



STATE OF NEW JERSEY

In the Matter of Ernest Farley
 Adult Diagnostic and Treatment
 Center, Department of Corrections

FINAL ADMINISTRATIVE ACTION
 OF THE
 CIVIL SERVICE COMMISSION

CSC DKT. NO. 2021-1244
 OAL DKT. NO. CSR 02998-21

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ISSUED: OCTOBER 6, 2021 BW

The appeal of Ernest Farley, Correctional Police Lieutenant, Adult Diagnostic and Treatment Center, Department of Corrections, removal effective February 11, 2021, on charges, was heard by Administrative Law Judge Tricia M. Caliguire, who rendered her initial decision on August 25, 2021. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of October 6, 2021, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Ernest Farley.

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



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Allison Chris Myers
Director
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. CSR 02998-21

AGENCY DKT. NO. n/a

2021-1244

**IN THE MATTER OF ERNEST FARLEY,
NEW JERSEY DEPARTMENT OF CORRECTIONS,
ADULT DIAGNOSTIC AND TREATMENT CENTER.**

Kevin D. Jarvis, Esq., for appellant (O'Brien, Belland & Bushinsky, LLC, attorneys)

Kendall J. Collins, Deputy Attorney General, for respondent (Andrew J. Bruck, Acting Attorney General, State of New Jersey, attorney)

Record Closed: July 20, 2021

Decided: August 25, 2021

BEFORE TRICIA M. CALIGUIRE, ALJ:

STATEMENT OF THE CASE

Appellant Ernest Farley (Farley) appeals the decision of respondent, New Jersey Department of Corrections (NJDOC), Adult Diagnostic and Treatment Center (AD&TC) to remove him from his position of correctional police lieutenant, effective February 11, 2021, on charges of conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); and other sufficient cause pursuant to N.J.A.C. 4A:2-2.3(a)(12), specifically violations of Human

Resources Bulletin 84-17, as amended (HRB 84-17), Sections C11, conduct unbecoming an employee; C27, the use or attempt to use one's authority or official influence to control or modify the political view of any person; and E1, violation of a rule, regulation, policy, procedure, order or administrative decision.

PROCEDURAL HISTORY

On August 18, 2020, NJDOC/AD&TC issued a Preliminary Notice of Disciplinary Action (PNDA) notifying Farley of the charges against him. Farley requested a departmental hearing, which was held on January 28, 2021. On February 11, 2021, NJDOC/AD&TC issued a Final Notice of Disciplinary Action (FNDA), which sustained charges of conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), and other sufficient cause pursuant to N.J.A.C. 4A2:2-2.3(a)(12), due to violations of HRB 84-17, Sections C11, conduct unbecoming a public employee; C27, the use or attempt to use one's authority or official influence to control or modify the political view of any person; and E1, violation of a rule, regulation, policy, procedure, order or administrative decision.

The appellant timely requested a hearing and the matter was transferred to the Office of Administrative Law (OAL) on February 23, 2021, but without the requisite fee. On March 24, 2021, the appeal was deemed effective and the matter was filed as a contested case. N.J.S.A. 52-14B-1 to 15 and 14F-1 to 13. An initial telephone prehearing conference was held on April 22, 2021, and an expedited schedule for discovery and hearing was set. A prehearing order issued on April 27, 2021.

On May 10, 2021, the parties participated in a telephone conference and reported that they had agreed on a joint stipulation of facts. Given that there are no disputed issues of material fact, the parties requested adjournment of the pending hearing and a briefing schedule for cross-motions for summary decision. Cross-motions for summary decision were filed on June 30, 2021, responses were filed on July 20, 2021, and the cross-motions are now ripe for review.

FACTUAL DISCUSSION AND FINDINGS

The parties submitted a joint stipulation of facts, numbered one through twenty-seven, accompanied by joint exhibits, marked as Attachments A through S. Accordingly, I **FIND** the following statements, stipulated by the parties and supported by documentary evidence, as **FACTS**:

1. Farley has been employed by the NJDOC since March 4, 1999.
2. On January 7, 2006, Farley was promoted to the rank of Sergeant.
3. On January 2, 2010, Farley was promoted to the rank of Lieutenant.
4. Farley had been assigned to the AD&TC for approximately eight months prior to his August 18, 2020 suspension in this matter.
5. Farley worked at the Albert C. Wagner Youth Correctional Facility prior to being assigned to the AD&TC.
6. Farley maintained a page on the Facebook, Inc. (Facebook) social media platform at all times relevant to this matter.
7. Farley's Facebook page was open to the public.
8. Farley's Facebook page identified him as a Lieutenant at the NJDOC and a Lieutenant at the State of New Jersey. (Attachment A, Bates No. DOC ADTC 066-067.)¹

¹ All joint documents show the same Bates numbering and therefore, only page numbers are used in the rest of this initial decision

9. Farley was a member of a private, invitation-only Facebook page entitled "Back the Blue Ocean County."
10. On or about July 24, 2020, Farley posted a response on the Back the Blue Ocean County page to Ann Endress (Endress) which stated "Ann Endress, hey stupid, shut the fuck up and go kill yourself you ignorant sack of shit. You support a traitor and a coward and then invoke Jesus's name. Fuck you! Oh, by the way, I am a Police Supervisor and I don't want scum like you backing me." (Attachment B, at 060-061.)
11. Endress responded by posting that she was taking Farley's post as a threat and that she was reporting the group to Facebook. (Attachment B, at 060-061.)
12. On July 27, 2020, Endress filed a police report of the incident with the Roselle Park Police Department (RPPD). (Attachment C, at 063-064; see also, videos of Endress speaking to an officer of the RPPD, Attachments D and E.)
13. On or about July 30, 2020, the NJDOC Special Investigations Division (SID) was informed of Endress' complaint and opened an investigation. (Attachment F, at 048-055.)
14. On or about August 11, 2020, SID conducted a video recorded interview of Farley. (Attachment G.)
15. SID also conducted a review of Farley's Facebook page as part of its investigation of this matter during which it flagged various postings which SID categorized as allegedly violent (Attachment H, at 069-073); racial (Attachment I, at 075-076); religious (Attachment J, at 078-081); Republican (Attachment K, at 083-089); Trump supporter (Attachment L, at 091-095); and relevant (Attachment M, at 097).

