



STATE OF NEW JERSEY

**DECISION OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Brian Pio, Salem
County Sheriff's Office

CSC Docket No. 2020-2193

Request for Reconsideration

ISSUED: JULY 31, 2020 (HS)

The Salem County Sheriff's Office, represented by Joseph M. DiNicola, Jr., Esq., petitions the Civil Service Commission (Commission) for reconsideration of the attached decision rendered on January 15, 2020, which modified the removal of Brian Pio to a six-month suspension and ordered that he attend diversity training.

As background, the appointing authority presented Pio, a County Correctional Police Officer,¹ with a Final Notice of Disciplinary Action that removed him, effective July 19, 2019, on charges of conduct unbecoming a public employee; violation of rules and regulations; and other sufficient cause. Specifically, the appointing authority asserted that Pio made harassing, racial comments towards co-workers.

Upon Pio's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case. The hearing was held on October 3, 8, 16 and 17, 2019. After the hearing, the Administrative Law Judge (ALJ) determined that the appointing authority had met its burden of proof with regard to the charges. In determining the penalty, the ALJ concluded that Pio's actions were so egregious as to justify his removal. The ALJ indicated that Pio's racially charged statements and his evasiveness to the investigator adversely affected morale and would tend to destroy public respect for the delivery of government services.

In his exceptions, Pio contended that his actions were not egregious enough to forego the principles of progressive discipline. He claimed that the ALJ failed to

¹ Pursuant to *N.J.S.A. 40A:14-180.3*, effective December 1, 2019, the title of County Correction Officer has been retitled to County Correctional Police Officer.

consider the lack of malice in his statement or his 13 years of service in correctional facilities. In its reply to exceptions, the appointing authority argued that the ALJ properly determined that the appropriate penalty was removal. Upon its *de novo* review of the record, the Commission agreed with the ALJ's determination regarding the charges but did not agree with his recommendation to uphold the removal. In this regard, Pio had only one two-day suspension in his disciplinary history and had been employed as a County Correction Officer with Gloucester County since 2008 before receiving an intergovernmental transfer to Salem County in 2013. While the Commission found that Pio's comments were completely inappropriate and were not condoned, it did not agree that they were so egregious as to warrant removal without following the tenets of progressive discipline. The Commission noted that Pio was not in a supervisory role when speaking to his co-worker and the inappropriate comments were made in a singular incident. Further, Pio apologized for his comments. Moreover, while the Commission noted that a law enforcement officer is held to a higher standard than a civilian public employee, the comments made in the context of the matter were not so egregious as to ignore the tenets of progressive discipline. Accordingly, the Commission imposed a six-month suspension and ordered that Pio attend diversity training. However, the Commission recognized that Pio's conduct was unacceptable and emphasized that, in imposing a six-month suspension, the most severe penalty permitted in lieu of removal, it was not acting to minimize the seriousness of the offense. The Commission was mindful that the penalty should serve as a warning to Pio that future offenses may result in his removal from employment.

In its request for reconsideration, the appointing authority proffers that there is new information that the Commission did not consider that would make it apparent that Pio's removal should be upheld. Specifically, the appointing authority presents an incident report prepared by Richard Langley, County Correctional Police Officer. Langley recounted the following:

I . . . received a new admission by the name of [C.H.]. While I was fingerprinting Inmate [C.H.] he made a statement in regards to one of the facilit[y's] former Officers. Inmate [C.H.] asked "where's the Officer that made the racial comments about a girl that can't work back here?" I replied "I don't know what you are talking about." Inmate [C.H.] said "I think his name was Officer Pio." I then replied "no clue I haven't heard anything about that." Inmate [C.H.] then stated "well he needs to be punched in the face for that shit."

Langley signed the report on October 14, 2019, the date of the incident. His supervisor and captain signed the report on October 28, 2019. The appointing authority states that on October 29, 2019, it filed a motion to reopen the hearing regarding this new evidence, but the ALJ never acted upon the motion. The appointing authority contends that the incident recounted in Langley's report goes

directly to the safety and security of both the facility and Pio. The appointing authority notes its belief that there is no way to provide the appropriate protection to Pio from these types of threats resulting from his racist actions. Additionally, the appointing authority requests that Pio's reinstatement be stayed until it files the appropriate appeal with the Appellate Division, in the event that the Commission will not reconsider its decision.

In response, Pio, represented by Frank Cioffi, Esq., maintains that the appointing authority's motion to reopen the hearing was actually previously addressed by the ALJ and properly denied. Thus, Pio argues that the Commission should not consider it.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

The appointing authority maintains that Langley's incident report, the subject of its October 29, 2019 motion to reopen the hearing before the ALJ, is new information not previously presented that would change the Commission's decision as to the proper disciplinary penalty. The ALJ's initial decision, which agreed with the appointing authority's original penalty of removal, makes no mention of the motion, and there is no evidence in the record of any ruling on the motion by the ALJ. In light of the record, Langley's report is information to which the Commission was not previously privy. The Commission cannot ignore the alarming nature of the alleged incident described in the report: an inmate's suggestion that Pio's comments deserved to be met with physical violence, which implicates matters of safety and security within a correctional facility. Therefore, the Commission finds it appropriate to remand this matter to the OAL for additional factfinding surrounding Langley's incident report. The appointing authority should be provided the opportunity to offer competent evidence and to call witnesses to testify about the incident or verify the incident report. Further, Pio will be permitted to offer evidence or testimony in rebuttal of the evidence or testimony presented by the appointing authority. After the additional proceedings at the OAL are complete, the Commission will be in a position to determine whether it should reconsider Pio's disciplinary penalty.

As to the appointing authority's request that Pio's reinstatement be stayed until it files the appropriate appeal with the Appellate Division, it should be noted that *N.J.A.C.* 4A:2-1.2(f) provides:

Following a final administrative decision by the Civil Service Commission, and upon the filing of an appeal from that decision to the Appellate Division of Superior Court, a party to the appeal may petition the Commission for a stay or other relief pending a decision by the Court in accordance with the procedures and standards in [N.J.A.C. 4A:2-1.2(b) and N.J.A.C. 4A:2-1.2(c)]. See N.J. Court Rules 2:9-7.

The appointing authority has not filed an appeal from the Commission's decision with the Appellate Division. Moreover, as already discussed, the Commission has determined that additional factfinding is necessary. As such, there is no basis for the Commission to stay its prior decision.

ORDER

Therefore, it is ordered that this matter be remanded to the Office of Administrative Law for further proceedings as set forth above.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 29TH DAY OF JULY, 2020

Deirdre' L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

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and
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Attachment

c. Stacy Pennington
Joseph M. DiNicola, Jr., Esq.
Brian Pio
Frank Cioffi, Esq.
Beth Wood (w/ file)
Division of Agency Services
Records Center



STATE OF NEW JERSEY

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DECISION OF THE
CIVIL SERVICE COMMISSION

 In the Matter of Brian Pio,
 Salem County Sheriff's Office
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 CSC Docket No. 2020-199
 OAL Docket No. CSV 11423-19
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ISSUED: January 29, 2020 (EG)

The appeal of Brian Pio, a County Correction Officer with the Salem County Sheriff's Office, of his removal effective July 19, 2019, on charges, was heard by Administrative Law Judge Jeffrey R. Wilson (ALJ), who rendered his initial decision on December 2, 2019. 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 January 15, 2020, did not adopt the ALJ's recommendation to uphold the removal. Rather, the Commission modified the removal to a six-month suspension and ordered that the appellant attend diversity training.

