STATE OF NEW JERSEY

In the Matter of Samantha Chirichello
Edna Mahan Correctional Facility

CSC DKT. NO. 2021-872
OAL DKT. NO. CSR 02414-21

DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 6, 2021 BW

The appeal of Samantha Chirichello, Senior Correctional Police Officer, Edna Mahan Correctional Facility, removal effective December 4, 2020, on charges, was heard by Administrative Law Judge Elia A. Pelios, who rendered his initial decision on August 26, 2021. Exceptions were filed on behalf of the appointing authority and on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and replies, the Civil Service Commission (Commission), at its meeting on October 6, 2021, did not adopt the ALJ's recommendation to modify the removal to a six-month suspension. Rather, the Commission upheld the removal.

DISCUSSION

The appellant was removed on charges of conduct unbecoming a public employee, violation of the State Policy Prohibiting Discrimination in the Workplace (State Policy) and other sufficient cause. The appointing authority asserted that the appellant posted inappropriate material on Facebook on multiple occasions and violated policy regarding carrying a visible firearm. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In his initial decision, the ALJ found that on an unspecified date, the appellant posted on Facebook a photo depicting a group of people lying across a two-lane highway with their hands behind their back. In the comments section, the

appellant's mother wrote "I would run them over no problem lol (laughing tears of joy emoji) didn't see it." The appellant shared another post on an unspecified date that quotes "if the police are going to be defunded, so should welfare, food stamps, and free medical care. If you don't need police, you can take care of yourself at every level." Additionally, the appellant shared a Facebook post that depicted a character that resembled "Elmer Fudd" with a confederate flag on his hat and chest while holding a black AR type rifle. Also in the picture was a fictional character resembling "Chase" from "Paw Patrol" and Elmer Fudd is captioned stating "I Got a New Gun & Friend". She also shared the post of a picture of George Floyd and captioned in the text is "The media and the left have made George Floyd into a martyr. But who is he really?" After the quote is a list of criminal offenses dated from 1998 to 2017. Further, the appellant shared another post on Instagram depicting a picture of the appellant kneeling on one knee wearing a black t-shirt with a NJDOC badge on the left chest area. The background of the picture has graffiti, including a dominant quote "lives matter" outline with an arrow pointing down to the word "sike". Below the picture of the appellant is the quote "if you are testing my water, you better know how to swim". On another Facebook post, the appellant shared a picture of a male looking down at a head with a mask. Below the mask is the quote "pedophilia is a sexuality". There is another picture of a male looking at the head and mask with a baseball bat smashing the head and blood splattering. The appellant shared a posted-on Twitter "Newark for a game! Ghetto time" (sic) "Washington heights is the worst show! So ghetto smh" (sic). Finally, an investigation revealed, and the appellant admitted that on or about June 20, 2020, she possessed a partly visible concealed firearm while purchasing alcoholic beverages.

The ALJ indicated that the appellant admitted posting the post containing the confederate flag but claimed she was not aware the flag was there and took it down within minutes. She expressed that she understood that people associate the confederate flag with racism and racist attitudes and understood that the post could be offensive. She explained that her intent in sharing the other internet posts was in support of people's right to protest. The appellant did not have a recollection of purchasing alcohol while wearing a duty weapon and the ALJ determined there was an absence of direct witness testimony and clear visual evidence to uphold the charge regarding her firearm. However, the ALJ found that the appellant's posts, regardless of her intent, exposes and ties together the appellant, her employment, and the sentiment reflected in the posts, to which she added no comment or context for countless people to see. Thus, any viewers of the post not familiar with the appellant or her personal views or thoughts on the sentiment of her intention in posting could reasonably presume that the sentiment expressed in the posts were a good measure of her ability to treat the people she serves in a fair and impartial manner. Accordingly, the ALJ concluded that the appointing authority sustained the charges associated with her postings of social media but dismissed the charges regarding the firearm. However, given that the appellant had never been charged with or been the subject of any prior complaints regarding discrimination, and the

appointing authority's lack of a social media policy, the ALJ found that a six-month suspension was appropriate.

In its exceptions, the appointing authority states that the appellant's actions in this matter were so egregious that removal is the only appropriate penalty. In this regard, it maintains that significant deference should be given to correctional officials in matters of determining an appropriate penalty for disciplinary infractions. In this case, as the inmate population is predominately African-American, if correction officers or other staff are perceived as biased against one race or another, it will compromise the safety and security for everyone involved. Of concern would be a potential demonstration or rebellion by inmates against staff, which would endanger everyone in the facility. The appointing authority emphasizes that it cannot take the chance that the appellant will hopefully realize the gravity of her actions and how they jeopardized the safety of the prison. Further, the appointing authority states that the facts of the appellant's case are different than other matters where the Commission modified the removals of employees that made comments on Facebook. Specifically, the appellant posted or shared multiple offensive images and comments, not merely "liked" one post.

