STATE OF NEW JERSEY

In the Matter of Keith Harkcom,
Department of Corrections

CSC DKT. NO. 2020-1077
OAL DKT. NO. CSR 14703-19

**DECISION OF THE CIVIL SERVICE COMMISSION**

**ISSUED: MAY 22, 2020 BW**

The appeal of Keith Harkcom, Senior Correctional Police Officer, South Woods State Prison, Department of Corrections, removal effective October 8, 2019, on charges, was heard by Administrative Law Judge Dorothy Incarvito-Garrabrant (ALJ), who rendered her initial decision on April 13, 2020. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on May 20, 2020, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision to modify the removal to a four-month day suspension. In this regard, while the exceptions filed by the appointing authority argue that removal is the appropriate penalty in this matter, the Commission is unpersuaded. The ALJ gave several reasonable and supportable reasons for her reduction in penalty. The exceptions have not substantively rebutted those reasons and the Commission, therefore, finds that the reduction, based on the ALJ's professed reasons, is supportable.

Since the removal has been modified, the appellant is entitled to be reinstated to his position with back pay, benefits and seniority following his suspension until the date of his reinstatement pursuant to *N.J.A.C.* 4A:2-2.10.

Regarding counsel fees, *N.J.A.C.* 4A:2-2.12(a) provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in the disciplinary appeal is the merits of the charges. *See Johnny Walcott v. City of*

*Plainfield,* 282 *N.J. Super.* 121,128 (App. Div. 1995); *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 this matter, while the penalty was modified, charges were sustained and major discipline was imposed. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12, counsel fees must be denied. This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* unpublished, 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. However, under no circumstances should the appellant's reinstatement be delayed based on any dispute regarding back pay.

## ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. Accordingly, the Commission modifies the removal to a four-month suspension. Pursuant to *N.J.A.C.* 4A:2-2.10, the appellant is entitled to receive mitigated back pay, benefits and seniority from the conclusion of the four-month suspension until the actual date of reinstatement. 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 are encouraged to make a good faith effort to resolve any dispute as to back pay. However, under no circumstances should the appellant's reinstatement be delayed based on any dispute regarding back pay.

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 shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20th DAY OF MAY, 2020

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Chairperson
Civil Service Commission
Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
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Trenton, New Jersey 08625-0312

Attachment

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

**INITIAL DECISION**
OAL DKT. NO. CSR 14703-19
AGENCY DKT. NO. N/A

**IN THE MATTER OF KEITH HARKCOM,**
**SOUTH WOODS STATE PRISON.**

**Arthur J. Murray,** Esq., for appellant, Keith Harkcom (Alterman & Associates, LLC, attorneys)

**Dipti Vaid Dedhia**, Deputy Attorney General, for respondent, South Woods State Prison (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: March 10, 2020 Decided: April 13, 2020

BEFORE **DOROTHY INCARVITO-GARRABRANT**, ALJ:

## STATEMENT OF THE CASE

Appellant, Keith Harkcom, a Senior Correction Police Officer[1] (SCPO), employed by South Woods State Prison (South Woods or respondent), appeals from the determination of respondent that he be terminated, pursuant to a Final Notice of Disciplinary Action (FNDA), dated October 8, 2019, for violations of N.J.A.C. 4A:2-2.3(a)(6) conduct unbecoming an employee; and other sufficient cause in violation of

[1]Until recently, appellant was a Senior Correction Officer (SCO). This civil service title was then modified by the agency to Senior Correctional Police Officer.

N.J.A.C. 4A:2-2.3(a)(12), specifically New Jersey State Department of Corrections Discipline Policy 84-17, as amended, C(11) conduct unbecoming an employee, and 84-17, as amended, (E)(1), violation of a rule, regulation, policy, procedure, order, or administrative decision.

The appellant denies that the allegations, as offered by respondent, warrant and support a termination of his employment.

## PROCEDURAL HISTORY

On August 21, 2019, respondent issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications against appellant. (R-3.) Following a departmental hearing on September 23, 2019, the respondent issued a Final Notice of Disciplinary Action (FNDA) on October 8, 2019, sustaining the charges brought in the preliminary notice and terminating appellant from employment. (R-1.) Appellant filed a timely notice of appeal. The matter was transmitted to the Office of Administrative Law (OAL) on October 16, 2019, for hearing as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13.

The hearing in this matter was held on December 27, 2019, and January 24, 2020. The parties filed post-hearing briefs and the record closed on March 10, 2020.[2] During opening arguments, appellant stipulated that his actions on June 2, 2019,[3] violated both the Administrative Code charges, N.J.A.C 4A:2-2.3(a)(6), and 4A:2-2.3(a)(11), and specifically State DOC regulations, HRB 84-17, as amended C(11), and E(1).

## FACTUAL DISCUSSION

### *Testimony*

[2] On March 23, 2020, pursuant to the Governor of New Jersey's Order, the OAL ceased normal operations and procedures due to the COVID-19 crisis. Subsequently, the OAL began remotely conducting emergent hearings. It also commenced processing limited time sensitive decisions. In light of the effects of the crisis, and restrictions on OAL workforce, technologies, and resources, which were beyond the control of the OAL, some decisions have been slightly delayed in their processing.

[3] This incident began on June 1, 2019, and continued into June 2, 2019. For purposes of this Initial Decision it will be referred to as the June 2, 2019 incident.

**For Respondent**

**Brandon Muessig** (Muessig), is a New Jersey State Trooper. He has worked as a trooper for approximately one and one-half years and is assigned to the Bridgeton State Police Barracks. He graduated from the academy and completed training regarding handling domestic violence incidents.