DISCUSSION

The appellant was charged with conduct unbecoming a public employee, violation of rules and regulations and other sufficient cause. Specifically, the appointing authority asserted that the appellant made harassing, racial comments towards co-workers. 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 his initial decision that on April 8, 2019, the appellant engaged County Correction Officer Shakyla Ellis in a conversation. The ALJ found that when the appellant overheard Ellis express interest in another position he advised her that she would not get the position because the County Correction

Sergeant in charge of booking was a racist. When Ellis expressed confusion with the statement as she was aware that an African-American female was working as a booking officer, the appellant stated to her that the reason she would not get the position was because that other officer was "Salem County Black" and that Ellis was "Black-Black" and had a "Black attitude." Ellis testified that she was offended, surprised, shocked and taken aback by the appellant's comments. The appellant acknowledged stating to Ellis that the other officer was "Salem County Black" and that Ellis was "Black-Black." The appellant tried to apologize when he realized he had offended Ellis.

The ALJ concluded that the appellant's behavior supported the charge of conduct unbecoming a public employee. In addition, the ALJ determined that the appellant's comments rose to the level of harassment and violated Salem County Corrections rules and regulations on harassment, standards of conduct, respect, prohibited activity and civil rights. Further, the ALJ upheld the charge of other sufficient cause. In determining the penalty, the ALJ considered the testimony of nine witnesses who testified regarding the appellant's character and job performance. The ALJ concluded that the appellant's actions were so egregious as to justify his removal. The ALJ indicated that the appellant's racially charged statements and his evasiveness to the investigator adversely affected morale and would tend to destroy public respect for the delivery of government services. Based on the foregoing, the ALJ determined that removal was the appropriate penalty.

In his exceptions, the appellant contends that his actions were not egregious enough to forego the principles of progressive discipline. The appellant argues that his conduct did not create a severe or pervasive hostile work environment. Additionally, the appellant claims that the ALJ failed to consider the lack of malice in his statement to Ellis or his 13 years of service in correctional facilities. Further, the appellant asserts that in cases such as *Karins vs. Atlantic City*, 152 N.J. 532 (1998), *In the Matter of William Roberts* (CSC, decided January 15, 2014) and *In the Matter of Victor Bermudez*, Docket No. A0590-17T1 (App. Div., decided May 2, 2019), those individuals used worse racial language such as the "n" word and none were terminated from their positions. Moreover, the appellant complains that the ALJ failed to find that he believed there was a "good ol boy system" at the Salem County Correctional Facility.

In its reply to the exceptions, the appointing authority argues that the ALJ properly determined that the appropriate penalty for the appellant's action was removal. Additionally, it asserts that the instant matter can be differentiated from the cases cited by the appellant as in those instances, the incidents occurred either in heat of the moment situations or occurred off duty. In the present case, the appellant's inappropriate comments were uttered at work and during a casual conversation.

Upon its *de novo* review of the record, 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 removal. Rather, the Commission modifies the removal to a six-month suspension and orders diversity training. In reviewing the charges, the Commission notes that neither party challenges the ALJ's determination that all the charges against the appellant were upheld. The exceptions filed mostly concern the ALJ's determination to uphold the penalty of removal.

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, the appellant had only one two-day suspension in his disciplinary history. The appellant had been employed as a County Correction Officer with Gloucester County since 2008 before receiving an intergovernmental transfer to Salem County in 2013. Given the actual incident in question, the Commission does not find removal to be appropriate under these circumstances. While the Commission finds that the appellant's comments to Ellis were completely inappropriate and are not condoned, it does not agree that they were so egregious as to warrant removal without following the tenets of progressive discipline. The Commission notes that the appellant was not in a supervisory role when speaking to his co-worker and the inappropriate comments were made in a singular incident. Further, the appellant apologized for his comments. Moreover, while the Commission notes that a law enforcement officer is held to a higher standard than a civilian public employee per *Moorestown v. Armstrong*, 89 N.J. Super. 560 (App. Div. 1965), *cert. denied*, 47 N.J. 80 (1966) and *In re Phillips*, 117 N.J. 567 (1990), the comments made in the context of this particular matter are not so egregious as to ignore the tenets of progressive discipline. Accordingly, the Commission imposes a six-month suspension on the appellant and orders that he attend diversity training. However, the Commission recognizes that appellant's conduct is

unacceptable and emphasizes that, in imposing a six-month suspension, the most severe penalty permitted in lieu of removal, it is not acting to minimize the seriousness of the offense. The Commission is mindful that this penalty should serve as a warning to the appellant that future offenses may result in his removal from employment.

As the removal has been modified, the appellant is entitled to back pay, benefits and seniority for the period after the imposition of the six-month suspension up to his date of reinstatement. With regard to counsel fees, since the appellant has not prevailed on the primary issues on appeal, he 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 major 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.

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

ORDER

The Civil Service Commission finds that the appointing authority's actions in removing the appellant was not justified. Therefore, the Commission modifies the removal to a six-month suspension and orders that the appellant attend diversity training. The Commission further orders that the appellant be granted back pay, benefits and seniority for the period after the imposition of the six-month suspension through the date of his actual reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF JANUARY, 2020



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

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and
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 11423-19

AGENCY DKT. NO. N/A

**IN THE MATTER OF BRIAN PIO,
SALEM COUNTY (SHERIFF'S OFFICE).**

**Christopher A. Gray, Esq., for appellant, Brian Pio (Sciarrà & Catrambone, L.L.C.,
attorneys)**

**Joseph DiNicola, Jr., Esq., for respondent, Salem County (Sheriff's Office),
DiNicola and DiNicola, L.L.C., attorneys)**

Record Closed: October 17, 2019

Decided: December 2, 2019

BEFORE JEFFREY R. WILSON, ALJ:

STATEMENT OF THE CASE

Appellant, Brian Pio, (Pio), a Corrections Officer, (CO), appeals his removal, effective July 19, 2019, for conduct unbecoming a public employee and for violating Salem County Correctional Facility (SCCF) Rules and Regulations. The respondent, Salem County, alleges that on April 8, 2019, the appellant made harassing, racial comments to another CO.

PROCEDURAL HISTORY

The appellant filed a timely appeal of the removal and requested a hearing before the Office of Administrative Law (OAL). The matter was transmitted to the OAL, where it was filed on July 23, 2019, and deemed defective because it did not include the Final Notice of Disciplinary Action (FNDA). On August 12, 2019, the FNDA was received and the appeal was deemed perfected, as a contested case. N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13.

Oral argument on motions in limine were heard telephonically and decided on September 24, 2019, September 27, 2019, October 1, 2019 and October 15, 2019. The fair hearing commenced on October 3, 2019, and continued on October 8, 2019, and October 16, 2019. The hearing concluded on October 17, 2019, and the record closed.

FACTUAL DISCUSSION AND FINDINGS

The following facts of this case are not in dispute; therefore, I **FIND** as **FACT**:

1. The appellant was employed as a CO at SCCF during all relevant times.

2. A Preliminary Notice of Disciplinary Action (PNDA) was issued on June 14, 2019. (J-1). A Final Notice of Disciplinary Action (FNDA) was issued on July 18, 2019, (J-2), that resulted in the appellant being charged with the following violations:
 - N.J.A.C. 4A:2-2.3(6) - Conduct Unbecoming a Public Employee

 - N.J.A.C. 4A:2-2.3(12) - Other Sufficient Cause
 - Violations of SCCF Rules and Regulations:
 - Section 3:1.32 – Harassment in the workplace (two Counts)
 - Section 3:1.1 – Standards of conduct
 - Section 3:2.1(13) – Prohibited activity on duty
 - Section 3:1.33 – Respecting Civil Rights
 - Section 3:1.35 – Respect

3. The FNDA described the incident giving rise to the charges and the date on which they occurred as follows:

On April 8, 2019, Officer Pio (caucasian) engaged Officer Shakyla Ellis, an African American officer, in conversation that rose to the level of workplace harassment towards employees that are in a protected group status. Officer Ellis and Officer Brandy Harris (African American. Officer Pio also claimed that Sgt. Jeffrey Trull, a white officer, did not want black officers in the booking department. The internal investigation (2019-025) resulted in 6 sustained charges against Officer Pio. (J-2).