In her exceptions, the appellant states that her conduct does not rise to the level to meet the threshold to be deemed conduct unbecoming a public employee. In this regard, she argues that although it is plausible that her posts could be interpretive as conveying a discriminatory message, it is also plausible that her actions could not be interpreted as such. The appellant suggests that the ALJ may have been unduly influenced by the backdrop of national events concerning social injustice and discrimination that occurred during the past year and is wrongfully presupposing the content of the appellant's conduct while the conduct itself does not rise to an unlawful level. She also states that she was raised by her African-American father and works with employees who are diverse members of various protected classes. Accordingly, the appellant maintains that the ALJ's findings were not supported by sufficient, competent and credible evidence in the record. Further, she has no disciplinary history and there was no evidence presented that she could not do her job in a fair and unbiased manner. Therefore, the appellant states that all the charges against her should be dismissed and/or the penalty significantly reduced.

Upon an independent review of the record, the Commission agrees with the Findings of Fact of the ALJ and concludes that the appointing authority has met its burden of proof in this matter. However, for the reasons set forth below, the Commission determines that the penalty of removal should be upheld.

In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered,

including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). Even when a Correctional Police Officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense occurring in the environment of a correctional facility may, nevertheless warrant the penalty of removal where it compromises the safety and security of the institution, or has the potential to subvert prison order and discipline. *See Henry, supra.* In this regard, the Commission emphasizes that a Senior Correctional Police Officer is a law enforcement officer who, by the very nature of his job duties, is held to a higher standard of conduct than other public employees. *See Moorestown v. Armstrong,* 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied,* 47 *N.J.*

In this case, removal is the proper penalty. In this regard, it is noted that in *In the Matter of Tammy Herrmann,* 192 *N.J.* 19 (2007), the State Supreme Court upheld the removal of Herrmann, a Family Service Specialist Trainee with the Department of Youth and Family Services, who, during an investigation of alleged child abuse, flicked a lighted cigarette lighter in front of a special needs child. Herrmann had been employed for approximately six months at the time of the incident and had no prior discipline but her conduct "divested her of the trust necessary for her position" and "progressive discipline [was not] appropriate in this matter." *Id. at* 38.

As noted in the appointing authority's exceptions, the appellant did not merely "like" one offensive post. Rather, she reposted and made many offensive and inflammatory comments and posts about those supporting defunding the police, those receiving public assistance, criminals, rioters, George Floyd's criminal history and one with confederate flags on her public Facebook page. As noted by the ALJ, regardless of her intent in making the posts, the appellant's posts expose and tie the appellant, her employment, and the sentiment reflected in the posts, to which she added no comment or context, for countless people to see. The Commission agrees that any viewer not familiar with the appellant or her personal views on the sentiment or intention in posting could reasonably presume that the sentiment expressed in the posts were a good measure of her ability to treat the people she serves in a fair and impartial manner. Clearly, the appellant's behavior in making these multiple posts could adversely affect the more and safety of the facility and undermine the public respect in the services provided. Moreover, the appellant was a very short-term employee at the time of her removal, having only been employed for less than two years. Perhaps, had the appellant had a lengthy and relatively

unblemished record of service, the matter of the ALJ's recommended reduction in penalty could have been considered. *See e.g., In the Matter of Douglas Burkholder* (CSC, decided June 30, 2021). However, that is not the facts of this matter. Accordingly, the Commission finds that the penalty imposed by the appointing authority was neither unduly harsh nor disproportionate to the offense and should be upheld.

ORDER

The Civil Service Commission finds that the action of the appointing authority in imposing the removal was justified. Therefore, the Commission dismisses the appeal of Samantha Chirichello.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6th DAY OF OCTOBER, 2021

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 02414-2021
AGENCY DKT. NO. N/A
2021-872

IN THE MATTER OF SAMANTHA CHIRICHELLO,
EDNA MAHAN CORRECTIONAL FACILITY.

Frank Crivelli, Esq., for appellant (Crivelli and Barbati, LLC, attorneys)

Elizabeth Davies, Deputy Attorney General, for respondent (Andrew J. Bruck, Acting Attorney General of New Jersey, attorney)

Record Closed: June 28, 2021 Decided: August 26, 2021

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

Samantha Chirichello (Chirichello or appellant) a Senior Correctional Police Officer with the New Jersey Department of Corrections/Edna Mahan Correctional Facility (respondent, EMCF or Department) appeals the EMCF's decision to remove her from employment for violating N.J.A.C. 4A:2-2.3(a): (6) Conduct unbecoming a public employee; and (12), other sufficient cause.

PROCEDURAL HISTORY

Respondent issued a Final Notice of Disciplinary Action (FNDA) dated December 21, 2020, removing appellant from employment based upon the aforementioned charges. Appellant appealed the FNDA to the Office of Administrative Law (OAL) on March 3, 2021. The matter was assigned to the undersigned on May 7, 2021, and heard on June 3, and 10, 2021. The record was held open for the simultaneous filing of closing briefs and was closed on June 28, 2021.