On June 1, 2019, Muessig received a call to respond to an alleged verbal domestic dispute. This incident involved the appellant. When he arrived on the scene, Muessig observed appellant and his girlfriend arguing. They were intoxicated. Trooper Crawford (Crawford) and a neighbor were present already. Muessig was equipped with a body camera, which captured the incident. (R-16A.)

During his testimony, Muessig explained the body camera video. When Muessig arrived, appellant already had a discussion with Crawford, who was familiarizing himself with the incident. Appellant was pushing his daughter, who was approximately one and one-half years old, around in a low stroller that looked like a toy car. Appellant's voice was raised and he was using profanities. He was yelling at his girlfriend and at times at the troopers. Muessig testified that he attempted to identify everyone at the scene. At one point, he was trying to enter the appellant's information into the system and appellant walked off angrily towards his girlfriend to continue arguing with her. When he did this, he left his daughter in the stroller by the trooper's vehicle. Muessig began talking to appellant in an attempt to calm him down.

Muessig testified that he attempted to engage appellant in conversation to de-escalate his behavior several times during the incident. This was depicted in the video. Muessig found that appellant responded better when engaged in conversation about his daughter. Even though he was very intoxicated, appellant seemed to be concerned for his daughter and her well-being. When engaged in conversation with Muessig, the appellant was crying and very emotional, which was better than him yelling and cursing at his girlfriend, in Muessig's opinion.

Muessig further explained what was recorded on the video. He testified that Crawford spoke with appellant's girlfriend to get her side of the story. Crawford, who was the primary trooper on this call, then approached appellant to speak with him. At that point, Muessig felt that appellant had calmed down. He was holding his daughter and his attention had been diverted from the situation. However, appellant became irate again when speaking with Crawford.

Muessig attempted to fill out some paperwork about the situation and appellant got irritated again and walked back over to his girlfriend's house, in which she was located. Muessig attempted to again de-escalate the situation and calm down the appellant. Appellant began arguing again and acting in a manner completely opposite to what the troopers were asking him to do. Appellant yelled at his girlfriend and a neighbor who was at the scene. He used profanities and made offensive statements. Again, Muessig attempted to distract appellant. Muessig asked him if he was a correction officer to strike up more conversation and distract appellant again.

Muessig attempted again to enter appellant's information, including his driver's license data, into the system. There were difficulties with the computer system, and it took about sixteen minutes to work. During this time, appellant's behavior de-escalated. He stopped arguing with people and disrespecting Muessig and the others around him. Appellant acted in a rational manner during that time. Muessig felt that appellant's daughter was safe with the appellant during this incident while appellant was holding her and pushing her in the stroller.

Several minutes later, his girlfriend's aunt arrived at the scene to pick up the appellant's daughter to care for her for the night.[4] Muessig discussed with appellant that his daughter would go with the aunt, because she was the only sober person that anyone could get a hold of at that time. Both appellant and his girlfriend were intoxicated. The appellant wanted his daughter to go with his sister; however, his sister did not answer the

[4] Muessig referred to this person as appellant's girlfriend's mother, although she was actually the girlfriend's aunt. He later testified that he was unsure exactly what familial relationship existed. Here, mother and aunt identify the same individual.

phone when appellant called her. At the thought of his daughter going home with his girlfriend's mother, appellant became enraged and another argument ensued. Muessig attempted to calm and control the appellant. He advised appellant that this was his "last chance." He did this because they had gotten appellant to calm down several times and to cooperate with them, only to have appellant become enraged and aggressive again. At this point, the appellant brought up the Commandant of the State Police. Muessig believed that appellant did that to sway the investigation to go a certain way. Muessig ignored this statement.

Muessig indicated that, as recorded on the video, they told appellant that his daughter was going with her aunt. If he continued his behavior and objected to this arrangement, then he was going to be arrested for disorderly conduct. Again, Muessig indicated to appellant this was his last chance. Muessig testified that they were patient and trying to work with the appellant. They gave him many opportunities to act reasonably. Muessig indicated they gave him courtesies because he was a correction officer. Muessig advised appellant that they would transport him home because no one was calling him back to pick him up at the scene.

Appellant then asked Muessig what would happen to his job if he was arrested. Muessig advised that it would have a negative impact on his job. Appellant wanted to take his daughter over to the aunt. He wanted to give his daughter a kiss. However, instead of doing this calmly as agreed, appellant became enraged, again. Muessig attempted to reason with appellant by telling him that he could sober up and pick up his daughter tomorrow. Appellant did not want to hear it. The troopers arrested appellant. He said, "[d]on't be a scumbag" to Crawford. He also made other derogatory comments to them.

After he was arrested, Muessig transported him to the barracks. While in route, appellant explained that his shoulder hurt because of the handcuffs. Muessig stopped the vehicle and loosened the cuffs. When they got back to the station, appellant continued to complain that the cuffs had hurt his shoulder. As a result, Muessig called EMS to evaluate him. Appellant continued to be verbally belligerent at the station. He even

kicked the clipboard of an EMS member. Muessig testified that this was not the behavior he expected from a law enforcement officer.

Muessig testified that he charged appellant with all of the charges for which he had probable cause. Muessig believed alcohol absolutely played a role in this incident.

**Daniel Crawford** (Crawford), testified that he has been employed as a New Jersey State Trooper for two and one-half years and is assigned to the Bridgeton Barracks. He graduated from the academy and completed training regarding handling domestic violence incidents. Crawford testified about the events which occurred on June 2, 2019. Crawford was dispatched for a report of domestic violence.

When Crawford arrived at the scene, the appellant was outside in front of the residence. He was irate. Crawford had difficulty speaking with the appellant. Subsequently, Muessig arrived at the scene, and at that point, Crawford spoke with appellant's girlfriend. Crawford was wearing a body camera, which recorded these events. (R-16B.) After Crawford spoke with appellant's girlfriend, he approached appellant, who was claiming he knew a State Police Administrator. Crawford believed this was to gain advantage in the investigation.