Testimony

Shakyla Ellis (Ellis) is a CO at the SCCF. She is of African American lineage. At the time of the hearing, she had held this position for two years. On April 8, 2019, she was working as a housing officer in Unit B-6. Earlier in the day, she was informed that the booking department was seeking a female booking officer for an opening in that department. Ellis expressed her interest in that position.

On that date, the appellant, who is Caucasian, was assigned to relieve COs as they went on break. When the appellant appeared at Unit B-6 to relieve another CO, he overheard Ellis as she expressed interest in the booking officer position and advised her that she would not get the position because Jeffrey Trull (Trull), the sergeant in charge of booking, is racist.

Ellis expressed her confusion to the appellant's accusation because she was aware that CO Brandi Harris (Harris), an African American female, was working as a booking officer. The appellant informed Ellis that the reason she would not get the position is because Harris is "Salem County Black" and she is "Black-Black" and has a "Black attitude." Ellis was offended, surprised, shocked and taken aback by the appellant's accusations. She had never been referred to in such a way. She felt that the comments were racist and that the appellant was racially prejudiced. When Ellis repeatedly asked the appellant to explain his comments, he simply replied that she knew what he meant.

Ultimately, the appellant appeared as he had offended Ellis and attempted to apologize. Ellis did not believe that his apologies were sincere. Ellis expressed her concern that she then understood what the appellant truly thought about her. She has not spoken to the appellant since that day, except in passing.

After this confrontation, Ellis was approached by CO Christa Urban (Urban), a co-worker and close friend of the appellant. Urban attempted to justify what the appellant said by detailing the appellant's tough upbringing. Ellis felt as though Urban was trying to discourage her from reporting the incident.

Eventually, Ellis approached Harris and told her about the confrontation with the appellant. Harris urged her to report the incident to Captain Alan Nobles (Nobles), who had an open-door policy. Despite Nobles not being her immediate supervisor, on April 12, 2019, Ellis reported the incident to Nobles because she felt comfortable doing so and also because her immediate supervisor, Sergeant April Garrison (Garrison), was a friend of the appellant.

After reporting the incident, Ellis felt intimidated by the investigation process. She was concerned that she would not be treated fairly because of the appellant's leadership position with the Police Benevolent Association (PBA) Union¹ and because he had so many friends within the SCCF. Prior to reporting the incident, Ellis enjoyed going to work. After her reporting, some co-workers would no longer speak to her. Rumors were circulated and threats were made against her. On April 17, 2019, Ellis was interviewed by Investigator Christopher Simmermon (Simmermon) as part of the Internal Affairs (IA) investigation (R-2 at Annex 16 and R-2A).

At the hearing, Ellis was adamant that she does not want to continue to work with the appellant. With his expressed bias against African Americans, she feels that he does not belong in law enforcement. As COs, they are responsible for overseeing an incarcerated population made up of mostly African Americans and Hispanics. If the

¹ Ellis is a member of the Fraternal Order of Police (FOP) Union.

appellant feels it is appropriate to address a fellow CO as he did, Ellis is concerned about how he treats the inmates. She is concerned of the affect the appellants racial bias would have on the overall safety and security of the facility; not to mention the dampening effect on CO morale.

It must be noted that on the morning that Ellis testified, dozens of PBA members, many not from the SCCF, appeared at the OAL seeking admittance to the hearing room; bringing extra chairs from other rooms and crowding the hearing room. Due to fire safety concerns, seating was limited and the additional chairs were removed. This crowd of union members did not appear for the remaining three days of the hearing.

In order to assess credibility, the witness' interest in the outcome, motive or bias should be considered. Furthermore, 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).

Having considered the testimonial and documentary evidence presented by the respondent, I accept the testimony offered by Ellis to be very credible and highly persuasive. Her testimony was free of any histrionics and she exhibited no ulterior motive aside from laying out the facts as she recalled them. Ellis had nothing to gain from testifying.

Brandi Harris. Pursuant to N.J.A.C. 1:1-15.12, and over the appellant's objection, transcripts of Harris' prior sworn testimony (R-5 and R-14at 60-73) were permitted in lieu of live testimony. Pursuant to N.J.A.C. 1:1-15.12(c), the appelant maintained the right to subpoena this witnesses to appear.

Harris has been employed at the SCCF twelve years. She presently holds the position of CO. On May 1, 2019, she was interviewed by Simmermon as part of the IA investigation (R-2 at Annex 43 and R-2A). On July 3, 2019, she was a witness at the appellant's departmental hearing. Her testimony was under oath and the appellant's attorney was present and subjected her to cross-examination (R-5 and R-14 at 60-73).

Ellis approached Harris on April 8, 2019, and relayed to her that Pio said Ellis would not be able to get a position in the booking department because she is Black. When pushed to explain why Harris was in booking, Pio responded because Harris is "Salem County Black" and Ellis is "Black-Black." When Ellis told Pio that she was offended by his statements, Pio indicated that if anyone should be offended it should be Harris because he does not even consider Harris to be Black. Harris was shocked and offended by this information.

Shortly thereafter, Urban approached Harris to express that Pio was the least racist person in the jail, he is a good person and that he says things without thinking. Urban then talked about Pio's tough upbringing with drug addicted parents.

Since the April 8, 2019 incident, Harris indicated that the SCCF is divided because she and Ellis came forward with the complaint. There is tension in the facility and coworkers do not speak to her anymore. She feels that her job is more dangerous now and fears retaliation.

In evaluating Harris' credibility, this ALJ did not have the benefit of observing her as she provided sworn testimony at the departmental hearing. This ALJ can only glean information as to her demeanor from reviewing the transcript. Having considered the departmental hearing testimony presented by Harris, I note that it is consistent with the testimony provided by Ellis. Therefore, I accept Harris to be credible. Her testimony was direct and to the point. She exhibited no ulterior motive aside from laying out the facts as she recalled them. Harris had nothing to gain from testifying.

Brian Pio, the appellant, detailed his personal history starting from his birth in Vineland, New Jersey, through his legal emancipation from his abusive parents. He then lived with family members and had to work to support himself. He enlisted in the military at the age of seventeen, completed basic training after his junior year of high school and returned to graduate with his senior class.

Pio underwent Advanced Individual Training (AIT) to become a truck driver. He was activated to Iraq, but was not selected to go there. He attempted to volunteer to be sent to Iraq, but was instead deployed to Germany. He remained in Germany for eighteen months, where he was married. Upon his return from Germany, he was assigned to Fort Dix and trained those being deployed for convoy operations. After Fort Dix, the appellant was honorably discharged.

After his honorable discharge, Pio worked as an electrician's assistant. In 2006-2007, he passed the civil service test, attended the Camden County Police Academy and worked as a CO in the Gloucester County Correctional Facility (GCCF). In August of 2013, he was transferred to the SCCF after the GCCF closed.

Pio gained experience with union activity while at the GCCF. There, he observed problems with their union, FOP. Upon moving to the SCCF, he transferred into the PBA-Local 400 and served as a trustee. He later moved up in the union ranks and served as a union delegate. In that position, he acted as the county liaison to the union's state board, coordinating the dissemination of information between all jails in the state. He assisted in organizing legal defense to minor and major disciplinary actions, counseled seasoned COs on contracts and expected behavior and provided guidance to new COs. He explained that COs approach him on a daily basis seeking assistance and advice concerning safety issues, policy questions, internal disagreements and inmate rights.