16. SID did not receive any complaints related to any of these, or any other, aforementioned Facebook postings by Farley.
17. The only complaint received by the State of New Jersey, NJDOC or SID related to Farley's Facebook postings was the aforementioned complaint from Endress.
18. George Holman (Holman), Andrew Pagan (Pagan) and Martin Heupel (Heupel) are co-workers of Farley's and are employed by NJDOC. (See, Attachment H, at 070-072.)
19. Holman, Pagan and Heupel did not file any complaints against Farley based on the social media postings at issue in this matter and were not interviewed as part of SID's investigation in this matter.
20. The only person interviewed by SID as part of its investigation in this matter was Farley, although SID did make contact and informally speak with Endress by telephone.
21. SID also reviewed the NJDOC Standards of Professional Conduct Policy (Attachment N, at 022-024); Farley's Individual Training Summary Report (Attachment O, at 025-029); and the NJDOC Law Enforcement Personnel Rules and Regulations. (Attachment P, at 030-046.)
22. During the relevant time period, the NJDOC did not have a policy that specifically addressed social media posts.
23. SID issued its Investigation Report on August 14, 2020. (Attachment F, at 048-055.)
24. The NJDOC issued a PNDA (31-A) to Farley on August 18, 2020, and an FNDA (31-C) to Farley on February 11, 2021. (Attachment Q, at 009-010.)

25. A true and correct copy of HRB 84-17 is attached hereto as Attachment R, at 103-118.
26. A true and correct copy of Farley's Work History is attached hereto as Attachment S, at 098-102.
27. Farley filed a timely appeal of all charges with the OAL.

Based on review of Attachments A through S, the briefs filed by both parties, and the certification of Farley, I **FIND** the following additional **FACTS**:

Farley's Message to Endress

Respondent characterizes "Back the Blue Ocean County" as "a law enforcement Facebook page." Ltr. Brief of Respondent in Support of Motion for Summary Decision (June 30, 2021) (Brief of Respondent), at 7. There was no evidence presented that this particular Facebook page or the group "Back the Blue Ocean County," was established by any branch of the law enforcement community in the State of New Jersey.² Endress stated that she presumed by the name of the group that it was established by supporters of the police and of then-President Donald Trump (Trump). (Attachment C, at 063.) A portion of Farley's message to Endress is evidence that members of this Facebook group, including Farley, support law enforcement: "I am a Police Supervisor and I don't want scum like you backing me." (Attachment B, at 060.)

Farley admitted that he posted his message to Endress on a group page and that the thread of commentary "could have had" 500 people on it. (Attachment G, Video 23 at 17:16-17:19, and 18:46-18:48; Attachment F, at 051). After initially denying that he identified himself to Endress as a "Correctional Police Lieutenant," Farley stated, "I did say I was a police

² Even so, the term "Back the Blue," which was ubiquitous in 2020, is generally known to refer to supporters of law enforcement personnel, particularly police officers.

supervisor.” (Attachment G, Video 23 at 7:54-8:12.) He further admitted that he identified himself in his public Facebook profile as a “Lieutenant with NJDOC” and that if Endress had clicked on his name, she could have found his profile. (Attachment G, Video 22 at 17:47, and Video 23 at 8:59-9:06; see also, Attachment A, at 066.)

Respondent characterizes the Facebook message Farley sent to Endress as “offensive, demeaning and harassing.” Brief of Respondent, at 7. Farley admitted that his message to Endress was “rude and mean.” (Attachment G, Video 23 at 7:47 and 11:48-12:08.) He admitted that he has no tolerance for Endress’s beliefs, but disagrees that such intolerance is “bigotry,” saying that he merely “was disagreeing with her.” Id. at 14:14-15:29. Endress responded through Facebook to Farley that she perceived his comment to be “a serious threat” toward her. (Attachment B, at 060.) She also reported Farley’s “abusive post” to Facebook and to the Back the Blue Ocean County group administrator. (Id. at 061.) Three days later, Endress contacted the RPPD to report “harassment.” (Attachment C, at 063.) In the investigation report filed by the RPPD, Endress is described as concerned for her children who live the same town as Farley and as saying that since Farley is armed (as a law enforcement officer), she “did not know what he was capable of doing.” (Id. at 064.)

RPPD Patrolman Avsar Patel (Patel) conducted two videotaped interviews of Endress, one in person and the second by telephone. (Attachments D and E.) In both interviews, Patel tells Endress that she can file an action in municipal court against Farley for harassment; in the report Patel filed, he describes the incident as “Harassment 2C:33-4.” (Attachment C, at 063.) In the second interview, Patel tells Endress that the RPPD recommends she file a claim for harassment in court or with “the agency.” (Attachment E, at 1:14-1:19, and 2:49-3:20.) As appellant notes, no such claim was filed; Farley was not charged nor convicted of this crime. Appellant’s Brief in Support of Motion for Summary Decision (June 30, 2021) (Brief of Appellant), at 20-21; Certification of Lt. Ernest Farley (June 28, 2021), ¶¶ 2-5.

On July 30, 2020, Endress sent an email report regarding the incident to NJDOC, in which she stated that she had made a police report. (Attachment F, at 048.) On August 3, 2020, SID investigators “made contact” with Endress who provided them a copy of the RPPD

report, which included her statements that she wished to document the incident to “prevent any repercussions as her children also live in Toms River, NJ” and that due to Farley being a law enforcement officer who is armed, “she did not know what he was capable of doing.” (Attachment F, at 049.) Subsequently, SID contacted Endress and “she [then] denied feeling threatened by Farley . . . and characterized the matter as harassment only.” (*ibid.*)

I **FIND** that Farley’s message to Endress was rude, offensive, demeaning, disrespectful, and public. Back the Blue Ocean County is a member-only Facebook account, meaning that only members are able to view or read posts, comments and messages. If however, as Farley stated, the thread which included his message to Endress could have included more than 500 people, that means the group has more than 500 members (and may have over 1,000 members), any one of whom can share his comments, both virtually and the old-fashioned way, by word of mouth. Farley appears to have failed to consider the reach of his message and the potential negative consequences on the public trust when a “police supervisor” addresses a member of the public in such disparaging terms because he disagrees with her political views.