While Crawford was attempting to get more information from the girlfriend, appellant approached her location in a violent manner and seemed to be attempting to hinder further investigation of the incident. Crawford indicated that the troopers were attempting to calm appellant down, so that they could investigate the incident. Crawford explained the recorded events. Crawford testified that he was trying to calm the appellant down and have him explain what was going on, because Crawford did not know if he or the girlfriend was a victim.

When Crawford stated he was going to talk to the neighbor, who was at the scene, the appellant reacted and did not want the troopers to speak with the neighbor. The appellant kept telling her to leave. He used offensive and profane language towards the neighbor. Crawford felt like the appellant was interrupting the investigation. Crawford told appellant that he was "acting stupid because [he was] drunk." The troopers

determined that the child should not be left with appellant or his girlfriend because they were intoxicated. Crawford attempted to make an arrangement for someone to take their daughter for the night.

Crawford had to call his sergeant during this incident. He turned off his body camera during that discussion. He then turned it on again. (R-16C.) At this point, Crawford spoke with appellant's girlfriend about the investigation. She advised that they had a verbal altercation. She advised that her aunt was going to take their daughter. She told Crawford that appellant was a correction officer. She was concerned about this incident and the impact on appellant's job.

Crawford then went to speak with appellant to explain that the aunt was going to take his daughter for the night, because the troopers believed that was the safest place for the child. Appellant called his sister to take his daughter; however, his sister did not respond. Crawford believed he had reached an agreement with appellant about his daughter going for the night with the aunt. Crawford tried to keep appellant calm and even told him that if this was anyone else, then he would have been arrested. However, appellant continued to be uncooperative and belligerent. As a result, he had to be put in handcuffs to allow the troopers to finish the investigation. Crawford testified he did not believe appellant's behavior was what he expected of a law enforcement officer. Crawford believed that appellant disrespected him with his behavior, offensive statements, and use of profanities.

While Muessig took appellant to the station, Crawford completed his investigation with appellant's girlfriend. When Crawford arrived at the station, appellant was still uncooperative. He acted the same way he had at the scene. At one point, appellant kicked a clipboard across the station floor. EMS transported appellant to the hospital. Appellant called an EMS member a "fat a**" and did not cooperate during his transport to the hospital. Crawford testified that he did not believe that appellant's intoxication excused his behavior.

Crawford authored an Investigation Report for this incident. (R-4.) Crawford produced an Arrest Report for this incident. (R-5.) Crawford charged appellant with a

petty disorderly persons offense, 2C:33-2A(1). (R-6.) Crawford completed a Domestic Violence Report for this incident. (R-7.) Crawford testified that the fact that appellant had mentioned an administrator in the State Police did not affect the investigation or influence his final decisions. Any leniency or courtesies extended to appellant during the investigation also did not affect the investigation or any final decisions that Crawford made. Crawford charged appellant with the charge for which he had probable cause. It was a petty disorderly persons offense. He did not show appellant any leniency in the charge filed. If Crawford believed that appellant had committed a simple assault, as the neighbor alleged, then he would have charged him with that.

**Thomas Cann** (Cann), is employed as an Administrative Major at South Woods. He has worked at that facility for six months. He oversees the Training Department, Operations Department and is the liaison for issues between custody and administration. He also handles discipline issues. Prior to his employment at South Woods, he worked as State-Wide Inmate Labor Program Lieutenant at the Central Office Headquarters in West Trenton. He was responsible for overseeing all inmate labor details when they were working with state agencies or accomplishing other tasks.

Cann was familiar with Department of Correction (DOC) policies as they relate to Correction Officers. These policies apply to officer's off duty conduct. Cann testified regarding the Law Enforcement Personnel Rules (Rules), which had been distributed to appellant. (R-12.) These Rules are distributed to correction officers. Cann was familiar with the charges brought against appellant. Cann generally testified that officers are not permitted to engage in conduct, which would discredit them or the department twenty-four hours a day, seven days a week (24/7). The Rules explain what constitutes professionalism.

Cann testified that Article I, Section 2, states as follows:

> No officer shall knowingly act in any way which could be reasonably expected to create any impression or suspicion among the public that an officer might be engaged in conduct violative of public trust as an officer. (R-12 at 3.)

This applied to appellant's conduct. He did not maintain control of himself and was not professional. Cann testified that appellant violated this Rule.

Cann testified that Article 3, Section 3 states provides that officers are held to a higher standard of conduct 24/7 in both their professional and private lives. Cann testified that appellant violated this Rule.

Cann testified regarding the required Personal Conduct of an Off Duty Member, which was promulgated by the Commissioner of the DOC. (R-13.) Cann testified that provides as follows:

> Whether you are on duty or off duty, your conduct reflects upon you and may reflect upon the Department of Corrections in the State.

Cann testified that appellant violated this policy. Appellant received this policy when he was hired, as shown on his New Hire Orientation Checklist. (R-11.)

Cann testified regarding Human Resources Bulletin 84-17, which is the guideline with the policy and sanctions for departmental discipline. (R-14.) This governs the penalties for the charges appellant received.

Appellant was charged with violating C(11), Conduct Unbecoming an Employee. Cann testified that the penalties range from a three-day suspension to removal from employment, for a first infraction. Appellant was also charged with E(1), violating a Rule, Regulation, Policy, Procedure, Order, or Administrative Decision, for which the penalties range from a reprimand through a removal. Cann testified that DOC takes such a strong position on the personal conduct of officers because the general public may know they are officers. Their behavior reflects both negatively and positively on the department.