John Cuzzupe (Cuzzupe) became warden of the SCCF in January 2017. During a meet-and-greet, after his arrival, Pio discussed issues in the jail with the new warden. They also discussed Pio's perceived existence of a "good old boys system" in the SCCF. Pio described a "good old boys system" as the failure of administration to treat COs and staff on the basis of merit as opposed to beneficial treatment based upon outside biases and influence, Salem County politics and family familiarity. Pio also discussed his perceived existence of a "good old boys' system" in the SCCF with Cuzzupe at an April 2018, meeting.

Pio detailed a Contentious Employee Protection Act (CEPA) claim he filed against the SCCF in 2013. Subsequently he was charged with insubordination. This charge was

upheld at the county level and he was suspended for two days. He appealed and three and one-half years later, that discipline was removed. Since Cuzuppe became warden of the SCCF in 2017, Pio filed approximately sixty to sixty-four grievances on behalf of the PBA; eight to ten of those grievances were against the facility's supervisors. Pio represented the CO's in disciplinary hearings and continued to do so at the time of the hearing.

On September 27, 2017, in violation of the facility's rules, Pio entered the visitor/staff sally port with his firearm on his right hip. He received a Guardian Tracking System² entry (R-12) and he insured his superior that it would never happen again. Sixteen days later, on October 13, 2017, Pio again entered the sally port while armed with his duty service weapon. On November 21, 2017, he received a Notice of Minor Disciplinary Action (R-13) and a two day suspension was imposed.

Prior to detailing the incident that occurred on April 8, 2019, Pio indicated that he had reviewed all discovery and reports related to the incident "hundreds of times" because he knew that he would have to testify. On April 8, 2019, Pio was working as a member of the response team and was responsible for relieving COs in Units B-4, B-5 and B-6 as they went on their breaks. After relieving another CO in Unit B-6, Pio approached Ellis who was sitting at a desk. Ellis complained about being assigned to Unit B-6 and Pio asked if she had applied for a position in the booking department. Ellis indicated that she had approached Garrison about the position and Pio informed her that she would not get the position stating "You're brown. That's never going to happen." Pio insisted that his statement was an absurd joke and that a different culture exists in the jail system. In order to be a CO, you have to be a special type of person. You have to have thick skin.

Ellis asked Pio what he meant by his statement because Harris works in booking and she is Black. Pio explained to Ellis that she and Harris are not the same kind of officer because Harris is "Salem County Black" and Ellis is "just Black/Black-Black." Concerned that his "joke" had offended Ellis, Pio tried to explain that he meant because

² Guardian Tracking System is an employee performance management tool used to record observations, events, conversations, incidents of good and bad performance, evaluations and other work-related happenings.

Ellis is from Salem County that she is a part of the good-old-boy system and that Ellis is not from Salem County and therefore not a part of the good-old-boy system.

Realizing that Pio did not understand why Ellis would be offended by his comments, she explained that her father is African-American. When pressed further to explain his comments, Pio responded that the difference between her and Harris is that Harris "talks white" and Ellis "talks black" and that Ellis "talks street all the time." Pio apologized to Ellis when he realized that he had offended her. He misspoke and used a poor choice of words. The conversation lasted approximately eight minutes. Pio adamantly denies that he ever mentioned Trull's name during the confrontation.

Pio saw Ellis later in the day. He apologized again, but there was silence between them. Pio then approached Urban, Garrison and CO Ashley Wright (Wright). He explained to them what transpired between him and Ellis because he thought that he had offended her and wanted to know what he had done wrong. He sought their assistance in how to mend the situation. They all told him he was dumb for making those statements.

The next day, Pio was aware that Ellis remained offended by his statements as it had become a topic of conversation throughout the jail. COs teased him and called him the new Don Imus³ and the new David Duke⁴. Realizing that Ellis was still upset, Pio did not approach her that day.

On April 17, 2019, Pio received formal notice that an IA Complaint (R-2 at Annex 13) had been made against him. Although the complaint does not name Ellis as the complainant, Pio did not try to approach her after receiving the notice. He did not hold it against Ellis for filing the complaint because she was justified in being offended. If an individual believes they have been wronged, they have the right to file a complaint.

³ Don Imus is known for his radio show "Imus In The Morning." He was labelled a "shock jock" radio host throughout his later career, and his programs have been popular and controversial. Imus and his crew repeatedly made controversial remarks through skits and character impersonations in what they considered a comical format which critics labeled as racist, misogynist, and anti-Semitic xenophobia. He has also been accused of making offensive remarks off the air.

⁴ David Dike is an American neo-Nazi and former Grand Wizard of the Ku Klux Klan.

On May 24, 2019, Pio was interviewed by Simmermon as part of the IA investigation (R-2 at Annex 41 and R-2A). At the onset of the interview, he was evasive when asked to recount the confrontation with Ellis on April 8, 2019. He made it appear as though Ellis injected race into the conversation. It was not until he was confronted with his actual statements that Pio admitted to his statements.

A PNDA was issued on June 14, 2019. (J-1). It was served upon Pio on June 17, 2019. On that date, he was met by the deputy warden who directed him to the warden's office. There, he was met by Cuzzupe who formally served him with the PNDA and informed that he was suspended pending termination and requested that Pio turnover his credentials, duty service arm, keys, etc. The deputy warden had Pio escorted to his vehicle to retrieve his county identification. Once in his car, Pio began to cry. At one point, he was taken to the hospital. A FNDA was mailed to Pio on July 18, 2019. (J-2).

At the hearing, Pio appeared to fight back tears as he detailed the difficulties he and his family experienced as a result of this disciplinary action. It has taken a toll on the family financially and emotionally. They had to suffer the publicity generated from the public departmental hearing and article posted on nj.com. On cross examination, Pio admitted that it was he that insisted that the hearing be publicized.

As for his diversity training, on August 30, 2013, Pio acknowledged that he received and reviewed the policies procedures, directives and documents required by the SCCF Training Department (R-10). On September 18, 2018, he completed a ten question "Cultural Diversity, De-Escalation and Bias Crimes Test" in under eight minutes. (P-9). On November 5, 2018, Pio completed and passed a ninety-minute course entitled "Cultural Diversity, De-Escalation and Bias Crime Reporting." (P-9).

Going forward, Pio learned that you must think before you speak and that on April 8, 2019, he did not. He believes he is now a more well-rounded person and sees the need for appropriate workplace conversations; especially those conversations involving protected classes. He believed that it is not proper for a person to be told they cannot get a particular job because of their race.

Having considered the testimonial evidence presented by the appellant, his testimony is very suspect. It is inherently incredible and inconsistent with common experience that one would not find it offensive to refer to any person with racial slurs, especially when it is contrasted with another racial slur; as though one is better than the other. That Pio sought out validation and support from Urban, Wright and Garrison the day of the incident, coupled with the dozens of PBA members crowding the room hearing for Ellis' testimony, shows a motive to garner support for his ongoing actions to inflict intimidation.

Therefore, I **FIND as FACT** on April 8, 2019, Pio, who is Caucasian, was assigned to relieve COs as they went on break. When he appeared at Unit B-6 to relieve another CO, he overheard Ellis as she expressed interest in the booking officer position and advised her that she would not get the position because Trull, the sergeant in charge of booking, is racist.