FACTUAL DISCUSSION

Many of the facts in this matter are not in dispute. On June 30, 2020, the Department received a civilian complaint regarding appellant's social media posts. On July 31, 2021, appellant was interviewed by the Department of Corrections Special Investigations Division (SID) regarding her social media posts.

On October 1, 2020, Senior Correctional Police Officer (SCPO) Samantha Chirichello was served with a Preliminary Notice of Disciplinary Action subjecting her to a penalty of removal from employment with the New Jersey Department of Corrections (hereinafter referred to as the Department of Corrections or the NJDOC). Soon after service of these charges she was suspended without pay. Prior to the service of the charges, SCPO Chirichello requested a Departmental Hearing which was held on the date of November 17, 2020.

Following the Departmental Hearing, Chirichello's suspension without pay was upheld and she was served with a Final Notice of Disciplinary Action dated December 21, 2020. (R-1.) Chirichello was charged with conduct unbecoming an employee; violating NJDOC's policy prohibiting discrimination, harassment, or hostile environments in the workplace; loss or careless control of firearms; violation of administrative procedures and/or regulations involving safety and security; violation of a rule, regulation policy procedure, or order or administrative decision; and other sufficient cause. (R-1.) A penalty of removal was imposed, and appellant brought the herein appeal.

The specifications to the charges state:

An investigation revealed you posted (on an unspecified date) to your social media platform Facebook (username Samantha Chirichello), the photo depicting a group of people lying across a two lane highway with their hands behind their back. In the comments section, Cheryl Chirichello (identified in your personal file as your mother) wrote "I would run them over no problem lol (laughing tears of joy emoji) didn't see it."

You shared another post (on an unspecified date) to your social media platform Facebook from user "Marne Helms" that quotes, "if the police are going to be defunded, so should welfare, food stamps, and free medical care. If you don't need police, you can take care of yourself on every level". Your statement shows certain members of society without regard for circumstance and as a result could display a bias to members of the public.

You shared another post (on an unspecified date) to your social media platform Facebook from user "Joe guess" that depicts a cartoon character that resembles "Elmer Fudd" with a confederate Flag on his hat and chest, while holding a black AR type rifle. Also, in the picture is the fictional Nickelodeon character resembling "Chase" from "Paw Patrol" and Elmer Fudd is captioned stating "I Got a New Gun & Friend". You admitted that the depiction is racist, hateful and displays southern pride" and that the public including your co-workers could be offended by the post.

You shared another post (on an unspecified date) to your social media platform Facebook from user "Christian Roman". The post is a picture of "George Floyd", and captioned is the text "The media and the left have made George Floyd into a martyr. But who is he really?" After the quote is a list of his criminal offenses dated from 1998 to 2017 provided by the original poster. Your post is calculated to inflame tensions.

You shared another post (on an unspecified dated) to your social media platform Instagram (username/log on name samanatha.ann) depicting a picture of you kneeling on one knee wearing a black t-shirt with a NJDOC badge on the left chest area. The background of the picture has graffiti including a dominant quote "lives matter" outlined with an arrow pointing down to the work "sike". Below the picture of you is a quote from "Samantha.ann" "if you are testing my water, you better know how to swim". Your post appears to be intimidating and culturally insensitive.

You shared another post (on an unspecified date) to your social media platform Facebook (username chello Smantha) of a picture of a male looking at a head with a mask. Below the mask is the quote "pedophilia is a sexuality". There is another picture of a male looking at the head and mask with a baseball bat smashing the head and blood splattering. Your post celebrates violence and

questions your ability to perform your duties as a law enforcement officer which is to have care and control over inmates that you supervise.

You shared posted the following to your social media platform Twitter (login: Chirigirls@msn.com)

1/31/13—"Newark for a game! Ghetto time" (sic)
2/14/13—"Washington heights is the worst show! So ghetto smh" (sic)

An investigation revealed and you admitted that on or about June 20, 2020, you possessed a concealed firearm, (partly visible) in plain clothes while purchasing alcoholic beverages. These actions are in violation of relevant Department rules and regulations, and shall not be tolerated by this Department.