Cann testified that there is a Work History, which would contain commendations or discipline, if any, for each employee, including appellant. (R-15.) The PNDA for appellant was dated August 21, 2019. (R-3.) Cann began employment at South Woods on August 1, 2019. Cann did not play any role in the selection of the charges set forth in

the PNDA. Cann did not decide which charges or specifications would be included within the FNDA. (R-1.) Cann testified that normally he would review appellant's Work History, when he consulted with Employee Relations about the penalty to be imposed. However, he could not specifically recall if he had reviewed appellant's Work History. Cann did not make any determination about the penalty of removal of appellant. Cann testified that length of service and past disciplinary events must be considered when imposing a disciplinary penalty. Cann could not recall if he had actually reviewed appellant's work history.

**For Appellant**

**Keith Harkcom**, appellant, a Senior Correctional Police Officer (SCPO) at South Woods, testified on his own behalf. Appellant has three children, the youngest of which was present during the June 2, 2019 incident.[5] He has been in a relationship continuously with this child's mother since 2015. They have resided together since October 2017. During parenting time with his older children from a prior relationship, appellant resides with his sister, whose residence provides more bedrooms. Appellant graduated the academy in 2004 and was then hired as a Correction Officer. He has been employed in that capacity at South Woods since 2004. He became a SCPO recently, when Civil Service administratively changed the job title.

Appellant is a union member of PBA 105. He testified that although PBA 105 is part of the State PBA Legal Protection Plan; he does not receive protection plan benefits like, a free attorney or free access to counselors. Appellant has paid for his legal representation in this matter.

Appellant testified that his duties included maintaining jail security, handing out equipment to officers, calling out movements over the loudspeaker, taking phone calls, aiding with paperwork, and helping out other officers. Appellant testified that his disciplinary history only included minor time and attendance infractions. On one occasion, he received major discipline for a violation, which arose from a Family and

[5] This child's mother was identified by Troopers Muessig and Crawford as appellant's girlfriend.

Medical Leave Act (FMLA) issue related to a back condition. Appellant offered that he had not turned his FMLA paperwork in on time. He received a fifteen-day suspension which was reduced to eight days served. Appellant testified he did not receive any other major discipline.

Appellant acknowledged the June 2, 2019 incident. He testified that he watched the video during this hearing. Appellant testified that the incident occurred at his girlfriend's house, where he lives. Appellant admitted to making the offensive statements and using profanity during the incident, which were recorded on the video, although appellant indicated he had vague memories about the incident because he was intoxicated. Appellant explained that prior to the contact with the troopers, he and his girlfriend had arranged for a babysitter, so that they could attend a motorcycle show event. The babysitter was to be an overnight sitter. Appellant and his girlfriend arranged this in case they hung out at the event and had a couple of drinks. Appellant stated they wanted to make sure that the baby was in a safe place.

Appellant and his girlfriend attended the event. They went to the event in the late afternoon. Their daughter was not being cooperative with the sitter and would not go to sleep that night. The babysitter contacted appellant's girlfriend and indicated she would not be able to watch the child for the entire night. This call occurred around 9:00 p.m. This night was the first night appellant's girlfriend had been out in a while, because of having their daughter. She was a first-time mother and her life had changed greatly. She was very excited to see her friends. Appellant and his girlfriend drank beer and shots of alcohol. Appellant testified that they did not schedule the babysitter overnight as a plan to go out and drink to excess. They had scheduled the babysitter before for overnight care and gone out together. However, they never got intoxicated and had been responsible. Appellant's girlfriend is a schoolteacher.

When he attended the event, appellant did not wear any aspect of his uniform and was off duty. He did not have another shift for several days. Appellant acknowledged that on the video he alleged that his girlfriend had used drugs that night. Appellant testified that this was false and the statement was caused by his intoxication. Appellant stated that nothing he was saying that night was making any sense. He only had vague

recollections of his belligerent and uncooperative behavior. Also, appellant did not have any recollection of using the Commandant of the State Police's name. Appellant testified that he grew up with the individual, but that he would not use that relationship to curry favor. Appellant had no recollection of kicking the clipboard or calling an EMS worker a "fat a**" in the barracks. Appellant had no recollection of holding his child on that night or pushing her in the stroller into the street. He had no recollection about arguing about the aunt taking his daughter or him objecting to it.

Appellant stated that when he sobered up, he woke up in a hospital. Everything was very vague. Appellant immediately went to the barracks. He testified that he was fortunate enough to speak with Crawford and apologize to him. Appellant also apologized to the other troopers who were on duty the night of the incident. He forwarded apologies to Muessig and to the EMS worker. Appellant denied consulting with an attorney or a union representative before he went and made these apologies.

Appellant stated he received a petty disorderly persons offense. He appeared in municipal court and it was reduced to a noise ordinance violation, to which he pleaded guilty. Appellant denied being an alcoholic or having problems with alcohol. He had never been disciplined at work for anything related to alcohol. He was never sent by a supervisor for a blood test based on a suspicion of being impaired and never had to complete a Fitness for Duty exam.

After he was removed from his position, appellant lost his health insurance benefits, which covered him and his children. Appellant's union benefits do not include counselors or a drug and alcohol examination at the union's cost. He could not afford to pay for this out of pocket. As a result, appellant did not have a drug and alcohol counselor to testify in this matter as an expert relative to the substantive issues and mitigation.

Appellant admitted that he should absolutely be disciplined for this incident. However, he did not believe he should be removed as a SCPO. Appellant testified that he is beyond embarrassed. He embarrassed his family, his friends, and himself. His actions were totally uncalled for. He stated that he has learned from this bad incident.

Appellant admitted he used bad judgment on that night. This was an aberration. Appellant acknowledge his behavioral duties do not go away when he drinks alcohol.