I **FIND as FACT** that Ellis expressed her confusion to the appellant's accusation because she was aware that Harris, an African American female, was working as a booking officer. The appellant informed Ellis that the reason she would not get the position is because Harris is "Salem County Black" and she is "Black-Black" and has a "Black attitude." Ellis was offended, surprised, shocked and taken aback by the appellant's accusations. She had never been referred to in such a way. She felt that the comments were racist and that the appellant was racially prejudiced. When Ellis repeatedly asked the appellant to explain his comments, he simply replied that she knew what he meant.

I **FIND as FACT** that ultimately, the appellant appeared as he had offended Ellis and attempted to apologize. Ellis did not believe that his apologies were sincere. Ellis expressed her concern that she then understood what the appellant truly thought about her. She has not spoken to the appellant since that day, except in passing.

I **FIND as FACT** that after this confrontation, Ellis was approached by CO Urban, a co-worker and close friend of the appellant. Urban attempted to justify what the appellant

said by detailing the appellant's tough upbringing. Ellis felt as though Urban was trying to discourage her from reporting the incident.

Finally, I **FIND** as **FACT** that the SCFF is divided because Ellis and Harris came forward with the complaint. There is tension in the facility and coworkers do not speak to them anymore. Ellis and Harris feel that their jobs are more dangerous now and they fear retaliation.

Alan Nobles has been employed at the SCCF for twenty-two years. He presently holds the position of administrative captain. On April 12, 2019, Ellis called him and stated that she wanted to talk privately. She informed Nobles that she was uncomfortable reporting to her immediate supervisors because of their close relationship with Pio. Due to the culture and climate on her shift, she feared that her supervisors shared the same views as Pio.

At his office, Ellis recounted the April 8, 2019, incident with Pio when he told her that she would not get the booking position because she is Black. When she confronted Pio with the fact that Harris already worked in booking, Pio stated that Harris was hired in booking because she is "Salem County Black" and that Ellis is "Black-Black."

Ellis had taken a few days to digest what had transpired between she and Pio before her meeting with Nobles. While meeting with Nobles, Ellis spoke very professionally but started to be overcome with tears as she recounted the incident. Nobles noted that she was very offended. Nobles does not know Pio personally, but professionally, he feels that Pio does his job. Nonetheless, Nobles took Pio's statements as wrongful, racist and hurtful. Ellis expressed that she felt intimidated. Noble immediately reported the incident by filing an IA-14 Form along with Ellis' Incident Report (R-2 at Annex 3 and Annex 4). On April 16, 2019, Nobles was interviewed by Simmermon as part of the IA investigation (R-2 at Annex 15 and R-2A).

Nobles detailed how Pio's behavior on April 8, 2019, violated each of the sustained charges listed in the FNDA (J-2); comparing them with the language found in the Salem

County Corrections Rule and Regulations and the Salem County Policy Against Harassment (R-1).

Having considered the testimonial and documentary evidence presented by Nobles, I accept him to be very credible and highly persuasive. His testimony was unwavering and exacting. He exhibited no ulterior motive aside from laying out the facts as he recalled them. Nobles had nothing to gain from testifying.

Jeffrey Trull (Trull) has been employed with the SCCF for twenty-five years. He presently holds the position of booking sergeant. He is not a racist and does not know why Pio would refer to him as such. He has never treated anyone differently. Hearing this accusation made him angry.

Trull indicated that Pio has a reputation for being outspoken and “filterless” with his words; showing arrogance towards his supervisors. He never approached Pio concerning his comment and did not file any complaint relative to the allegation.

Having considered the testimony presented by the Trull, I accept him to be very credible. Though brief, his testimony was straightforward and free of any histrionics. He exhibited no ulterior motive. He had nothing to gain from testifying.

Christopher Simmermon began working for the Salem County Sheriff’s Office as an IA investigator on February 6, 2019. Aside from the Sheriff’s Office, he was assigned to investigate complaints in other departments throughout the county, including the Public Works Department and the Transit Authority.

On April 12, 2019, he was contacted by the sheriff and directed to the warden of the SCCF to conduct an investigation of allegations from the facility. Simmermon conducted an IA investigation based upon the complaint filed by Nobles (R-2 at Annex 3 and Annex 4) and issued a detailed report that included recorded interviews and their transcriptions (R-2 and R-2A). Simmermon listed the eleven elements of the investigation as well as the six established allegations. All allegations were ultimately sustained in the FNDA (J-2).

On cross examination, Simmermon was accused of being too inexperienced to conduct such an investigation and that he lacked objectivity because of his relationship with the sheriff. There was no competent, credible evidence to support these allegations. Simmermon's eleven page report (R-2 and R-2A) is thorough, detailed and includes forty-four Annexes. His report is free from any bias and makes no recommendation as to penalty. His report reflects a careful weighing and evaluation of the elements and resulting allegations.

Having considered the testimonial and documentary evidence presented by the Simmermon, I accept him to be very credible. His testimony was straightforward and his report is free from any bias and makes no recommendation as to penalty. His report reflects a careful weighing and evaluation of the elements and resulting allegations. He exhibited no ulterior motive aside from laying out the facts as he recalled them. Simmermon had nothing to gain from testifying.

John Cuzuppe (Cuzuppe) has been in law enforcement for thirty-five years. He has served as the warden of the SCCF since January 1, 2017. On April 12, 2019, Nobles brought Ellis' report to his attention. He advised the sheriff of the reporting and the sheriff and Simmermon was assigned to the investigation.

On June 3, 2019, Cuzuppe received Simmermon's completed report and Annexes (R-2 and R-2A). He digested the report for one week with a focus on the interviews of Ellis, Harris and Pio. On June 7, 2019 or June 8, 2019, based upon his review of the investigation report up to that point, Cuzuppe ordered that Pio and Ellis be kept separate. He ultimately determined that the allegations detailed in Simmermon's report were violative of county policy and that removal was appropriate. He personally served Pio with the PNDA on June 17, 2019.

Cuzuppe justified the long process from Noble's initial reporting, on April 12, 2019, to the serving the PNDA, on June 17, 2019, because of the sensitive nature of the allegations. He wanted to have all available facts before making a such an impactful decision. Considering the volume and extent of the investigation, he considered all

related actions as timely. He did not want to bring such charges against a CO without careful and thorough consideration. He wanted the to keep the investigation process fair and impartial.

Cuzuppe's decision to recommend removal was painstakingly made. It was not a recommendation he wanted to make, but considering the information before him, he had no other options. Racial discrimination in the workplace has a damaging effect on COs, staff and inmates. It affects morale and lowers respect, dignity and trust. In bringing the charges against Pio, he followed the Salem County Rules and Regulations and Salem County Policy Against Harassment (R-1).

The fact that this investigation was made public through the media and the open departmental hearing, created a security risk to all involved. In addition, there is a damaging effect on the moral fabric of and potential loss of credibility in the community at large.

On cross examination, Cuzuppe was accused of being inexperienced for the position as warden. He was also accused of favoritism for selecting Simmermon to conduct the IA investigation. Furthermore, he was accused of retaliating against Pio for filing grievances and alleging an atmosphere at the SCCF based upon the "good old boy system." There was no competent, credible evidence to support any of these allegations.

Although he had no prior experience as a warden, Cuzuppe came to the position with 35 years of experience in law enforcement. He started in the New Jersey State Police Department (NJSP) and later served as undersheriff where he established Professional Standards. He had nothing to do with selecting Simmermon to conduct the IA investigation. Simmermon was contracted by the county to conduct investigation in several of their departments. It was the Human Resource Department that selected Simmermon to conduct the within investigation. Cuzuppe acknowledged the grievances filed by Pio and the PBA, but that had no bearing on his action in this matter. As to the "good old boy system, " that was a perception created and held by Pio.