Endress’ intent in posting her initial message may have been to express her support for Trump more than for the police, but she said nothing negative about the police generally or members of this Facebook group in particular. That alone makes Farley’s response to her, as he calls it, “mean and rude.” Read literally, Farley’s message to Endress does not include a specific threat, but it was still reasonable that Endress would feel threatened when a self-identified “police supervisor” told her to kill herself, even if two weeks’ later, she changed her mind. In her interview with the RPPD, Endress states that she was “scared” and her action in reporting Farley’s message to the Back the Blue group administrator, to Facebook, and eventually to the RPPD is evidence that she, at least initially, was concerned for her own safety and that of her family members. (Attachment D.) Although Endress also described Farley’s message as “harassment,” she did not file a criminal complaint and there is no finding made with respect to this claim.

The SID Investigation/Farley's Facebook Page and Interview³

Further investigation by SID into Farley's use of Facebook revealed "publicly accessible content" including posts that "appeared to characterize persons of particular social, racial and religious classes as immoral, traitors and so forth; who appeared to have a different ideology than Farley." (Attachment F, at 049.) As discussed in greater detail below, SID broke down certain posts into the following categories: Violent, Racial, Religious, Republican, Trump Supporter, and Relevant.

During his SID interview, Farley admitted to posting all of the identified images (most of which are political cartoons) to his publicly accessible Facebook page. (Attachment F, at 049). He described his postings as critical of Trump supporters and clarified that he generally "shared" posts found on other Facebook pages; he did not create these posts. (Attachment G, Video 22 at 7:06-7:50, and Video 23 at 1:08.) Farley also described how he interpreted the various political cartoons but stated that he did not usually include his interpretation when he posted a cartoon. Farley admitted that in these posts he was categorizing groups of people (e.g., Trump supporters, white Americans, Evangelical Christians, the "seriously religious"). But he insisted that he attacked these groups based upon their political beliefs, not their race or religion. (Attachment G, Video 22 at 19:00-19:48; Attachment F, at 049 – 050.)

Violent Posts

On January 20, 2019, Farley posted an image of a Native American man named Nathan Phillips (Phillips), an Omaha Elder, which includes a quotation criticizing "pro-Trump kids." (Attachment H, at 069.) By way of background, Phillips gained national media attention when he attended a rally in Washington, D.C. and encountered a group of high school students who were visiting the capital. As was seen on television news shows, Nicholas Sandman (Sandman), a sixteen-year old male high school student, stood facing Phillips as Phillips banged on a drum. As respondent explains:

³ Farley was represented by a union official during his SID interview but he was not questioned on-camera by this official.

It is [Sandman] that Farley references on [Attachment H, at 070] in which he states, 'George Holman I'm not being manipulated at all, that smug, little piece of shit [e]hit and his friends should have had their skulls caved in with bats and left to die on the sidewalk.' Farley also commented in response to a comment made by others in the [same] comment thread 'Confronting hatred and bigotry with force is always appropriate.'

[Brief of Respondent, at 10, quoting Attachment H, at 071.]

In his SID interview, Farley conceded that the above statements were "possibly harsh," (Attachment G, Video 23 at 33:13), but defends the statements as "an argument with [another corrections officer⁴]." (*Id.* at 33:29-37.) At the same time that Farley says Sandman should have "gotten hit . . . for his attitude," (*Id.* at 34:40-35:13), he denies that he was advocating violence against a minor. While he admits that leaving someone "to die on the sidewalk" constitutes extreme indifference, he denies showing extreme indifference with that statement ("I didn't mean anything by it"). (*Id.* at 41:26-42:00.) He defends his statements based on his perception of Sandman at the time, a smug kid who would not get out of Phillips' way.⁵ Farley makes a distinction between advocacy of violence or unlawful force, which he says he was not doing, and making a "stupid, dumb comment," which he admits to doing. (Attachment G, Video 24 5:00-6:01.)

In his SID interview, Farley admitted writing "confronting hatred and bigotry with force is always appropriate" but he said that he only said that to "mess with" someone else on the thread (who appears to be Holman). (Attachment G, Video 24 at 1:22-1:28.) Farley was reminded that his Facebook page was publicly accessible, but he denied that that his postings compromised public trust in his ability to be fair and impartial, stating that his comments, even about wishing another person dead, were "off the cuff." (*Id.* at 3:50-4:39.)

⁴ Holman is one of the officers described in Joint Statement of Fact No. 18 and is the officer with whom Farley is arguing in the comments that accompany this post. The other officers, Pagan and Heupel, also make comments critical of Holman's position and of Holman. (See, Attachment H, at 070-71.)

⁵ Farley admits that the initial media coverage of Sandman was incomplete and his comments were directed at Sandman's actions as Farley understood them at the time of this posting.

On July 24 (no year indicated),⁶ Farley posted images of protesters and law enforcement personnel with a call for soldiers to stop “tear-gassing a mom wearing a bicycle helmet to protect” herself. (Attachment H, at 073.) There does not appear to be any original commentary from Farley in this post.

Racial Posts

On July 25 (no year indicated), Farley posted an image and accompanying text which can reasonably be interpreted as implying that all Trump supporters are racist and/or will tolerate racism to support Trump. (Attachment I, at 075.) On June 1, 2020, Farley posted an image of a political cartoon of the killing of George Floyd (Floyd) under the heading “Black America,” with Floyd saying, “I CAN’T BREATHE,” next to a political cartoon under the heading “White America,” of a white man in a surgical mask saying, “I CAN’T BREATHE.” In his SID interview, Farley tried to downplay the distinction made in this post between black and white Americans. (Attachment G, Video 22 at 8:50-11:00 and 21:25-25:17.) There does not appear to be any original commentary from Farley in this post.

Religious Posts

Farley posted four images on separate dates critical of Christianity, conservatives, conservative Christians, evangelical Christians, Republican Christians, and supporters of Trump. (Attachment J, at 078 – 81.) These posts generally portray Republican, evangelical and/or conservative Christians as hypocritical, cynical, lacking in compassion and empathy, and violent. In his SID interview, Farley strongly denied that by sharing these images, he was attacking persons for their religious beliefs, insisting that his attack was on the support certain persons had for Trump. (Attachment G, Video 22 at 20:30-21:12.) Underneath only the last post does Farley appear to add commentary, stating “Conservatives Are Destroying Our Future.” Id. at 081.

⁶ Based on the subject matter of Farley’s posts, it can safely be assumed that all postings were done between 2019 and 2020. If possible, precise dates are noted.