## CREDIBILITY

Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, 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). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "'[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). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Cmty. Affairs Dep't, 182 N.J. Super. 415, 421 (App. Div. 1981).

After reviewing the evidence, I make the following **FINDINGS of FACT:**

Troopers Muessig and Crawford's testimonies were credible. They clearly and accurately described the video recording of the incident, which they captured on their body cameras. Their testimony about what occurred off camera at the scene of the call

and at the barracks was credible. Crawford's reports were consistent with their testimony and what was recorded on the video. Additionally, each testified that the fact that appellant was a SCPO did not cloud or interfere with their investigation, findings, and charging. Similarly, the appellant mentioning the Commandant of the State Police did not limit or inhibit their investigation, or the ultimate action they took against appellant. Their individual testimonies that they filed all charges for which they had probable cause based on their investigation and that they would have filed other charges if they had probable cause for them was believable and credible. They filed all of the appropriate charges against the appellant. Had either determined that the domestic dispute was violative of law, then either of them would have filed those charges. The investigation did not support such actions. The fact that their failure to take more action and file more charges could have impacted their careers added credibility to their testimonies. Crawford filed one petty disorderly person offense charge against appellant, based on his tumultuous behavior, which included yelling, arguing, using offensive language, and aggressively approaching his girlfriend.

Based on their testimonies, reports and their video recorded statements, it was clear that Muessig and Crawford understood the totality of circumstances involved in this incident, including the limitations on appellant's ability to formulate an intent to act appropriately or to act reasonably because of his highly intoxicated state.

Similarly, appellant's testimony was credible. He admitted his conduct was unbecoming and inappropriate. His testimony, that he did not, or only vaguely, recalled the incident and his behavior as it occurred, was consistent with his level of intoxication which resulted in his hospitalization. Appellant admitted his actions and took responsibility for them. He genuinely accepted and took responsibility for the significant consequences he and his family have suffered as a result of his actions in this incident. Appellant admitted his poor judgment. Appellant's demeanor while testifying demonstrated that he was genuinely remorseful and regretted his actions. His testimony that this was an anomaly in both his professional and personal lives was believable and supported by the lack of significant disciplinary work history, the absence of any alcohol related incidents, whatsoever, and the absence of any law enforcement contact in his personal life.

## FINDINGS OF FACT

The following facts were undisputed, and therefore, I **FIND** them as **FACTS**:

Appellant stipulated that his actions on June 2, 2019, violated both the Administrative Code charges, N.J.A.C 4A:2-2.3(a)(6), conduct unbecoming a public employee, and 4A:2-2.3(a)(11), other sufficient cause, and both State DOC regulations, HRB 84-17, as amended C(11), conduct unbecoming and employee, and E(1), violation of rule, regulation, policy, procedure, order or administrative decision.

After carefully reviewing the exhibits, video, and documentary evidence presented during the hearing, and after having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I **FURTHER FIND** the following to also be relevant and credible **FACTS** in this matter:

Appellant has been employed as a SCPO at South Woods since 2004. He received some minor discipline during his fifteen-year employment, mostly relating to attendance issues between 2006 and 2015. Appellant received one major discipline in August 2015. This was caused by his failure to return his FMLA papers as required, which resulted in him calling out with a zero sick leave balance. Although he was initially given a fifteen-day suspension, it was ultimately reduced to an eight-day served suspension.

On June 1, 2019, not long after the birth of their daughter, appellant and his girlfriend attended a social event with friends. The couple had previously arranged to have a babysitter to watch their daughter overnight. This was one of appellant's girlfriend's few times out socializing, since becoming a first-time mother. The couple left for the event in the late afternoon of June 1, 2019. After the motorcycle show, they joined friends and consumed alcohol. In this regard, they consumed some beers and then shots of alcohol. Appellant became highly intoxicated. Appellant's girlfriend also became intoxicated.

At approximately 9:00 p.m., the babysitter telephoned the couple and indicated that they would have to pick up their daughter, because she would not settle down and cooperate relative to going to sleep. Under the influence of the alcohol and with the disappointment of this impact to their social outing, appellant and his girlfriend had an argument about their relationship. The couple safely returned home. Appellant did not drive.

While at their residence, the verbal argument continued. Troopers Crawford and Muessig responded to the incident. The troopers fully investigated this matter into the hours after midnight on June 2, 2019. After speaking with appellant's girlfriend, Crawford did not find any evidence of domestic violence or any evidence to support any criminal activity on appellant's part or his girlfriend's part. Throughout the entirety of the investigation, appellant was highly intoxicated. He made offensive and profane statements, yelled at his girlfriend, the troopers and a neighbor, made unsubstantiated allegations, was completely uncooperative, and acted aggressively and unreasonably. Appellant lacked the capacity to make appropriate decisions and to form an intent to act.

Appellant's actions were chaotic. Appellant placed his daughter in a stroller, pushed her around the area in the vicinity of trooper Muessig and his vehicle, alternately agreed with and argued with the troopers, and paced around wildly, sometimes in the direction of his girlfriend's house. He could not provide information, which was requested of him. He agreed and then refused to let his girlfriend's aunt take his daughter home for the night, and mentioned the Commandant of the State Police, with whom he grew up, to the troopers. Although Muessig and Crawford were patient, they were only able to distract or calm down the appellant for short periods of time. Their repeated attempts to reason with appellant were lost to his impairment. Appellant could only remain reasonable and unemotional for short periods of time.