Having considered the testimonial and documentary evidence presented by Cuzuppe, I accept him to be very credible and highly persuasive. His testimony was unwavering and exacting. He exhibited no ulterior motive aside from laying out the facts as he recalled them. Cuzuppe had nothing to gain from testifying.

Stacy Pennington (Pennington) serves in numerous capacities for Salem County including Director of Human Resources (HR) and Payroll, Deputy Administrator for the Court, OPRA Officer/Custodian, Public Information Officer and Clerk of the Board. In addition, she is an adjunct professor at Rowan University. The Salem County Policy Against Harassment (R-1 and R-7) was revised on July 17, 2013, and applies to all County employees. It mirrors the Salem County Sheriff's Office Policy on Harassment in the Workplace (R-6).

Pennington had no direct contact with Ellis and is not aware if Ellis completed a complaint form. However, HR can accept a harassment complaint without a formal complaint form. When HR receives a complaint, they arrange for the investigation. At the time the within complaint was filed, Simmermon was the only investigator that the county was using, despite posting the position. The decision to assign Simmermon to conduct the investigation was made between herself and the sheriff. She was familiar with Simmermon due to the closeness and small size of Salem County

Having considered the testimony presented by the Pennington, I accept her to be very credible. Though brief, her testimony was straightforward and free of any histrionics. She exhibited no ulterior motive. She had nothing to gain from testifying.

Charles Miller (Miller) has been the Salem County Sheriff since 2007. He successfully ran for re-election in 2018 and began his latest term in 2019. His prior experience includes the Salem County Prosecutors Office and Homeland Security. When seeking candidates for the warden's position, Miller considered Wright and Cuzuppe. Wright worked in corrections since 2007, while Cuzuppe had no prior corrections experience, but Wright worked with him in the Salem County Prosecutor's Office in the past and was aware of his experience with the NJSP. Wright was looking to retire so Miller recommended Cuzuppe for the position with Wright's support.

When HR posted the position for county investigators, Miller informed Simmermon of the openings. Miller is not aware if there were any other applicants for the position. When he sought an investigator to conduct the within IA investigation, HR provided only Simmermon's name.

Miller was aware that Pio had been hired by the warden previous to Cuzuppe and that he was assigned to the Transport Unit. Miller was not aware that Pio worked for the campaign of the unsuccessful candidate in the 2018 election for sheriff.

Having considered the testimony presented by Miller, I accept him to be very credible. Though brief, his testimony was straightforward and free of any histrionics. He exhibited no ulterior motive. He had nothing to gain from testifying.

LEGAL ANALYSIS AND CONCLUSIONS

The bases for all charges sustained against the appellant are the statements he made to Ellis on April 8, 2019, when he informed her that she would not get a position in the booking department because she is "Black", talked Black," and had a "Black Attitude." He sought to justify the reason the Harris was assigned to booking because Harris is "Salem-County Black" and that Ellis is "Black-Black."

First, the appellant is charged with conduct unbecoming a public employee pursuant to N.J.A.C 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins v. City of Atl. City, 152 N.J. at 555, quoting In re Zeber, 156 A.2d 821, 825 (1959). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands

in the public eye as an upholder of that which is morally and legally correct.” Hartmann v. Police Dep’t of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) quoting Asbury Park v. Dep’t of Civil Serv., 17 N.J. 419, 429 (1955).

As a corrections officer, appellant is held to a higher standard of conduct. The public respects officers for discovering, reporting, and championing the truth in circumstances of wrongdoing and while they are satisfying their duties. Appellant's racially charged statements and his evasiveness to the investigator adversely affected the morale or efficiency of a governmental unit and would tend to destroy public respect in the delivery of governmental services. Appellant's actions were violative of his obligations in a position of public trust. It offended publicly accepted standards of respect and decency. No circumstances existed to warrant or justify appellant's conduct. Moreover, no circumstances existed justifying his garnering support from other COs and seeking to intimidate Ellis at the fair hearing by crowding the hearing room with union members.

Therefore, I **CONCLUDE** that appellant's behavior did rise to a level of conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6). I **CONCLUDE** that respondent has met its burden of proof on this issue.

The appellant is facing two separate counts of harassment as to Ellis and Harris. The Salem County Corrections Rules and Regulations - Section 3:1.32 states:

Harassment in the Workplace

All employees of the agency shall adhere to the policy and procedures established by the Sheriff and the County of Salem regarding harassment in the Workplace.

The Salem County Policy Against Harassment includes in protected group status: race, creed and color and states:

Harassment includes, but is not limited to:

- A. Treating an individual less favorably based upon a person's protected group status;
- B. Using derogatory or demeaning slurs to refer to a person's protected group status;
- C. Calling another by an unwanted nickname which refers to one or more protected group statuses, or telling ethnic jokes that harass an employee or create a hostile work environment;
- E. Engaging in threatening, intimidating, or hostile acts, in the workplace, based on a protected group status; or

The Salem County Sheriff's Office Policy – Harassment in the Workplace mirrors the Salem County Policy Against Harassment and states:

- A. Harassment is defined as discrimination or disparate treatment against any person because of their protected class that includes; race, creed, color . . .
 - 1. . . . the harassing conduct must be unwelcomed and coercive . . .
- E. Examples of behaviors that may constitute prohibited workplace discrimination or harassment include, but are not limited to:
 - 1. Discriminating against an individual with regard to terms and conditions of employment because of that individual's protected class;
 - 2. Treating an individual differently because of their protected class . . .
 - 4. calling another by an unwanted nickname which refers to one or more of the above characteristics, or telling ethnic, racial, etc. jokes . . . that harass an employee . . . or create a hostile work environment;

6. Engaging in threatening, intimidating, or hostile acts in the workplace based on the protected class.

Here, the appellant's conduct is violative of the County and Sheriff's Office policies against harassment in the workplace. It was not only the appellant's mere utterance of the racial slurs, but his comparing of one to the other to establish some type of hierarchy between the two. The fact that the appellant sees one coworker as being "Salem County Black" and "talking White" and another coworker as being "Black-Black" with a "Black Attitude" who "talks Black" goes to his personal perception and racial bias. Even the appellant's claims that he was only joking is violative of the policies against harassment in the workplace. Clearly, the appellant's comments were unwelcomed. Furthermore, reaching out to other employees to garner support and crowding the hearing room with union member to confront Ellis goes to establish the coercion and continued threatening effect.

Finally, Harris was shocked and offended by the appellant's conduct. She indicated that the SCCF is divided because she and Ellis came forward with the complaint. There is tension in the facility and coworkers do not speak to her anymore. She feels that her job is more dangerous now and fears retaliation.

Therefore, I **CONCLUDE** that appellant's behavior did rise to a level of harassment in the workplace as to Ellis and Harris in violation of the Salem County Corrections Rules and Regulations - Section 3:1.32 and the Salem County Sheriff's Office Policy Against Harassment in the Workplace. I **CONCLUDE** that respondent has met its burden of proof on both of these Counts.

The Salem County Corrections Rules and Regulations - Section 3:1.1 states:

Standards of Conduct

Employees shall conduct their private and professional lives in such a manner as to avoid bringing the agency to disrepute.

As stated above, as a corrections officer, appellant is held to a higher standard of conduct. The public respects officers for discovering, reporting, and championing the truth in circumstances of wrongdoing and while they are satisfying their duties. Appellant's racially charged statements and his evasiveness to the investigator adversely affected the morale or efficiency of a governmental unit and would tend to destroy public respect in the delivery of governmental services. Appellant's actions were violative of his obligations in a position of public trust. It offended publicly accepted standards of respect and decency. No circumstances existed to warrant or justify appellant's conduct.