Republican Posts

Farley posted seven separate images and comments characterized by SID as “anti-Republican.” (Attachment K.) The first image shows a prayer for the gates of hell to open and swallow Trump, his family members and “every Republican” who helped him. (Id. at 083.) On July 27 (no year indicated), Farley posted the following, which appears to be his original statement:

Don't give Trump too much credit. It's not just one man that's destroying our country and getting people killed. It's Trump, Pence, Mnuchin, Barr, McConnel, Graham, Jordan, Nunes, McCarthy and every other republican [sic] that's loudly supporting Trump's actions through their silence.

[Id. at 087.]

Two additional posts are of images which state that Republicans are treasonous, (Id. at 088), and that “racists, religious extremists, bigots and white supremacists all align themselves with the Republican Party.” (Id. at 089.) Other than the comment quoted above, Farley does not appear to add commentary to these posts.

Anti-Trump Posts

Farley posted five separate images (mostly of political cartoons) characterized by SID as anti-Trump. (Attachment L.) The statements that accompany the images are very critical of Trump and his supporters, including that Trump supporters lack morals, ethics and humanity. Farley agreed that these posts are directed at a group (Trump supporters), not at any individual. (Attachment G, Video 22 at 16:00-16:08.) Farley does not appear to add commentary to these posts.

Relevant Posts

On June 10, 2020, Farley posted a statement in which he advocates “throwing through a wall” rather than pushing out the door the officer “who made our department a laughingstock

on the national stage.” (Attachment M.) In his SID interview, Farley stated that his statement referred to a NJDOC officer who was involved in a stunt mocking the death of George Floyd during a June 2020 Black Lives Matter march in a south New Jersey town. (Attachment G, Video 24 at 12:01-12:10.) Farley did not receive permission from the NJDOC for his posted remarks and denied that he spoke on behalf of the NJDOC, stating that he acted as a member of the general public commenting on a current event that got national media attention. (Id. at 12:22 and 13:04-13:26.) Yet, Farley then states that good officers should step up and “take a stand” against bad officers, (Id. at 15:35-15:45), and he argues that the value of his post is found in its contradiction of the public perception that all officers stick together. Brief of Appellant, at 38. Farley did not agree that due to his self-identification as a NJDOC officer, anyone reading this post would presume that the NJDOC investigation had concluded with a finding that this officer was guilty. (Id. at 13:33-13:50.)

Overall, I **FIND** that Farley makes his political views clear on his Facebook page and anyone visiting this public page would have no difficulty determining where he stands on current issues. Though Farley did not always include his own words, I **FIND** that with each posting, Farley communicated his position on a social, racial, political, and/or religious issue and his criticism of people whose positions he opposes. I **FIND** Farley publicly advocates the use of violence in response to action taken by others with whom he disagrees, advocates the use of force in response to bigotry and proposes a violent death for specific minors with whom he does not agree. I **FIND** that Farley’s public comments are offensive and disrespectful and show an absence of discretion.

The NJDOC Standards of Professional Conduct Policy Statement (Professional Conduct Policy) applies to all NJDOC employees and provides “a set of ethical standards which will guide their relationships with . . . the general public[.]” (Attachment N, at 022.) The Policy requires all employees to “meet an enhanced standard of professional conduct and ethical behavior which upholds the respect and confidence of the citizens of the State.” (Id. at 023.) This high standard of conduct is required of employees whether on or off duty and applies to personal conduct “in writings or any other manner where a person identifies him/herself as an employee of the [NJDOC].” Ibid.

Further, the Law Enforcement Personnel Rules and Regulations (Rules and Regulations) mandate standards of conduct for all NJDOC law enforcement personnel, including the following:

ARTICLE I, GENERAL PROVISIONS, SECTION 2:

No officer shall knowingly act in a 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.

ARTICLE II, PERFORMANCE OF DUTIES, SECTION 4:

Officers must maintain a high degree of self-control at all times.

ARTICLE II, PERFORMANCE OF DUTIES, SECTION 6:

An officer shall promptly report in writing through the chain of command all crimes, misconduct or unusual incidents which come to the officer's attention during the performance of duty.

ARTICLE III, PROFESSIONAL CONDUCT, SECTION 2:

No officer shall:

- a. Engage in threatening or assaultive conduct;
- b. Direct insulting language or behave in a disrespectful manner while in the performance of their duty.

ARTICLE III, PROFESSIONAL CONDUCT, SECTION 3:

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.

ARTICLE III, PROFESSIONAL CONDUCT, SECTION 5:

An officer shall:

- a. Be civil, orderly, maintain decorum control temper, be patient and use discretion in the performance of their duty;
- b. Cultivate and maintain the good opinion of the public, by prompt obedience to all commands, by steady and impartial conduct in the discharge of duty and by a respectful bearing to all persons.

ARTICLE IX, CONFLICTS OF INTEREST, SECTION 2:

No officer shall use their official position to control or affect the political action of another person. No officers shall engage in political activity during working hours.

ARTICLE IX, CONFLICTS OF INTEREST, SECTION 4:

No officer's official position with the Department shall be used for any political purpose whatsoever.

[(Attachment P, at 033—046.)]

Farley stated that he has received ethics training annually, knows NJDOC policies and the code of ethics and standards of professional conduct, and understands that he is subject to these while on- and off-duty. (Attachment G, Video 23 at 3:39-3:40, 3:42-3:43, 3:51-5:53.) Even so, throughout his SID interview, Farley appears incredulous (though he was wearing a mask) that he was being questioned about his use of Facebook, giving the strong impression that he never considered that NJDOC policies and regulations applied to posting and sharing political, violent, racial and/or religious messages on social media.

Respondent contends that Farley's message to Endress "clearly demonstrates that [Farley] has no ability to control his impulses and is prone to act irrationally and menacingly towards members of the public." Brief of Respondent, at 8. Appellant counters that there was nothing menacing or harassing about his posts and notes that Endress "ultimately admitted that she did not feel threatened." Ltr. Brief of Appellant in Response to Respondent's Brief in Support of its Motion for Summary Decision (July 20, 2021) (Response Brief of Appellant), at 1-2. As stated above, there was no criminal action initiated against Farley in any forum for harassment of Endress; moreover, his message to her does not exemplify lack of self-control (he only sent one message) but rather an abuse of discretion and failure to realize that harm to the reputation of the NJDOC could result when an officer made such offensive public comments to a civilian.