Ultimately, appellant was charged with a petty disorderly persons offense, N.J.S.A. 2C:33-2A(1) for tumultuous behavior in public. He was handcuffed and transported to the trooper barracks. When taken into custody, appellant used profanities against the troopers and called them derogatory names like "piece of sh*t" and "scumbag." During this transport, appellant complained of shoulder pain from being handcuffed. Muessig

stopped the transport and loosened the handcuffs. While at the barracks, appellant again complained of pain and EMS was summoned. Appellant continued to be uncooperative and highly intoxicated. Appellant kicked a clipboard in the barracks and called one of the EMS workers a "fat a**." After evaluation, appellant was hospitalized for the night.

Appellant's actions were unprofessional and unbecoming.

When appellant sobered up, he found himself in the hospital. He had little competent recollection of the incident or his actions. Without consulting an attorney or his union representative, appellant immediately went to the barracks and apologized to Crawford and the other individuals who were there. Appellant forwarded apologies to Muessig and the EMS worker. Appellant returned to his home. He continues to reside with his girlfriend and daughter.

Appellant represented himself in Municipal Court. The petty disorderly persons offense was downgraded to a local ordinance violation. These original and downgraded offenses were not criminal charges. Appellant took responsibility and pleaded guilty to the violation. Appellant is genuinely remorseful for his actions. Appellant's behavior was an aberration. Appellant had no prior incidents involving law enforcement in his personal life. Appellant had no prior employment discipline involving alcohol during his fifteen-year career as a SCPO. Appellant had no history of alcoholism or substance abuse. Appellant simply used poor judgment on one night and acted stupidly.

This entire incident occurred in the yard of appellant's residence. This was a personal incident. The appellant was not in uniform. His actions did not jeopardize the safety of the facility, Department, or public.

Subsequently, on August 21, 2019, respondent issued a PNDA setting forth the charges and specifications against appellant. Following a departmental hearing on September 23, 2019, the respondent issued a FNDA on October 8, 2019, sustaining the charges brought in the preliminary notice and removing appellant from employment.

## LEGAL ANALYSIS AND CONCLUSIONS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The appointing authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Appellant's status as a correction's officer subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

> The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We

> can take judicial notice that such facilities, if not properly operated, have a capacity to become "tinderboxes."

Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

**N.J.A.C. 4A:2-2.3(a)(6)**

Appellant was charged with "conduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase that 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, 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)).

The basis for the charge of conduct unbecoming a public employee was appellant's actions during the entirety of the June 2, 2019 incident. Appellant was admittedly highly intoxicated. His belligerent conduct was clearly fueled by the effects of alcohol. Appellant lost the ability to know what he was saying and doing. He lost his ability to act reasonably and professionally.

As a SCPO, 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. Unfortunately, appellant's behavior and actions demonstrated his unbecoming conduct. Appellant admitted that he violated his responsibility to act professionally. Appellant admitted that he exercised poor

judgment. While appellant's excessive alcohol consumption fueled and prevented appellant from truly knowing what he was doing, it does not excuse how he acted.

Appellant conceded that his actions were violative of his obligations in a position of public trust. They offended publicly accepted standards of respect.

Therefore, I **CONCLUDE** that appellant's behavior rose 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. Accordingly, I **CONCLUDE** that this charge against appellant is **SUSTAINED**.

Appellant has also been charged with violating other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12), ), Other sufficient cause by violating specifically New Jersey State Department of Corrections Discipline Policy HR 84-17, as amended, C(11) conduct unbecoming an employee, and 84-17, as amended, (E)(1), violation of a rule, regulation, policy, procedure, order, or administrative decision.

**New Jersey Department of Corrections Discipline Policy, Human Resources Bulletin 84-17, as amended.**

84-17, as amended, provides in pertinent part as follows:

> In any disciplinary matter, reference must always be made to the collective bargaining agreement covering the disciplined employee, relevant Department of Personnel Rules, appropriate Department bulletins or memoranda, the Handbook of Information and Rules for Employees of New Jersey Department of Corrections, and/or the Law Enforcement Personnel Rules and Regulations.

(R-14.)

**C(11) Conduct Unbecoming an Employee**

As a correction officer, appellant is held to a higher standard of conduct which is aimed at "bringing honor and respect to you, your coworkers, the Department of

Corrections, and the State of New Jersey. To act otherwise, may be cause for discipline." (R-13.) The public respects officers for discovering, reporting, and championing the truth in circumstances of wrongdoing and while they are satisfying their duties.

Here, appellant conceded that his actions were unbecoming conduct. The video, documentary, and testimonial evidence demonstrated misconduct.

Therefore, I **CONCLUDE** that appellant's behavior rose to a level of conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(11), specifically State Department of Corrections Discipline Policy HR 84-17, as amended, C(11), conduct unbecoming an employee. Accordingly, I **CONCLUDE** that this charge against appellant is **SUSTAINED**.

**E(1) , Violation of a Rule, Regulation, Policy, Procedure, Order, or Administrative Decision**

Appellant conceded that his actions on June 2, 2019, violated the rules of conduct and the DOC's regulations and policies. He admitted his actions brought embarrassment to him, his family, and South Woods. The video, documentary, and testimonial evidence demonstrated these actions.

Therefore, I **CONCLUDE** that appellant violated DOC rules, regulations and policies in violation of N.J.A.C. 4A:2-2.3(a)(11), specifically State Department of Corrections Discipline Policy HR 84-17, as amended, E(1), violation of a rule, regulation, policy, procedure, order, or administrative decision. Accordingly, I **CONCLUDE** that the charge against appellant on this issue is **SUSTAINED**.

**N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause**

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. Appellant conceded that his

conduct was unbecoming. As detailed above, 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).

Accordingly, I **CONCLUDE** that respondent has met its burden proof on all charges made against the appellant. The charges brought against appellant in the FNDA, dated October 8, 2019, are **SUSTAINED**.