Your postings to your social media platforms were insensitive, distasteful, derogatory, caused a lack of trust with co-workers and undermined your ability to care and control over inmates. Your social media accounts show you in your NJDOC uniform. Your actions in posting these items, especially as you are readily identifiable as a Senior Correctional Police Officer dressed in uniform are reckless, alarming, and inflammatory and show a profound disregard for considerations of maintaining public confidence in the Department, and of public order and safety, conduct especially egregious by an officer sworn to protect the public. Your conduct as a sworn law enforcement officer in posting comments/pictures that depict racial animus, threats, violence, incitement to violence and hate is reckless, incendiary and inflammatory and inconsistent with a sworn law enforcement officer's responsibility to maintain law and order. The foregoing shows that you do not understand nor do you care about your role as a sworn law enforcement officer, and neither the NJDOC nor the public can have confidence in your ability and judgement, especially in the performance of your duties as a Senior Correctional Police Officer where you are responsible for the safety of inmates and staff, and supervise staff. These public postings of a Senior Correctional Police Officer, who took a sworn oath to protect the inmates, staff, and ultimately, the public at large, adversely impacts and compromises the workplace. Your posts indicate you condone violence and will be motivated by considerations of race in the performance of your duties, which include the care, custody and control of inmates, and ultimately, protection of the public at large. Your reckless conduct compromises the safety and security and orderly operation of the institution. As a sworn Senior Correctional Police Officer, it is expected that you maintain composure, keep order and calm, discourage and prevent violence where possible, protect the public and show no bias. Your conduct is egregious, unbecoming a sworn law enforcement officer, violates relevant Department rules and regulations, and shall not be tolerated by this Department.

The preceding statements are not in dispute and are hereby **FOUND** as **FACT**.

Mathew Leitner (Leitner), a senior investigator for the Department of Corrections at Enda Mahan Correctional Facility working in the Special Investigations Division, Professional Standards Unit, testified on behalf of respondent. He noted that appellant was the subject of an investigation by the NJDOC's Special Investigations Division. The investigation was initiated after receiving a civilian complaint from and individual named Morgan Usher, with whom appellant appeared to have a contentious history, regarding racially insensitive and offensive Facebook posts on Chirichello's Facebook page. Usher provided Leitner with screen shots from Chirichello's Facebook page which he reviewed and described. (R-7.) He also reviewed a Facebook photo from Chirichello's Facebook page (R-8) which he personally viewed. Leitner also reviewed Instagram screen shots provided by Officer Laquwanna Blackman from Edna Mahan Correctional Facility. (R-11.)

Leitner interviewed both Usher and Chirichello. During his interview with appellant Leitner addressed the Facebook posts with her. When he searched for appellant's Facebook page, he noted that she altered her name on her Facebook page and removed all references to the NJDOC. Leitner acknowledged that appellant was not the author of the posts, nor did she make a comment after posting them on her social media page.

Regarding a separate incident from the social media posts yet still a subject of this disciplinary matter, Leitner interviewed a confidential informant at Best Celler's Liquor who claimed she had seen the handle of Chirichello's gun when she came to the store to purchase alcohol. Leitner included a screen shot a photo of Best Caller's Liquors showing Chirichello at the time that the confidential informant had claimed witnessing Chirichello and the butt of a handgun exposed from under her clothing. (R-6.) The manager of the store acknowledged seeing appellant in the store on a number of occasions but could not recall if he saw a firearm in her possession. Neither the CI nor the manager testified at hearing. Although he noted in his report that it appeared appellant was wearing a firearm, in his testimony Leitner acknowledged the issues of clarity of the photographic and video evidence and expressed difficulty in determining if appellant was in fact wearing a side

arm and if she was, if it was concealed. He acknowledged that in her interview appellant could not remember wearing a firearm, concealed or otherwise to the liquor store and that she expressed that she often wears a bulky waist trainer. He notes that Chirichello had been with the Department for approximately one year at the time of her interview.

Leitner authored a report summarizing and detailing his investigation. (R-3.)

Major Khasima Alexander (Alexander), a Correctional Police Major employed by the NJDOC as at the Adult Diagnostic Treatment Center in Avenel, also testified on behalf of respondent. She has been in her current position for approximately one month at the time of her testimony but previously worked at the Edna Mahan Correctional Facility during the time period relevant to this matter. Alexander testified that as law enforcement officers, NJDOC Corrections Officers are held to a higher standard of conduct on and off duty, twenty-four hours a day, seven days a week. She never had any issues or problems concerning appellant during her employment with the Department.

Alexander reviewed the Law Enforcement Personnel Rules and Regulations (R-13), which govern the conduct of all NJDOC law enforcement. Officers receive a copy of this document when they are hired and are expected to read and understand the documents, they receive listed in the new-hire orientation checklist. Alexander states that the public must be able to trust that Corrections Officers will treat inmates fairly and notes that when the public trust is violated it may be cause for concern for the safety and security of the inmates at the facility and the perceptions of their family members. Alexander states the conduct of all NJDOC officers, on or off duty is subject to NJDOC policy and that officers must not act in such a manner which may be seen as being to the discredit of the officer or the Department. Alexander testified that offensive social media postings can raise concerns for prison security and other officers and can create animosity toward the staff by the inmate population and among that population as well.

Alexander also reviewed the Standards of Professional Conduct. (R-14.) This policy applies to officers at work, in their home or anywhere an officer may be, whether

they are on or off duty. It addresses the importance and policy of upholding the public trust.

Regarding the liquor store incident, Alexander also described Internal Management Procedures for Approved Off-Duty Firearms and Holsters. The policy requires that all off-duty firearms are to be concealed at all times.