While Farley denied that his Facebook postings and statements brought disrepute to the NJDOC or compromised public trust in the NJDOC, he conceded that if another officer "made a statement toward others [such as he made regarding Sandman]," he would have told that officer that he or she shouldn't do that. (*Id.*, Video 24 at 20:34-20:51.) However, Farley denied that he would report an officer for making statements regarding taking violent action, despite acknowledging that he is required to report such violent conduct if it occurred. (*Id.* at 20:55-20:56.) Farley stated strongly that making "stupid comments" are not an actionable offense, reasoning that everyone has been known to make such statements without intending them

literally (e.g., “I could kill my wife”; “my children are driving me crazy”). (*Id.* at 22:24-22:53.) Here, he fails to distinguish between casual face-to-face conversation, which is typically private and is accompanied by non-verbal cues, and dialogue on Facebook, which is often public, and is not tempered by facial expressions or tone of voice and therefore, is more likely to be taken literally.

I **FIND** that Farley’s action on Facebook showed a lack of good judgment and understanding as to the sensitive nature of his position and his responsibility to uphold the public trust. Even though in many cases, the subject of Farley’s posts were current events, the images and comments were offensive and insulting to religious and racial groups and advocated violence (and in some cases, violent death) for persons with whom Farley did not agree politically. Farley took this action knowing his Facebook page could be seen by his Facebook friends, some of whom are NJDOC employees,⁷ and by members of the public. Respondent made the reasonable assessment that if Farley is unable to exercise good judgement while on social media, his ability to use good judgement in the workplace, a much more stressful environment, is also suspect. Farley’s message to Endress and his conduct on his Facebook page were sufficiently egregious to serve as the basis for respondent to pursue disciplinary charges against Farley.

LEGAL ANALYSIS AND DISCUSSION

Standard for Summary Decision

Summary decision is a well-recognized procedure for resolving cases in which the facts that are crucial to the determination of the matters at issue are not actually in dispute. By applying the applicable law and standard of proof to the undisputed facts, a decision may be reached in a case without the necessity of a hearing at which evidence is presented and testimony taken. The procedure is equally applicable in judicial as well as executive branch administrative proceedings. N.J.A.C. 1:1-12.5.

⁷ Farley agreed that many of his colleagues are Trump supporters and acknowledged that subordinate officers who may be Trump supporters, upon viewing his posts and comments, could “possibly” get the impression that he could not be fair with them because he considered them immoral. (See, Attachment F, at 53.)

The regulations provide that the decision sought by the movant “may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” N.J.A.C. 1:1-12.5(b).

The standards for determining motions for summary judgment are found in Judson v. Peoples Bank & Trust Co., 17 N.J. 67 (1954), and later in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). Summary decision is appropriate when “the evidence . . . is so one-sided that one party must prevail as a matter of law.” Brill, 142 N.J. at 541 [quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)]. In reviewing the proffered evidence to determine the motion, the judge must be guided by the applicable evidentiary standard of proof that would apply at trial on the merits.

Here, appellant’s rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to -12-6 (“Act”), and its implementing regulations, N.J.A.C. 4A:1-1.1 to -10-3.2. 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. Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987); 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). 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).

In their cross-motions for summary decision, the parties agree that the material facts are not in dispute and therefore, I **CONCLUDE** that summary decision is appropriate in this matter and it may be determined as a matter of law whether Farley violated 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 including violations of HRB 84-17, Sections C11, conduct unbecoming an employee; C27, the use or attempt to use one's authority or official influence to control or modify the political view of any person; and E1, violation of a rule, regulation, policy, procedure, order or administrative decision. Finally, it may be determined as a matter of law whether the penalty imposed by respondent on appellant is appropriate.

The Act and its implementing regulations are designed in part "to encourage and reward meritorious performance by employees in the public service and to retain and separate employees on the basis of the adequacy of their performance." N.J.S.A. 11A:1-2(c). The Act also recognizes that the public policy of this state is to provide public officials with appropriate appointment, supervisory and other personnel authority in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). A public employee who is protected by the Act may nonetheless be subject to major discipline for a wide variety of offenses connected to his or her employment, including conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6), and for other sufficient cause. N.J.A.C. 4A:2-2.3(a)(12). Major discipline for such an infraction may include removal, disciplinary demotion, or suspension or fine for more than five working days at any one time. N.J.A.C. 4A:2-2.2(a).

Appellant's status as a corrections officer subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). Law enforcement officers 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).]

Respondent contends that Farley's Facebook posts "violated the standard of good conduct required of all law enforcement officers" in the State of New Jersey. Brief of Respondent, at 20. While acknowledging that "some of the postings and commentary were more egregious than others," respondent argues that "all [are] highly inappropriate and unprofessional and clearly violative of the charged sections of the New Jersey Administrative Code and the [NJDOC's] Rules and Regulations and the Code of Ethics." Id. at 9.

Appellant claims that respondent cannot prove that it had just cause to discipline Farley because first, his actions were protected First Amendment speech; second, his actions did not rise to the level of conduct unbecoming a public employee or other sufficient cause; and third, Farley did not seek to use his authority or official influence to control or modify the political view of any person or to violate a rule, regulation, policy, procedure, order or administrative decision. Brief of Appellant, at 8.

First Amendment Protection

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

As appellant notes, the U.S. Supreme Court has found that the First Amendment "protects a public employee's right, in certain circumstances, to speak as a citizen addressing

matters of public concern.” Brief of Appellant, at 9, citing Garcetti v. Ceballos, 547 U.S. 410, 417 (2006) (emphasis added by appellant). But the U.S. Supreme Court also recognized that the State’s interest as an employer in regulating its employees’ speech differs significantly from its regulation of the speech of ordinary citizens. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). To determine whether the interest of a public employee “in commenting upon matters of public concern” is greater than the interest of the public employer “in promoting the efficiency of the public services it performs through its employees,” the U.S. Supreme Court has developed a two-part balancing test:

First, can the employee's speech be fairly characterized as relating to a matter of public concern? This is known as the employee's interest prong because it focuses on the interest of an employee, as a citizen, in commenting upon matters of public concern. Second, is there a governmental interest, as an employer, in the effective and efficient fulfillment of its responsibilities to the public through its employees? This is known as the public's interest or the governmental interest prong.