Therefore, I **CONCLUDE** that appellant's behavior did rise to a level in violation of the Salem County Corrections Rules and Regulations - Section 3:1.1 – Standards of Conduct. I **CONCLUDE** that respondent has met its burden of proof on this issue.

The Salem County Corrections Rules and Regulations - Section 3:2.1(13) states:

Prohibited Activity on Duty

Employees are prohibited from engaging in the following activities while on duty . . .

13. . . . threatening, coercing; intimidating; harassing; or interfering with inmates, employees or civilians on county property . . .

The issue of harassment has been addressed above. Therefore, I **CONCLUDE** that appellant's behavior did rise to a level of harassment and in violation of the Salem County Corrections Rules and Regulations - Section 3:2.1(13) – Prohibited Activity on Duty. I **CONCLUDE** that respondent has met its burden of proof on this issue.

The Salem County Corrections Rules and Regulations - Section 3:1.33 states:

Civil Rights

All employees shall observe and respect the civil rights of all persons . . .

Civil rights guarantee equal social opportunities and equal protection regardless of race, religion, or other personal characteristics. Here, the appellant's words and actions showed an absolute disregard for the civil rights of the COs involved. His words and actions caused division and tension in the workplace. The appellant's verbalized position as to the inability of one to advance within the facility because of the color of their skin had a chilling effect on the workplace.

Therefore, I **CONCLUDE** that appellant's behavior did rise to a level of a violation of the Salem County Corrections Rules and Regulations - Section 3:1.33 – Civil Rights. I **CONCLUDE** that respondent has met its burden of proof on this issue.

The Salem County Corrections Rules and Regulations - Section 3:1.35 states:

Respect

Employees shall display respect for their supervisors, subordinates and associates. All employees are to display good ethical character in on and off duty contexts and shall conduct their professional and private lives in a manner to avoid bringing this agency to disrepute.

As stated above, as a corrections officer, appellant is held to a higher standard of conduct. The public respects officers for discovering, reporting, and championing the truth in circumstances of wrongdoing and while they are satisfying their duties. Appellant's racially charged statements and his evasiveness to the investigator adversely affected the morale or efficiency of a governmental unit and would tend to destroy public respect in the delivery of governmental services. Appellant's actions were violative of his obligations in a position of public trust. It offended publicly accepted standards of respect and decency. No circumstances existed to warrant or justify appellant's conduct.

Therefore, I **CONCLUDE** that appellant's behavior did rise to a level of a violation of the Salem County Corrections Rules and Regulations - Section 3:1.35 – Respect. I **CONCLUDE** that respondent has met its burden of proof on this issue.

Finally, appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." 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. As detailed above, the appellant's conduct was such that he violated this standard of good behavior. As such, I **CONCLUDE** that the respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's actions violated N.J.A.C. 4A:2-2.3(a)(12).

PENALTY

Here, the respondent in this matter has determined that the appropriate penalty is removal. The appellant has been employed by the respondent since 2013. He contends that during his employment he has had an exemplary disciplinary record and he argues that a lesser penalty is appropriate under the circumstances and with taking into consideration the principal of progressive discipline.

However, the principle of incremental, or progressive, discipline does not need to be applied in every disciplinary setting, particularly when the misconduct "is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest." In re Hermann, 192 N.J. 19, 33 (2007). New Jersey courts have repeatedly concluded that, even in the absence of a prior disciplinary record, removal may be imposed if the charges are serious enough in nature. Ibid.; Henry v. Rahway State Prison, 81 N.J. 571 (1980). While one error, even a serious one, does not necessarily require the ultimate penalty of removal, in cases involving correctional facilities, the evaluation of the seriousness of the offenses and the degree to which such offenses subvert discipline are matters peculiarly within the expertise of the corrections facilities. Bryant v. Cumberland County Welfare Agency, 94 N.J.A.R. 2d (CSV) 369.

The Appellant offered the testimony of nine witnesses who attested to his character and job performance:

Linda Miller has been a CO at the SCCF for twenty years. She worked with Pio in the past, in the home detention department. She never saw him exhibit any biased or racist behaviors. She described Pio as a relentless union representative who worked to improve working conditions in the facility. She would have no problems working with Pio if he was permitted to return to work.

Michael Shannon has been a CO at the SCCF for 14 years. He was a prior president of the PBA and worked with Pio in the past. He never observed Pio exhibit any racist actions or utter any racist words. He described Pio as blunt, brutally honest and very reliable. He believed it would be honest for a Caucasian CO to tell an African American coworker that they would not get a job because they are black.

Ashley Wright has been a CO at the SCCF for 8 years. She worked with Pio and testified that he is not a racist and never displayed any biased actions or uttered any racist words. She described Pio as a great union representative who is fair and hard working. He is a good person and he is loud.

Wright was interviewed as part of the IA investigation. She did speak with Pio on April 8, 2019, after his confrontation with Ellis. He told her that he was only joking with Ellis. She believed that it was appropriate for a Caucasian CO to tell an African American coworker that they would not get a job because they are black.

Anthony Jones has been a CO at the SCCF for 5 years. He worked with Pio at the GCCF and the SCCF. He was afraid of testifying due to his fear of retaliation. He testified that Pio is not a racist and has never displayed any biased actions or uttered any racist words. He described Pio as very loud and a good person that would give you the shirt off of his back. He believed that it was appropriate for a Caucasian CO to tell an African American coworker that they would not get a job because they are black.

April Garrison is a sergeant and has worked at the SCCF for 16 years. She was a past president of the PBA. She never observed Pio exhibit any racist actions or utter any racist words. She described Pio as not timid and outspoken. He is very honest and sometimes, too honest and that sometimes, his mouth moves faster than his brain. She

believed that it was appropriate for a Caucasian CO to tell an African American coworker that they would not get a job because they are black. She would have no problems working with Pio if he was permitted to return to work.

John Austin has been a CO at the SCCF since 2013. He worked with Pio at the GCCF and the SCCF. He never observed Pio exhibit any racist actions or utter any racist words. He described Pio as fair, consistent and respectful. He believed that it was not appropriate for a Caucasian CO to tell an African American coworker that they would not get a job because they are black. He would have no problems working with Pio if he was permitted to return to work.

James Porter (Porter) has been a CO at the SCCF since 2009. He has worked with Pio and has never observed him exhibit any racist actions or utter any racist words. He described Pio as being outspoken. He was aware of the words Pio used during his confrontation with Ellis and felt that worse things are said at the SCCF and that is the way that people joke with each other in the facility.

Porter believed that it was not appropriate for a Caucasian CO to tell an African American coworker that they would not get a job because they were black. However, he would have no problems working with Pio if he was permitted to return to work because it is all in the past.

Christa Urban has been a CO at the SCCF for 17 years. She has known Pio since he started working at the SCCF in 2013 and has never observed him exhibit any racist actions or utter any racist words. She described Pio as being truthful and honest.

Urban was interviewed as part of the IA investigation. She did speak with Pio on April 8, 2019, after his confrontation with Ellis and she advised him to apologize. She then approached Ellis because Pio is a "genuinely good guy"; not like the other male COs at the facility. She compared Pio's comments to Ellis to those heard in episodes of South

Park⁵. Urban explained this comparison because most people think that South Park is funny and that Pio is “an adult humor kind of guy.”

Urban refused to answer the question if she felt it was appropriate for a Caucasian CO to tell an African American coworker that they would not get a job because they are black. However, she would have no problems working with Pio if he was permitted to return to work.