Chiqueena A. Lee (Lee), a Legal Specialist in the Equal Employment Division and Ethics Unit at the Department of Corrections, also testified on behalf of respondent. She described the NJDOC's policy prohibiting discrimination in the workplace reflecting the Civil Service Commissions' policy that provides protections against certain protected categories against discrimination in the workplace. While the DOC policy in place at the time did not address social media, Lee noted the Civil Service Commission issued an updated policy in September 2020 that the NJDOC adopted in full in November and distributed in December 2020 which specifically states that it applies to social media. Lee expressed that while not addressing social media posts by name, the prior policy in place at the times relevant is interpreted and does apply to social media posts as well. The policy extends outside the workplace.

Lee explained that appellant's post containing the confederate flag warrants attention because it represents racist animus which frustrates the goal of the policy to maintain a work environment free of discrimination and harassment. When law enforcement applicants are going through the vetting process, they have to submit all of their social media usernames and passwords so they can be vetted. This should be understood to mean that social media posts are seen as an extension of the workplace.

The appellant testified on her own behalf. She holds bachelors' degrees in criminal justice and behavior science. She started working with the NJDOC in June 2019 after attending the correctional training academy in March 2019 for four months. She was assigned to Enda Mahan Correctional Facility and worked there for one year and two days.

Appellant uses Facebook to stay in touch with family. She admitted posting the post containing the confederate flag but claims she was not aware the flag was there and took it down within minutes. She offered no other reason for making the post beyond a desire to share it. She expressed understanding that people associate the confederate flag with racism and racist attitudes and understood that the post could be offense to others. Her intent in sharing the other internet posts was in support of people's right to protest.

Appellant acknowledged being told that her Facebook posts had been reported but denies that such was the motivation for removing them after her SID interview. Appellant did not receive training on social media but acknowledges that when she was hired, she was required to provide the NJDOC with her social media accounts and passwords.

Appellant states she does not have any recollection of purchasing alcohol while wearing her off duty weapon.

Considering the foregoing, it is not in dispute that appellant made the social media posts described in the specifications and depicted in the exhibits and I so **FIND**.

Credibility is best described as that quality of testimony or evidence which makes it worthy of belief. The Supreme Court of New Jersey considered the issue of credibility in In Re Estate of Perrone, 5 N.J. 514 (1950). The Court pronounced:

> Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.
>
> [Ibid. at 522]

See also Spagnuolo v. Bonnet, 16 N.J. 546, (1954), State v. Taylor, 38 N.J. Super. 6 (App. Div.1955).

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).

There was nothing inherently unbelievable or controversial about the testimony offered by any of the respondent's witnesses during its case in chief. Leitner directly described the process of his investigation and his process in arriving at his conclusions. Lee and Alexander described in a succinct and straightforward manner their understanding of the events that occurred and their interpretation of how rules regulations and policies were implicated by those events. Their testimony is deemed credible and accepted as **FACT**.

Similarly, appellant's testimony was not on its face beyond belief, nor did she appear evasive or indirect in her testimony. While one may question the decision-making process in making the posts, given her explanations of her own family makeup and personal background her explanations as to her intent in making the posts do not seem outside the realm of the possible, nor have they been directly challenged contradicted or rebutted. Her testimony as to her intent is deemed credible and accepted as **FACT**.

With regard to the liquor store firearm incident, although it is not disputed that appellant has on several occasions patronized the business in question while off-duty, the absence of direct witness testimony as to the events coupled with the lack of clarity of the visual evidence submitted, the lack of clarity of appellant's own recollection and the uncertainty expressed in Leitner's testimony render it impossible to make a finding that appellant wore a firearm when patronizing the business while off-duty, let alone whether such firearm was properly concealed if she did. The nature of the allegations also allows for the possibility that any lack of concealment, if any, may have been technical, inadvertent or de-minimis in nature, although again the record lacks sufficient evidence to make a determination that any violation occurred or if appellant even carried a firearm. Accordingly, I **FIND** that respondent has not met its burden in demonstrating that the

alleged events described in the specifications and informing the charges with regard to appellant's firearm occurred.

LEGAL ANALYSIS

Under the Civil Service Act, a public employee may be subject to major discipline for various employment-related offenses, N.J.S.A. 11A:2-6. In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:-2.21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

Appellants status as a corrections officer, subjects her to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1980). 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 (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 appellant has been charged with violations of N.J.A.C. 4A:2-2.3(a)6, (conduct unbecoming a public employee); and N.J.A.C. 4A:2-2.3 (a)12: Other sufficient cause;

"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 Atlantic 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 Atlantic City, 152 N.J. 532, 555 (1998) [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)]. Suspension or removal may be justified where the misconduct occurred while the employee was off duty. In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960).