[Karins v. Atl.City, 152 N.J. 532, 548, 550 (1998), citing Pickering, 391 U.S. at 568, and Connick v. Myers, 461 U.S. 138, 146 (1983).]

Appellant contends that his Facebook posts and comments are speech made as a private citizen and not made pursuant to his employment duties or among the things he was employed to do. See, Garcetti, 547 U.S. at 421. This is so “even in the rare instance where [Farley] had particular knowledge or expertise of a subject due to his law enforcement background.” Brief of Appellant, at 16. While respondent does not suggest that Facebook activity is within the scope of Farley’s job description, the NJDOC policy states that even while off-duty, the conduct of employees, including “in writings or any other manner where a person identifies himself as an employee of the NJDOC,” reflects on the NJDOC and the State of New Jersey. (Attachment N, at 023.) On at least two occasions, Farley mentioned his employment in his communications and at all times, Farley’s posts are accompanied by his profile in which he identifies himself as a NJDOC police lieutenant.

When Farley sent the message to Endress on a thread seen by as many as 500 people, he told her he is a "police supervisor." When he stated on his public Facebook page that a fellow NJDOC officer should be "thrown through a wall," Farley made clear his opinion that this officer brought disrepute on the NJDOC, and he explained (in his SID interview) that good officers need to stand up to bad officers. Further, Farley stated that he was not concerned that the statement of a corrections lieutenant could give the public the impression that the NJDOC investigation had concluded and the offending officer would be terminated as a result.

I **CONCLUDE** that Farley did not act as a private citizen as he used his employment status in both his Facebook profile and certain statements. Therefore, Farley has no First Amendment protection to the reaction of his employer to such speech. Garcetti, 547 U.S. at 418. If, however, Farley were to have acted as a private citizen, the inquiry would continue as most if not all of the issues on which Farley posted or commented were matters of public concern. See, Czaplinski v. Bd. of Educ. Of Vineland, 2015 U.S. Dist. LEXIS 38349, at *9 (even though security guard's racist Facebook comments were made as a private citizen on a matter of public concern, court found her speech was not constitutionally protected as her employer had adequate justification to treat her differently than the general public).

Farley argues that because the postings identified by SID, for which he was disciplined, "were all clearly political postings regarding current issues of public concern," Brief of Appellant, at 16, the question is

'[W]hether the relevant government entity had an adequate justification for treating the employee differently from any other member of the public' and whether the speech impedes the employee's proper performance of his duties, calls into question his fitness for duty, or interferes with the employer's operations generally.

[ibid. quoting Pickering, 391 U.S. at 568, 572-73 ; see also, Karins, 152 N.J. at 551-52 ('the City's interest in maintaining order, discipline, harmony, and a professional working relationship between the police and the fire departments substantially outweighs Karins's right to make abusive, insulting, racially motivated comments.')]]

Even though there was no evidence that Farley was on-duty or physically in the workplace when he was using Facebook, because he is a correctional police lieutenant, his conduct and speech are restricted twenty-four hours a day to ensure a higher level of conduct, awareness, and sensitivity. This does not mean that Farley cannot enjoy First Amendment protection for daily speech made outside the workplace as a private citizen. Rather, it means that his daily speech is not afforded an automatic guarantee of privacy, like that of other members of the public, because he chooses to be employed as a correctional police lieutenant and voluntarily accepts the restrictive conditions of his employment.

It is worth noting here that Farley made no attempt to hide his employment status on Facebook, including it in his profile and even using it to bolster the impact of his response to Endress. Farley stated that he told Endress his job title to “show that he had an understanding of the issues surrounding law enforcement since he was a member of law enforcement.” Brief of Appellant, at 25. Maybe so, but the words “hey stupid, shut the fuck up and go kill yourself you ignorant sack of shit” and “I am a Police Supervisor and I don’t want scum like you backing me” hardly meet the standard of “well-informed views of government employees engaging in civic discussion” protected by Garcetti. See, 547 U.S. at 419.

While Farley reposted and/or shared certain images involving matters of public concern in 2019 and 2020, most of Farley’s posts⁸ did nothing to legitimately advance productive reasonable discourse about issues of political and/or social injustice. Farley admitted that in most cases, he did not add his own interpretation of an image, taking away from his argument that he was sharing opinions developed over his twenty-plus years as a correctional officer and leaving a reader to conclude that he simply endorsed insults (or worse) leveled at people with whom he disagrees. When Farley did add his own comments, he typically added more insults.⁹

⁸ It could be argued that the quotation from, and photo of, Phillips was positive in nature and did promote reasonable discourse about treatment and characterization of Native Americans, but the comments that accompanied this post – including those from Farley – did not do the same. See, Attachment H.

⁹ While admitting that the tenor of his comments was rude, mean and harsh, appellant notes that the U.S. Supreme Court stated that “debate on public issues . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” Brief of Appellant, at 20, quoting N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964). The persons to whom Farley directed his most caustic comments, Endress and Sandman, are not government or public officials.

On balance, respondent's interests in ensuring that NJDOC officers conduct themselves in a civil, professional manner at all times (particularly when identified as NJDOC officers), 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 – all outweigh appellant's right to make and perpetuate rude, disrespectful, biased and insensitive posts and comments in a public forum, such as on Facebook. Farley is obligated as a correctional police lieutenant to temper his public writings and/or communications to comply with NJDOC policies and regulations. I **CONCLUDE** that appellant's comments to Endress in the Back the Blue Ocean County group thread and on his own Facebook page are not protected free speech under the Fifth Amendment to the U.S. Constitution.

Conduct Unbecoming a Public Employee

There is no precise definition for "conduct unbecoming a public employee," and the question of whether conduct is unbecoming is made on a case-by-case basis. In re King, CSV 2768-02, Initial Decision (February 24, 2003), adopted, Merit Sys. Bd. (April 9, 2003), <http://njlaw.rutgers.edu/collections/oal/>. "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, 152 N.J. at 554; 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).

As stated above, Farley's status as a correctional police lieutenant subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. at 576-77;

Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965) (a police officer “represents 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”).