## PENALTY

The next question is the appropriate level of that discipline. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number, and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

A penalty in this case is unavoidable. The case law setting sworn law enforcement officers apart from other public servants as "special" is consistent. The standard guiding their behavior and informing their discipline is strict:

> A police officer is a special kind of public employee. His primary duty is to enforce and uphold the law . . . He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have respect of the public.
>
> [Twp. of Moorestown v. Armstrong, 898 N.J. Super. 560, 566, 215 A.2d 775 (App. Div. 1965), certif. denied, 47 N.J. 80, 219

A.2d 417 (1966); *See also,* In re Phillips, 117 N.J. 567, 577 (1990)]

Relative to the penalty herein, in West New York v. Bock, 38 N.J. 500, 522 (1962), which was decided more than fifty-years ago, our Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Herrmann, 192 N.J. 19, 29 (2007), (citing Bock, 38 N.J. at 522). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Bock, at 523-24.

As the Supreme Court explained in In re Herrmann, "[s]ince Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct." In re Herrmann, at 30. According to the Court:

> . . . First, principles of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct . . .
>
> The second use to which the principle of progressive discipline has been put is to mitigate the penalty for a current offense . . . for an employee who has a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions . . .
>
> . . . [T]hat is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when . . . the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> [In re Hermann, at 30-33 (citations omitted).]

In the case of In re Carter, 191 N.J. 474 (2007), the Court decided that the principle of progressive discipline did not apply to the sanction of a police officer for sleeping on duty and, notwithstanding his unblemished record, it reversed the lower court and reinstated a removal imposed by the Board. The Court noted the factor of public-safety concerns in matters involving the discipline of correction officers and police officers, who must uphold the law and "present an image of personal integrity and dependability in order to have the respect of the public." In re Carter, at 486 (citation omitted).

In the matter of In re Stallworth, 208 N.J. 182 (2011), a Camden County pump-station operator was charged with falsifying records and abusing work hours, and the ALJ imposed removal. The CSC modified the penalty to a four-month suspension and the appellate court reversed. The Court re-examined the principle of progressive discipline. Acknowledging that progressive discipline has been bypassed where the conduct is sufficiently egregious, the Court noted that "there must be fairness and generally proportionate discipline imposed for similar offenses." In re Stallworth, at 193. Finding that the totality of an employee's work history, with emphasis on the "reasonably recent past," should be considered to assure proper progressive discipline, the Court modified and affirmed (as modified) the lower court and remanded the matter to the CSC for reconsideration.

In the instant matter, respondent argued that appellant's actions were egregious and even outrageous. As a result, respondent submitted progressive discipline is inappropriate. In re Carter, at 484; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962). *See also*, Bowden v. Bayside State Prison, 268 N.J. Super. 301, 306 (1993). The DOC is a paramilitary organization charged with maintaining order and discipline in facilities housing convicted felons. Termination is the only appropriate remedy.

Respondent submitted that appellant's actions were "heinous." The appellant chose to drink excessively to the point that he could not recall the events of the night and was disrespectful to the troopers, his girlfriend, and EMS workers. The appellant created a public nuisance through his belligerent, intoxicated conduct. The respondent submitted that appellant's conduct led those around him to fear for their safety and the safety of others prompting the call to the police. Respondent alleged that appellant then chose to use his relationship with Commandant Buck to influence the officers. The respondent submitted that

the DOC cannot permit the appellant to compromise the principles of order and discipline by violating its rules and policies. Appellant discredited the Department. In sum, respondent argued that the "DOC is no place for someone with bad judgement." (Respondent's closing brief, p. 8.)

In contrast, appellant argued that the goals of progressive discipline are not served by imposing appellant's removal in this instance. Appellant argued that his lack of substantive discipline in his work history is important and must be considered. (R-11.) Feldman v. Town of Irvington Fire Department, 162 N.J. Super 177 (App.Div. 1978). A penalty must be based on the totality of an employee's work history. Bock at 524. Appellant argued that progressive discipline should be used for two reasons. First, to permit imposition of a more severe penalty on a habitual offender. Second, to mitigate the penalty for an instant offense, wherein the employees work history is largely unblemished by significant disciplinary infractions. In re Hermann, at 30-33.

Appellant submitted that progressive discipline has historically been bypassed only in the most appalling of circumstances. *See*, Wayne Truex v. Lakewood Township, OAL Docket NO. CSV 4964-03; Anthony Tortorella v. City of Orange Police Department, OAL Docket No. CSV 7975-02. While untruthfulness may be an act which supports bypassing progressive discipline, even substantiated acts of untruthfulness do not always result in the employee's removal.

Appellant argued and submitted that precedent is replete with instances of more serious conduct by employees, including law enforcement officers, for which progressive discipline was utilized. The ultimate penalties imposed were less than removal. Additionally, such precedent, in part, also demonstrated that progressive discipline should be utilized by tribunals to reduce or order penalties commensurate with the offense, totality of circumstances, and work history. Similarly, progressive discipline should be utilized to increase penalties on habitual offenders for subsequent similar instances. Karins v. City of Atlantic City, 152 N.J. 532 (1998).

Here, on June 2, 2019, appellant failed to adhere to the code of conduct, which applies to correction officers while on and off duty. Appellant admitted this misconduct. He volunteered and genuinely understood that he should be disciplined. He accepted responsibility for his actions.

Respondent's arguments relative to the appropriateness of a removal penalty were unpersuasive. Respondent pronounced that appellant's actions and judgment were "heinous." Heinous is defined as hatefully or shockingly evil. *Merriam-Webster.com Dictionary*, Merriam Webster (2020),<<https://www.merriam-webster.com/dictionary/heinous>>. In this matter, appellant's actions reflected poor personal choices on a particular day. His conduct was an aberration for him. Nothing in the record credibly supported a conclusion that his actions amounted to heinous conduct. Nothing supported a conclusion that his behavior was shockingly evil. Even respondent acknowledged this by arguing that on June 2, 2019, the appellant had "not just a moment of bad judgment, but a string of bad choices each made solely by [him]." (Respondent's closing brief, p. 7.)