In the present matter, the record reflects that appellant made multiple posts to social media which are described in the specifications and depicted in the exhibits in the record. Even though there was no evidence that appellant was on-duty or physically in the workplace when she made these posts, her conduct and speech are restricted twenty-four hours a day to ensure a higher level of conduct, awareness, and sensitivity, because she is a sworn law enforcement officer. This does not mean that appellant does not enjoy First Amendment protection for daily speech made outside the workplace as a private citizen. However, she must remain aware that her daily speech is not afforded an automatic guarantee of privacy, like that of other members of the public, because she chooses to be employed as an SCPO and voluntarily accepts the restrictive conditions of his employment, which may limit his First Amendment rights.

While appellant shared certain images involving matters of public concern, these posts did nothing to legitimately advance productive reasonable discourse about issues they involved. Further, appellant did not add her own interpretation of comment on any image, leaving a potential reader to conclude, perhaps incorrectly, that she simply endorsed or agreed with the sentiment depicted.

Respondent's interest in maintaining order in its facilities, in promoting professional and respectful relationships among correctional officers and between correctional officers and the people they serve, including inmates, outweighs appellant's right to repost offensive insensitive posts in a forum, such as on Facebook. Appellant's account reflected her professional role, before she removed such references after making the posts in question, and were therefore not made as a private citizen. **I CONCLUDE** that appellant's posts as described and depicted in the record are not protected free speech under the First Amendment to the U.S. Constitution.

The behavior demonstrated in the record underscores a major problem with social media, such as Facebook; appellant's posts, regardless of her intent in making the posts, exposes and ties together appellant, her employment and the sentiment reflected in the posts, to which she added no comment or context, for countless people to see. This is exacerbated by the ability of viewers of the posts to potentially share them further. Any viewers of the posts not familiar with appellant or her personal views or thoughts on the sentiment or her intention in posting could reasonably presume that the sentiment expressed in the posts were a good measure of her ability to treat the people she serves in a fair and impartial manner. This clearly constitutes behavior which could adversely affect the morale of the facility and undermine public respect in the services provided. Appellant argues that to sustain the charge is to impute racist intent to the appellant in posting. This is not the case at all. It is to consider and appreciate the potential of the conduct to undermine the public confidence in and jeopardize the efficient and safe operation of the public service being performed by appellant and the facility. Accordingly, I **CONCLUDE** that the appointing authority has proven, by a preponderance of credible evidence, that the charge of N.J.A.C. 4A:2-2.3(a)6 (conduct unbecoming a public employee), should be and is hereby **SUSTAINED**. To the extent that appellant is charged with violation of HRB 84-17 (C-11), which addresses unbecoming conduct, consideration of such violation is hereby incorporated into the current analysis and is similarly **SUSTAINED**.

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. Further to this, appellant has been charged with multiple violations of violation of HRB 84-17, specifically: C-11—conduct unbecoming an employee (already **SUSTAINED**); C-31 - Violation of the NJDOC Police Prohibiting discrimination, harassment or hostile environments in the workplace; D-6c—Loss or careless control of firearms; D-7—Violation of administrative procedures and/or regulations involving safety and security; and, E-1—Violation of a rule, regulation, policy, procedure, order or administrative decision.

Regarding the charge of a violation of HRB 84-17 (C-31), racial discrimination and harassment in the workplace. NJDOC Policy Number ADM.005.001 titled "Prohibiting Discrimination in the Workplace" (R-12) sets forth the NJDOC policy prohibiting discrimination in the workplace. The protected categories are race, creed, color, national origin, nationality, ancestry, age, sex/gender, pregnancy, marital status, civil union status, domestic partnership status, familial status, religion, affectional or sexual orientation, gender identity or expression, atypical hereditary cellular or blood trait, genetic information, liability for service in the Armed Forces of the United States and disability. (R-12 page DOC111.) The policy applies to both conduct that occurs in the workplace and conduct that occurs at any location that can be reasonably regarded as an extension of the workplace (i.e. any field location, any off-site business related social function, or any facility where State business is being conducted and discussed). (R-12, page DOC112.) "It is also a violation of this policy to use derogatory or demeaning references regarding a person, race, gender, age, religion, disability, affectional or sexual orientation, ethnic background, or any other protected category set forth in Section II A above. A violation of this policy can occur even if there was no intent on the part of the individual to harass or demean another." (R-12, page DOC112.)

Examples of behaviors that constitute a violation of the Policy include "Using derogatory references with regard to any of the protected categories in any communication" and "Displaying or distributing material (including electronic communications) in the workplace that contains derogatory or demeaning language or images pertaining to any of the above protected categories." (R-12, page DOC113.)

The policy also applies to third party harassment. Third party harassment is unwelcome behavior involving any of the protected categories referred to in Section II, A that is not directed at an individual but exits in the workplace and interferes with an individual's ability to do his or her job. (R-12, page DOC112.)

