work product of any judge, law clerk, staff attorney, or other employee including, but not limited to, notes, papers, discussions, or memoranda.

Canon 3 of the Code of Conduct for Judicial Employees concerns Avoiding Actual or Apparent Impropriety and provides in pertinent part:

> A court employee shall observe high standards of conduct so that the integrity and independence of the courts may be preserved, and shall avoid impropriety or the appearance of impropriety.

The comment to the Canon provides that:

> The holding of public employment in the court system is a public trust. That trust is sustained by conduct that maintains the confidence of the citizenry in the integrity of officers and employees of the judicial branch.

The guideline to the Canon provides in pertinent part:

> In light of the injunction to "avoid impropriety or the appearance of impropriety" judiciary employees must not risk:...participating in activities or allowing themselves to be used in a manner as to impair the dignity and esteem in which the court should be held.

The Policy for the Use of Social Media for Judiciary Employees advises court personnel who choose to participate in social media to exercise caution in online activities. See, R-1, page 1 of the Policy. The policy further advises employees that they must adhere to the Code of Conduct for Judiciary Employees. Id.

The January 31, 2011, letter from the Honorable Glenn A. Grant, J.A.D., explains in pertinent part: "The policy also cautions all employees about the possibility, even inadvertently, of violating our code of conduct through inappropriate use of social media tools." See, R-1, page 1, paragraph two of the cover letter to the Policy.

Here, appellant's action in responding to Geraghty's Facebook status posting violated Canon 2 and 3 of the Code of Conduct for Judiciary Employee because her comments specifically identified the Judiciary as the source or location of the conduct alleged. Additionally, her comments identified a sheriff's officer by name and incorrectly represented that he was entering bench warrants. Finally, appellant's comments, referenced details relating to the operations and processing of specific types of court matters. In referencing alleged court processing practices and urging Geraghty to hurry back because the Judiciary needed her, appellant created a false impression that court matters were being improperly handled. Appellant's comments demonstrate a failure to observe high standards of conduct necessary to preserve the integrity of the courts. They also serve to undermined the citizenry's confidence in the integrity of the officers and employees of the judicial branch.

Additionally, while it may have been appellant's intent to only share her comments with co-workers, it is clear that the Facebook posting was also received by at least one person (Tucker) who was not a judiciary employee and was seen by at least one additional person who anonymously provided a copy to the TCA. Moreover, once

appellant posted her comments to Geraghty's Facebook status, she had no control over where or with whom the posting would be shared. Thus, in choosing to participate in the social media activity of responding to a co-worker's Facebook status posting, appellant failed to exercise appropriate caution and failed to avoid the appearance of, if not actual, impropriety. For these reasons, appellant's comments also violate the Policy on the Use of Social Media for Judiciary Employees.

Accordingly, I **CONCLUDE** that respondent has proved the charges of violation of Canon 2 and 3 of the Code of Conduct for Judicial Employees and violation of the Policy on the Use of Social Media for Judiciary Employees. As appellant's conduct violates the above referenced policies, it is clear that her conduct also violates the charge of Other Sufficient Cause. Thus, I further **CONCLUDE** that respondent has also proved that charge.

Penalty

Having concluded that appellant engaged in the conduct charged, I must determine the proper penalty to be assessed. When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); W.N.Y. v. Bock, 38 N.J. 500 (1962).

Where appropriate, concepts of progressive discipline involving penalties of increasing severity are used in imposing a penalty and in determining the reasonableness of a penalty. W. New York v. Bock, 38 N.J. 500, 523–24. Typically, the Civil Service Commission considers numerous factors, including the nature of the 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. Nonetheless, progressive discipline is not a fixed and immutable rule to be followed without question. Carter v. Bordentown, 191 N.J. 474, 484 (2007).

Here, the respondent has proved the charges against appellant. For the reasons set forth above, appellant's disclosure on social media of information relating to the Judiciary's processing of the specific types of court matters represents a serious violation of Canons 2 and 3 of the Code of Conduct for Judiciary Employees and the Policy for the Use of Social Media for Judiciary Employees.

Appellant raises a number of arguments regarding the ten-day suspension including that respondent failed to conduct an objective and thorough investigation. Appellant also argues that respondent failed to adduce any legally competent evidence establishing just cause to impose a ten-day suspension. More specifically, appellant argues that respondent failed to call Natalie Meyers as a witness to testify to the written guidelines (absence thereof) used to assess the penalty and how she determined that a ten-day suspension was appropriate in this instance. As a result, appellant seeks an adverse inference to be drawn based on respondent's failure to call Meyers as a witness. Appellant also argues that respondent's action imposing a ten-day suspension constitutes disparate treatment. Finally, appellant argues that respondent failed to follow the principles of progressive discipline. Based on these collective arguments appellant seeks a determination that respondent's action imposing a ten-day suspension was arbitrary, capricious, and unreasonable.

Many of these arguments have been previously addressed herein, and for those reasons, the arguments are deemed to be without merit. As to appellant's request for an adverse inference, she fails to provide any case law or other legal support for this request. Additionally, she fails to demonstrate adequate factual support for such a request. Here, Schweitzer directly participated in the decision/recommendation process regarding the penalty imposed. She provided reasonable and credible testimony regarding the actions taken to arrive at her recommendation of a ten-day suspension to the TCA. Thus, appellant's request for an adverse inference is without merit and is denied.

Similarly, appellant's claim of disparate treatment is without merit. The undisputed facts demonstrate that appellant's comments to the Facebook posting were the only comments that specifically mentioned the Judiciary, identified another employee by name, and contained detailed (albeit inaccurate) information relating to the Judiciary's

processing of bench warrants and VOPs. Thus, respondent's decision to impose discipline against appellant was reasonable and appropriate.

Finally, despite the fact that appellant is a long time employee of the Judiciary, has positive performance evaluations, and a disciplinary-free employment history, the importance of preserving the integrity of the courts and maintaining the public's trust, esteem and confidence in same, justifies imposition a of ten-day suspension.

Accordingly, for the reasons set forth above, I **CONCLUDE** that the ten-day suspension is the appropriate penalty and should be **SUSTAINED**.

ORDER

I **ORDER** that the Judiciary's action in issuing a ten-day suspension is hereby **AFFIRMED** and appellant's appeal is **DISMISSED**.

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.

January 27, 2020
DATE

SUSAN L. OLGIATI, ALJ

Date Received at Agency: 1/27/20

Date Mailed to Parties: 1/27/20

SLO/vj

APPENDIX

LIST OF WITNESSES

For respondent:

Laura Schweitzer

For appellant:

Donna Roche

LIST OF EXHIBITS

Joint:

J-1 Collective Negotiation Agreement
J-2 PNDA
J-3 FNDA, dated June 15, 2018

For respondent:

R-1 Social Media Policy
R-2 Roche's Learning Transcript
R-3 Code of Conduct for Judiciary Employees
R-4 Screenshot of Facebook posting
R-5 Complete Facebook posting
R-6 Email from Roche to Schweitzer, January 17, 2018.
R-7 Email from Robinson to Schweitzer, January 16, 2018.
R-8 Email from Grant to Schweitzer, January 16, 2018.
R-9 Email from Replinger to Schweitzer, January 16, 2018.
R-10 FNDA with attached posting.

For appellant:

A-1 Annual Performance Advisory 2018

A-2 Mid-Year Evaluation 2018

A-3 Annual Performance Advisory 2017

A-4 Annual Performance Advisory 2016