Kenneth Oliver has been a CO at the SCCF for 20 years. He has worked with Pio and has never observed him exhibit any racist actions or utter any racist words. He described Pio as being a good person and a good CO. He was aware of the words Pio used during his confrontation with Ellis and deemed it as a poor choice of words because Pio is not very articulate. He would have no problems working with Pio if he was permitted to return to work.

The Appellant also offered eight affidavits (P-53, P-54, P-55, P-56, P-57, P-58, P-59, P-60) from COs that worked with him at either the SCCF or the GCCF. These affidavits were basically boilerplate and repeated identical information.

The appellant's conduct in this matter was so egregious as to justify his removal. His conduct raises even more concern taking into consideration his position as a corrections officer. As stated above, as a corrections officer, appellant is held to a higher standard of conduct. The public respects officers for discovering, reporting, and championing the truth in circumstances of wrongdoing and while they are satisfying their duties. Appellant's racially charged statements and his evasiveness to the investigator adversely affected the morale or efficiency of a governmental unit and would tend to destroy public respect in the delivery of governmental services. Appellant's actions were violative of his obligations in a position of public trust. It offended publicly accepted standards of respect and decency. No circumstances existed to warrant or justify appellant's conduct.

⁵ South Park is an animated television series that is not for children. It's content has been deemed both shocking and offensive

Considering the arguments of the parties in light of the seriousness of the violations, I **CONCLUDE** that the appropriate penalty is removal.

ORDER

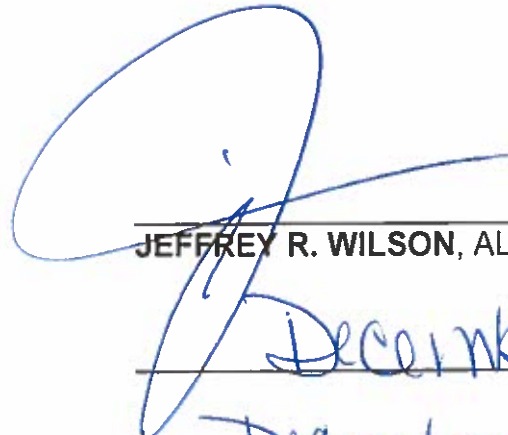
It is hereby **ORDERED** that the appellant's removal effective July 19, 2019, is hereby **AFFIRMED**. The appellant's appeal is hereby **DISMISSED**.

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. 40A:14-204.

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.

December 2, 2019
DATE



JEFFREY R. WILSON, ALJ

Date Received at Agency:

December 2, 2019

Date Mailed to Parties:

December 2, 2019

JRW/tat

WITNESSES

For Appellant

(Live Testimony)

Stacy Pennington
Officer Linda Miller
Officer Michael Shannon
Officer Ashley Wright
Officer Anthony Jones
Sergeant April Garrison
Officer John Austin
Officer James Porter
Sheriff Charles Miller
Officer Christa Urban
Sergeant Kenneth Oliver
Officer Brian Pio

For Respondent

(Live Testimony)

Officer Shakyla Ellis
Captain Alan Nobles
Sergeant Jeffrey Trull
Investigator Christopher Simmermon
Warden John Cuzzupe

For Respondent

(Transcript in lieu of live testimony pursuant to N.J.A.C. 1:1-15.12)

Officer Brandi Harris

EXHIBITS

Joint Exhibits

- J-1 Preliminary Notice of Disciplinary Action, dated June 14, 2019
- J-2 Final Notice of Disciplinary Action, dated July 18, 2019

For Appellant:

- P-1 Withdrawn
- P-2 Withdrawn
- P-3 Withdrawn
- P-4 Withdrawn
- P-5 Withdrawn
- P-6 Withdrawn
- P-7 Withdrawn
- P-8 Withdrawn
- P-9 Withdrawn
- P-10 Withdrawn
- P-11 Withdrawn
- P-12 Withdrawn
- P-13 Withdrawn
- P-14 Withdrawn
- P-15 Withdrawn
- P-16 Withdrawn
- P-17 Withdrawn
- P-18 Power Point Slide – Listening Techniques
- P-19 Withdrawn
- P-20 Withdrawn
- P-21 Withdrawn
- P-22 Redacted Notice(s) of Disciplinary Action
- P-23 Redacted Notice(s) of Disciplinary Action
- P24 Redacted Notice(s) of Disciplinary Action
- P-25 Withdrawn

- P-26 Withdrawn
- P-27 Redacted Notice(s) of Disciplinary Action
- P-28 Redacted Notice(s) of Disciplinary Action
- P-29 Redacted Notice(s) of Disciplinary Action
- P-30 Redacted Notice(s) of Disciplinary Action
- P-31 Redacted Notice(s) of Disciplinary Action
- P-32 Redacted Notice(s) of Disciplinary Action
- P-33 Letter and Settlement Agreement, dated July 24, 2018
- P-34 Withdrawn
- P-35 Redacted Notice(s) of Disciplinary Action
- P-36 Not Admitted In Evidence
- P-37 Withdrawn
- P-38 Redacted Notice(s) of Disciplinary Action
- P-39 Withdrawn
- P-40 Withdrawn
- P-41 Withdrawn
- P-42 Email – Brian Pio to Douglas Merckx, dated May 4, 2017
- P-43 Withdrawn
- P-44 Withdrawn
- P-45 Withdrawn
- P-46 Withdrawn
- P-47 Withdrawn
- P-48 Redacted Notice(s) of Disciplinary Action
- P-49 Redacted Notice(s) of Disciplinary Action
- P-50 Not Admitted In Evidence
- P-51 Withdrawn
- P-52 Certified Transcript of Departmental Hearing, dated July 12, 2019
- P-53 Affidavit of Doug Merckx, dated October 15, 2019
- P-54 Affidavit of Kyle Meadows, dated October 11, 2019
- P-55 Affidavit of Michael Murphy, dated October 11, 2019
- P-56 Affidavit of Jesse Yamada, dated October 14, 2019
- P57 Affidavit of Jerry Cora, dated October 14, 2019
- P-58 Affidavit of Charles Finnegan, dated October 11, 2019

- P-59 Affidavit of Angel Rivera, dated October 11, 2019
- P-60 Affidavit of Lamonte Sorrell, dated October 10, 2019
- P-61 Certified Transcript of Departmental Hearing
- P-62 Not admitted in evidence

For Respondent:

- R-1 Salem County and General Rules and Regulations and Salem County Policy Against Harassment
- R-2 Internal Affairs Investigation Reports of Investigator Christopher Simmermon
- R-2A DVD of Recorded Statements Included in R-2
- R-3 Brian Pio – Transcript of Statement – Page 7 of 13, dated May 24, 2019 (reduced in size)
- R-4 Brian Pio – Transcript of Statement – Page 8 of 13, dated May 24, 2019 (reduced in size)
- R-5 Brandi Harris – Certified Transcript of Departmental Hearing Testimony, page 59/line 22 to page 73/line 10, dated July 3, 2019
- R-6 Salem County Sheriff's Office Policy – Harassment in the Workplace, effective July 23, 2013
- R-7 Salem County Policy Against Harassment, revised July 17, 2013 (also included in R-1)
- R-8 Salem County Sheriff's Office Policy – Internal Affairs, effective July 23, 2013
- R-9 Brian Pio Training Record and Cultural Diversity Test
- R-10 Brian Pio Training Acknowledgement, dated August 30, 2013
- R-11 Brian Pio – Performance Evaluation Report, evaluation period January 1, 2018 to January 1, 2019
- R-12 Brian Pio – Incident Report, dated September 27, 2017
- R-13 Brian Pio – Notice of Minor Disciplinary Action, dated November 21, 2017
- R-14 - Certified Transcript of Departmental Hearing Testimony, dated July 3, 2019