Sworn law enforcement personnel are prohibited from knowingly acting in any way that might reasonably be expected to create an impression of suspicion among the public that an officer may be engaged in conduct violative of the public trust as an officer. The rules and regulations state that no officer shall act or behave, either in an official or private capacity, to the officer's discredit, or to the discredit of the Department. Appellant is to be held to the highest standards of conduct. She received and is expected to comply with all of the policies and procedures both off and on duty. In posting on Facebook, even if he was off the clock, appellant was broadcasting her position to anybody that had access to her Facebook page.

The record reflects that appellant made electronic communications that displayed and distributed racially derogatory and demeaning language and images in the workplace.

Even if posted while off duty using a personal computer at home or a personal device, the very nature of the communication publishes the image and comments for all the world to see, anywhere and everywhere. Whether or not appellant intended to convey a racially derogatory and demeaning message and comment, her lack of explanation or context as to why he made the posting could tend to lead others to believe she held racist beliefs.

A violation of the policy, by its own terms, can occur even if there was no intent to harass or demean another. Being a zero-tolerance policy, an appointing authority may take either disciplinary action, if appropriate, or other corrective action, to address any unacceptable conduct that violates the policy, regardless of whether the conduct satisfies the legal definition of discrimination or harassment. (R-16, page 058.)

Accordingly, I **CONCLUDE** that the respondent has met its burden of proof in establishing a violation of HRB 84-17 C-31- violation of the NJDOC Policy Prohibiting Discrimination, Harassment or Hostile Environment in the Workplace. NJDOC Policy Number ADM.005.001, and E-1--Violation of a rule, regulation, policy, procedure, order or administrative decision by a preponderance of the credible evidence and that those charges must be **SUSTAINED**.

The record reflects that the respondent did not meet its burden in demonstrating that the underlying conduct alleged to support violations of HRB 84-17 D-6c—Loss or careless control of firearms and D-7—Violation of administrative procedures and/or regulations involving safety and security occurred as described. It is noted that it is not a violation for off-duty personnel to be carrying a firearm – it must be unconcealed for a violation to occur. As discussed earlier, the absence of direct witness testimony as to the events coupled with the lack of clarity of the visual evidence submitted, the lack of clarity of appellant's own recollection and the uncertainty expressed in Leitner's testimony render it impossible to make a finding that appellant wore a firearm when patronizing the business while off-duty, let alone whether such firearm was properly concealed if she did. The nature of the allegations also makes for the possibility that any lack of concealment, if any, may have been technical, inadvertent or de-minimis in nature, although again the record lacks sufficient evidence to make a determination that any violation occurred or if appellant even carried a firearm. Accordingly, I conclude that those charges must be **DISMISSED**.

PENALTY

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 West New York v. Bock, 38 N.J. 500, 522 (1962)). 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." West New York v. Bock, 38 N.J. 500, 523-524 (1962).

As the Supreme Court explained in In re Herrmann, 192 N.J. 19, 30 (2007), "[s]nice Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct." 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, 192 N.J. 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, 191 N.J. 474 (2007)

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 Civil Service Commission (Commission) 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, 208 N.J. 182, 208 (2011). 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 Commission for reconsideration.

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).

Furthermore, it has been held that termination without progressive discipline is appropriate in circumstances where an employee cannot competently perform the work required of his position. Klusaritz v. Cape May Cty., 387 N.J. Super. 305, 317 (App. Div. 2006), certif. denied, 191 N.J. 318 (2007). In Klusaritz, the panel upheld the removal of a principal accountant on charges of inability to perform duties, among other things, based on proof that the employee had consistently failed to perform the duties of his position in a timely and proper manner, and had also failed or refused to accept direction with respect to performance of these duties.

In the present matter, respondent has brought and sustained charges of violations of N.J.A.C. 4A:2-2.3(a)6, (conduct unbecoming a public employee); and N.J.A.C. 4A:2-2.3(a)12 (other sufficient cause).

The record reflects that appellant's disciplinary record was unremarkable prior to the incident that is the subject of this matter. However, despite appellant's lack of significant disciplinary history, the behavior described herein certainly constitutes misconduct that is severe; that is unbecoming to the employee's position.

Respondent seeks appellant's removal from her position as a SCPO. Respondent argues that appellant's conduct is so egregious, it prohibits her from being able to perform her duties in a fair and impartial manner and jeopardizes the safety of the inmates and her fellow officers. Respondent also points to HRB 84-17 – a Table of Offenses and Penalties (R-17), which notes that for a first offense of Conduct unbecoming a range of penalty from three-day suspension to removal can be appropriate. Although not binding on this tribunal, this document offers a reasonable basis for imposition of penalty which may be considered, and it is well settled that even a first offense, if egregious enough, can warrant a removal from public employment.

Although persuasive and not precedential, it is appropriate to note the recent final decision of the Civil Service Commission in In the Matter of Douglas Burkholder South Woods State Prison, Department of Corrections, CSC Dkt. No. 2021-879, OAL Dkt. No. CSR 00716-2021 issued July 2, 2021.