There is no question that appellant had mostly minor disciplinary issues prior to the events of June 2, 2019. Specifically, during his fifteen-year career, appellant had four official reprimands and five minor suspensions for attendance and unexcused lateness, which occurred between September 2006 and November 2015. In August 2015, appellant also had one major discipline, which arose from an allegation of calling out sick with zero sick leave balance, which was caused by appellant's failure to timely return his FMLA papers to respondent. For this, appellant was suspended for fifteen days, which was reduced to eight days served. None of appellant's discipline was related to alcohol or unbecoming conduct. Cann agreed that the length of service and past disciplinary events must be considered when imposing a disciplinary penalty. This tribunal specifically notes that it does not know whether appellant's minimal disciplinary history was actually reviewed before the respondent determined the penalty would be removal, as it should have been, because Cann could not recall specifically if he had actually reviewed the appellant's work history before the PNDA was issued on August 21, 2019.

Additionally, it is undisputed that immediately after this unfortunate incident, appellant apologized to the troopers and EMS workers. Appellant appeared in Municipal Court and took responsibility for his actions by pleading guilty to a local ordinance violation. Appellant was never charged criminally. Appellant is genuinely remorseful.

Based on the body camera recordings, it certainly appeared that respondent actually lacked the capacity to form an intent to act or make any reasonable choices, due to his excessively intoxicated condition. This does not excuse or justify his actions. Appellant clearly understands this. However, recognizing he was impaired, the troopers only charged him with a petty disorderly persons offense. It was clear from Muessig and Crawford's testimonies and their recorded actions that they did not believe appellant's conduct was criminal. Instead, they determined his actions were uncooperative and disorderly. They concluded his actions were caused by consuming too much alcohol. Additionally, their testimonies were clear that had they thought he committed an act of domestic violence, or obstructed their investigation by mentioning the Commandant, they would have charged him accordingly. While they were on scene conducting their investigation, both believed that appellant's daughter was safe with appellant and that appellant was concerned about her. They did not believe he had endangered his daughter. Otherwise, they would have charged him accordingly.

This entire incident occurred in the yard of appellant's residence. This was a personal incident. The appellant was not in uniform. His actions did not jeopardize the safety of the facility, Department, or public.

In sum, respondent chose on this one day to consume too much alcohol, which impaired his conduct and reason. Respondent had never been involved in any other alcohol related incidents professionally or personally. His actions were not sufficiently egregious to warrant or justify his removal. To terminate him under the totality of circumstances presented herein would be harsh, excessive, and would fly in the face of progressive discipline. One bad day, albeit one during which the appellant made many poor personal choices, should not define appellant's career based on the facts herein. Such a penalty is not commensurate with the offenses as evidenced in this matter.

Having weighed the aggravating and mitigating factors and the proofs presented, I **CONCLUDE** that appellant's misconduct does not warrant removal and progressive discipline is appropriate. In re Hermann, at 21. Respondent's action of removing the appellant from his position is inappropriate.

Accordingly, I **CONCLUDE** that a four-month suspension without pay is the appropriate discipline for the violations of N.J.A.C. 4A:2-2.3(a)(6) conduct unbecoming an employee; and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11), specifically violations of Human Resource Bulletin (HRB) 84-17, as amended; C(11), conduct unbecoming an employee; and E(1) violation of rule, regulation, policy, procedure, order or administrative decision. I **CONCLUDE** the original removal penalty must be **MODIFIED** to a four-month suspension without pay.

## ORDER

Accordingly, it is **ORDERED** that the charges entered in the Final Notice of Disciplinary Action, dated October 8, 2019, of the South Woods State Prison against appellant, Keith Harkcom, are hereby **SUSTAINED**. It is **ORDERED** that the administrative decision as it relates to the penalty of removal of appellant, Keith Harkcom, is hereby **MODIFIED** to a four-month suspension without pay. It is **FURTHER ORDERED** that appellant, Keith Harkcom, be returned to his employment as a Senior Corrections Police Officer with respondent, South Woods State Prison, subject to the provisions of this Initial Decision and the accompanying separate Order of this same date.

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.

April 13,2020
DATE

**DOROTHY INCARVITO-GARRABRANT**, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

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## APPENDIX

## LIST OF WITNESSES

**For Appellant:**

Keith Harkcom, Appellant

**For Respondent:**

Trooper Brandon Muessig

Trooper Daniel Crawford

Major Thomas Cann

## LIST OF EXHIBITS

**For Appellant:**

None

**For Respondent:**

R-1 Final Notice of Disciplinary Action, dated 10/8/19

R-2 Not admitted

R-3 Preliminary Notice of Disciplinary Action

R-4 NJ State Police Investigation Report, dated 6/24/19

R-5 NJ SP Arrest Report

R-6 NJSP Complaint

R-7 Supplementary Domestic Violence Offense Report

R-8 Not admitted

R-9 Not admitted

R-10 Not admitted

R-11 NJDOC New Hire Orientation Checklist

R-12 NJDOC Law Enforcement Personnel Rules and Regulations

R-13 NJDOC Memorandum, dated 4/28/03, Personal Conduct On and Off Duty

R-14 NJDOC HRB 84-17 Disciplinary Action Program and Table of Offenses

R-15 NJDOC Appellant's Disciplinary History Table

R-16(a) NJ State Police Body Camera Footage

R-16(b) NJ State Police Body Camera Footage

R-16(c) NJ State Police Body Camera Footage