While “the implicit standard of good behavior” expected of public employees is also not defined, none of the following would qualify: the use of offensive language when addressing another person in a public forum;¹⁰ publicly recommending and/or endorsing the use of violence against minors and/or persons with whom you disagree; publicly repeating and spreading slanderous statements about persons who practice a specific religion.¹¹ Farley did all of this. As respondent argues,

[T]his is entirely unacceptable behavior for any Correction Officer let alone a Correctional Police Lieutenant, who is obligated not only to maintain the highest standards of conduct, but also to set an example for subordinate officers.

[Brief of Respondent, at 8.]

Appellant argues that the only NJDOC employees who are certain to have viewed Farley’s offensive comments – Holman, Pagan and Heupel – did not complain to Facebook or NJDOC, and there is no evidence that his “comments affected the morale or efficiency of the governmental unit.” Brief of Appellant, at 28-29. First, it is not surprising that NJDOC officers who were also making inappropriate comments on a public Facebook page did not complain and thereby risk bringing attention to their own actions. Second, as respondent notes, the issue is Farley’s conduct; the NJDOC rules exist to prevent such conduct whether or not a colleague and/or a member of the public brings a complaint. Brief of Respondent, at 9-10. As stated by the New Jersey Supreme Court, “it is not necessary ‘for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest

¹⁰ Posting to a 500+ member Facebook group is not a private conversation. See, Liverman v. City of Petersburg, 844 F.3d 400, 407 (4th Cir. 2016) (court notes that social media both amplifies distribution of the speaker’s message and increases the potential for disruption of employers’ operations).

¹¹ Farley argues here that the posts characterized as “religious” by SID cannot be as they do not attack any specific religion and he is a Roman Catholic. Brief of Appellant, at 34. Christianity is a religion; the posts are – at best – criticism of Christians. Just because Farley is a member of the Roman Catholic denomination of Christianity does not mean he gets a pass when he makes public statements about members of other Christian denominations.

before taking action." Karins, 152 N.J. at 561-62, quoting Connick v. Myers, 461 U.S. 138, 152 (1983). Finally, given the public nature of Facebook generally, and Farley's page in particular, "we may never know how many people saw Farley's posts and commentary and/or were offended by them and . . . lost faith and confidence in the NJDOC." Brief of Respondent, at 9.

Farley disputes that anyone who read his response to Endress would question his ability to perform his duties in a fair and impartial manner and disputes that the post could compromise the public trust in him. For support, Farley cites his twenty-five year career in public service, including the armed forces, and the commendations he has received. Brief of Appellant, at 26. That is precisely the problem with social media, such as Facebook; though Back the Blue Ocean County was a private group, it still had hundreds of members, not all of whom could be familiar with Farley's career and so could reasonably presume that his words to Endress were a good measure of his ability to treat the people he serves in a fair and impartial manner. Had they moved on to Farley's personal account, which was public and where his profile shows he is a correctional police lieutenant, his fairness and impartiality toward the people he serves becomes even more suspect.¹² I **CONCLUDE** that respondent has met its burden of proving that appellant's actions on Facebook were conduct unbecoming a public employee in violation of N.J.A.C. 4A:2.3(a)(6).

Other Sufficient Cause/Violations of HRB 84-17

There is no definition in the New Jersey Administrative Code for other sufficient cause, which is generally defined as all other offense caused and derived as a result of all other charges against appellant. There have been cases in which the charge of other sufficient cause has been dismissed when "[r]espondent has not given any substance to the allegation." Simmons v. City of Newark, CSV 09122-99, Initial Decision (February 22, 2006), <https://njlaw.rutgers.edu/collections/oal/>. Here, respondent determined that sufficient cause

¹² Appellant argues that respondent offered no evidence that Farley had acted unfairly toward the officers he supervises or "that any of his subordinates actually believe he cannot or has not acted fairly towards them[.]" Reply Brief of Appellant, at 2. That is true; Farley is charged here only for his virtual conduct as to which only Endress complained. However, the government need not show the existence of actual disruption if it establishes that disruption is likely to occur because of the speech. Munroe v. Cent. Bucks Sch. Dist., 805 F.3d 454, 472 (3rd Cir. 2015).

charges are attributable to appellant for his alleged violations of HRB 84-17, Sections C11, C27, and E1.

Farley is charged with violating Section C11, conduct unbecoming a public employee. For the reasons provided above, I **CONCLUDE** that respondent has carried the burden of proving that appellant violated HRB 84-17, Section C11, conduct unbecoming a public employee.

Farley is charged with a violation of Section C27, “the use or attempt to use one’s authority or official influence to control or modify the political view of any person.” (Attachment R, at 103112.) As described above, Farley identified himself on Facebook using his title as a corrections lieutenant and, with respect to his message to Endress, Farley contends that he used his title “to show that he had an understanding of the issues surrounding law enforcement[.]” Brief of Appellant, at 25. At the same time, Farley claims that he made no “attempt to use his position to modify or influence anyone else’s opinion.” *Id.* at 40. If Farley was not attempting to change minds, it is curious that he chose to support his posts with his credentials. Implicit in the criticism of a person, or a group of people, for holding certain beliefs, is an attempt to convince others of the error of those beliefs. I **CONCLUDE** that respondent has proved by a preponderance of credible evidence that Farley used his job title on Facebook to influence people to modify their political and/or social views in violation of HRB-17, Section C27.

Farley is charged with a violation of Section E1, “violation of a rule, regulation, policy, procedure, order or administrative decision.” (Attachment R, at 103117.) Specifically, respondent charges that Farley failed to comply with the Professional Conduct Policy (Attachment N), and the following provisions of the Rules and Regulations:

ARTICLE I, GENERAL PROVISIONS, Section 2:

No officer shall knowingly act in a 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.

ARTICLE II, PERFORMANCE OF DUTIES, SECTION 4:

Officers must maintain a high degree of self-control at all times.

ARTICLE II, PERFORMANCE OF DUTIES, SECTION 6:

An officer shall promptly report in writing through the chain of command all crimes, misconduct or unusual incidents which come to the officer's attention during the performance of their duty.

ARTICLE III, PROFESSIONAL CONDUCT, SECTION 2:

No officer shall:

- a. Engage in threatening or assaultive conduct;
- b. Direct insulting language or behave in a disrespectful manner while in the performance of their duty.

ARTICLE III, PROFESSIONAL CONDUCT, SECTION 3:

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.