In Burkholder, a recent case involving a racist Facebook posting by a corrections officer at South Woods State Prison, the Commission adopted the initial decision of the ALJ and found that the six-month penalty imposed, together with requiring a fitness for duty exam and diversity training was the appropriate penalty in light of the policy of progressive discipline, the officer's twenty-four-year career, and the lack of significant disciplinary history. A further mitigating factor found in that case was that the NJDOC had no specific written policy regarding social media use.

In the present matter, appellant's work history reflects no discipline received on previous occasions. (R- 16.) While admittedly over a short tenure, it is still noteworthy that appellant has had no other discipline until the incident at issue in this case. Appellant has never previously been charged with or been the subject of any prior complaints

regarding discrimination, harassment or hostile work environment by any inmates, staff or the public.

Although appellant's conduct in this case warrants major discipline, the NJDOC's lack of a formal written policy on the acceptable use of social media by its corrections officer at the time of the incident is problematic and should be considered as a mitigating factor in this case. If the NJDOC intends to seek the ultimate penalty of removing an officer from their position, a policy explaining what type of social media use is appropriate and what type of social media use is prohibited is advisable as is training provided to the rank and file corrections officers on the subject. The number of recent cases involving corrections officers disciplined for social media postings indicate that a written policy describing the parameters for acceptable and unacceptable social media use as well as training in this regard may be beneficial. Appellant is a young person at the beginning of a career who made a severe misstep and exercised extremely poor judgement in an area where she received little to no training or guidance and policy had not yet caught up to the behavior despite its having been a simmering and burgeoning issue in the area. Hopefully the gravity of the missteps and the seriousness of the conduct will not be lost on her and she will going forward appreciate better the interconnectedness of off duty behavior, including social media posts, and the public perception of the very necessary and important public service she performs.

I **CONCLUDE** that Appellant's misconduct does not warrant removal. Considering principles of progressive discipline, I **CONCLUDE** that the imposition of discipline of a one-hundred-eighty day suspension without pay, the maximum amount permitted to be imposed as a suspension pursuant to N.J.A.C. 11A:2-20 is appropriate for the sustained charges of N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(12) other sufficient cause, specifically, violations of HRB 84-17, as amended, C(11) conduct unbecoming an employee; C(31)-violation of the NJDOC policy prohibiting discrimination in the workplace; and E(1) violation of a rule, regulation, policy, procedure, order or administrative decision. Furthermore, I **CONCLUDE** that as a prerequisite to reinstatement, appellant be required to participate in mandatory diversity and tolerance training, as well as undergo a Fitness for Duty psychological examination.

Therefore, I **CONCLUDE** that the original penalty of removal be **MODIFIED** to a one-hundred-eighty-day suspension without pay.

ORDER

The appointing authority has proven by a preponderance of credible evidence the charges against appellant with violations of N.J.A.C. 4A:2-2.3(a)6 (Conduct unbecoming a public employee); and N.J.A.C. 4A:2-2.3(a)(12) other sufficient cause, specifically, violations of HRB 84-17, as amended, C(11) conduct unbecoming an employee; C(31)-violation of the NJDOC policy prohibiting discrimination in the workplace; and E(1) violation of a rule, regulation, policy, procedure, order or administrative decision. I therefore **ORDER** that these charges be and are hereby **SUSTAINED.**

It is further **ORDERED** that the charges alleging violations of HRB 84-17 D-6c—Loss or careless control of firearms and D-7—Violation of administrative procedures and/or regulations involving safety and security be and are hereby **DISMISSED.**

Furthermore, I **ORDER** that the penalty of removal is hereby **MODIFIED** to a one-hundred-eighty-day suspension without pay. It is further **ORDERED** that appellant be returned to her employment as a SCPO with respondent following her completion of mandatory diversity and tolerance training and her successful completion of a Fitness for Duty psychological evaluation.

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.

August 26, 2021
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: August 26, 2021 (emailed)

Date Mailed to Parties:

EAP/mel

APPENDIX

LIST OF WITNESSES:

For appellant:

Samantha Chirichello

For respondent:

Mathew Leitner
Major Khasima Alexander
Chiqueena A. Lee

LIST OF EXHIBITS:

For appellant:

None

For respondent:

R-1	FNDA
R-2	Departmental Hearing Decision
R-3	Investigation Report
R-4	Photo of Gun
R-5	Photo of Liquor Store
R-6	Liquor Store Video Clip
R-7	Photos/Screen Shots
R-8	Pedophilia Depiction

R-9	Receipt from Best Cellars
R-10	New Hire Checklist
R-11	Photos of Brick Factory
R-12	Policy Prohibiting Discrimination in the Workplace
R-13	Law Enforcement Rules and Regulations
R-14	Standards of Professional Conduct
R-15	Policy for Approved Off-Duty Firearms, Ammunition and Holsters
R-16	Work History
R-17	Table of Offenses
R-18	Video Interview 7/31/2020
R-19	Video Interview 9/10/2020