Article III, PROFESSIONAL CONDUCT, SECTION 5:

An officer shall:

- a. Be civil, orderly, maintain decorum control temper, be patient and use discretion in the performance of their duty;
- b. Cultivate and maintain the good opinion of the public, by prompt obedience to all commands, by steady and impartial conduct in the discharge of duty and be a respectful bearing to all persons.

ARTICLE IX, CONFLICTS OF INTEREST, SECTION 2:

No officer shall use their official position to control or affect the political action of another person. No officers shall engage in political activity during working hours.

ARTICLE IX, CONFLICTS OF INTEREST, SECTION 4:

No officer's official position with the Department shall be used for any political purpose whatsoever.

[(Attachment P.)]

As respondent argues, taken together, the Professional Conduct Policy and the Rules and Regulations:

[R]equire officers to uphold the highest level of professional and ethical conduct on and off duty and to maintain the public trust and confidence. They prohibit officers from engaging in assaultive or threatening conduct or using disrespectful or insulting language.

They mandate that officers maintain decorum and self-control at all times, particularly when interacting with the public. They prohibit the use of one's position to attempt to influence the political views of another person or for any other political purpose.

[Brief of Respondent, at 23-24.]

While the parties stipulated that the NJDOC did not have a specific social media policy during the time period at issue here, respondent urges, and I agree, that the Professional Conduct Policy and the Rules and Regulations are sufficient to prohibit the use of social media to engage in certain conduct. Id. at 24. Put another way, the fact that Farley's alleged conduct was limited to his social media account does not free him from his continuing obligation to adhere to NJDOC policies and regulations. As noted by respondent, "the Rules and Regulations also do not specifically address other forms of communication including offensive letters, bumper stickers or signs" but address the officer's conduct. Ibid.

For the reasons stated above, I **CONCLUDE** that respondent has proved by a preponderance of credible evidence that Farley violated HRB 84-17, Section E1, specifically the Professional Conduct Policy and the above-cited sections of the Rules and Regulations. I further **CONCLUDE** that respondent has proved by a preponderance of credible evidence other sufficient cause to discipline Farley, pursuant to N.J.A.C. 4A:2-2.3(a)(12).

PENALTY

In West New York v. Bock, 38 N.J. 500, 522 (1962), the New Jersey 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." The system of progressive discipline serves the goals of providing public employees with job security and protecting them from arbitrary employment decisions. Essentially, an employee is subject to present discipline based on the nature, number and proximity in time of past infractions. "Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. at 581, quoting Bock, 38 N.J. at 523. Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the

matter.” Bowden v. Bayside State Prison, 268 N.J. Super. at 305. The question to be resolved here is whether the discipline imposed by respondent on appellant, removal from employment, is appropriate.

Farley is subject to major discipline for the 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. Major discipline for such infractions may include removal, disciplinary demotion, or suspension or fine for more than five working days at any one time. N.J.A.C. 4A:2-2.2(a).

With respect to the violations of HRB 84-17, a range of penalties is recommended for each offense. (Attachment R.) Although not binding on this tribunal, HRB 84-17 offers a reasonable basis for imposition of penalty and is duly considered. For a Section C11 violation of conduct unbecoming an employee, the penalty for a second infraction is removal.¹³ (Id. at 103109.) The penalty for a first infraction for a Section C27 violation, the use or attempt to use one’s authority or official influence to control or modify the political view of any person, is removal. (Id. at 103112.) The penalties for a second Section E1 violation of a rule, regulation, policy, procedure, order or administrative decision range from a five-day suspension to removal. (Id. at 103117.)

Prior to July 24, 2020, Farley received major discipline in the form of suspensions twice, including in April 2013 for a Section D-20(c) violation for “accessing non-work related Internet websites,” for which he could have been removed following a first infraction. (Attachment S, at 98; Attachment R, at 103116.) In 2019, Farley received an official reprimand for a violation of Section C11, conduct unbecoming a public employee, for sending an email to the NJDOC Office of Information Technology which contained “inappropriate, insulting and unprofessional language.” (Attachment S, at 100.)

Appellant argues that the concept of progressive discipline does not support removal of Farley who, prior to the present matter, “had only two minor suspensions” and a “handful” of written reprimands over the twenty-one years he served at NJDOC. Brief of Appellant, at 42.

¹³ Farley was disciplined for a Section C11 infraction in February 2019. (Attachment S, at 100.)

Further, Farley's military service, four commendations, and service as an EMT must be considered; his record outweighs "a single 'rude' or 'mean' comment on Facebook during a political debate." Ibid. Appellant mischaracterizes the infraction; Farley's message to Endress could hardly be called a "political debate," as it was more of a one-sided attack on Endress for her politics. (For her part, Endress did not engage in a political back and forth; she complained about the words Farley used to address her.) Further, respondent also charged Farley for activity on Facebook over the course of 2019 and 2020, not just for the single incident with Endress.

Respondent argues that the NJDOC "has demonstrated leniency towards Farley in the past," specifically in 2013 (as described above) and in 2019, when he received only an official written reprimand for a violation of C11, though the range of penalties included removal. Brief of Respondent, at 27. Respondent contends that removal from employment was the appropriate response to appellant's conduct and "the disgrace and discredit Farley brought upon himself and the NJDOC." Ibid.

Based upon a consideration of the totality of the evidence, and with due consideration of appellant's prior disciplinary record, I **CONCLUDE** that the penalty of removal is reasonable and consistent with the policy of progressive discipline and is the appropriate discipline for the violations of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and other sufficient cause pursuant to N.J.A.C. 4A:2-2.3(a)(12), including violations of HRB 84-17, Sections C11, conduct unbecoming an employee; C27, the use or attempt to use one's authority or official influence to control or modify the political view of any person; and E1, violation of a rule, regulations, policy, procedure, order or administrative decision.

ORDER

It is **ORDERED** that the motion for summary decision of Respondent **New Jersey Department of Corrections, Adult Diagnostic and Treatment Center** is **GRANTED**, the motion for summary decision of Appellant **Ernest J. Farley** is **DENIED**, and the charges entered in the Final Notice of Disciplinary Action dated February 11, 2021, are hereby **SUSTAINED**.

Accordingly, I **ORDER** that the penalty imposed on appellant by respondent removing appellant from his employment as a Correctional Police Lieutenant is hereby **AFFIRMED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 25, 2021
DATE



TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/nd