STATE OF NEW JERSEY

In the Matter of Eric Lange Edna Mahan Correctional Facility CSC DKT. NO. 2021-1426 OAL DKT. NO. CSR 03703-21	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**

ISSUED: November 22, 2021 (NFA)

The appeal of Eric Lange, Correctional Police Lieutenant, Edna Mahan Correctional Facility, Department of Corrections, removal effective August 27, 2020, on charges, was heard by Administrative Law Judge Susan G. Olgiati, who rendered her initial decision on October 8, 2021. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the 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 November 17, 2021, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision. However, it did not adopt her 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 and other sufficient cause. The appointing authority asserted that the appellant posted inappropriate material on Facebook on multiple occasions. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In her initial decision, the ALJ found that the appellant acknowledged making numerous Facebook posts, including ones depicting violent images and

symbols, as well as racially insensitive or derogatory images or narrative. The exact nature and subjects of the posts are discussed in detail in the initial decision. After finding that the posts did indeed support the charges levied against the appellant, the ALJ determined that the proper penalty, rather than the originally imposed removal, was a six-month suspension and further training. In essence, the ALJ found that the appellant's 23-year career with no prior discipline and one commendation mitigated against imposing the removal sought by the appointing authority. Specifically, the ALJ stated:

> As an initial matter, the fact that the respondent did not have a social media policy at the time the posts were made, does not wholly excuse appellant's actions. The offensive, racially insensitive, derogatory, discriminatory, and violent nature of the images and content of the posts should have alerted appellant, a Correctional Police Lieutenant since 2018 and with over twenty-three years of employment experience with the DOC, that his posts/reposts had the potential to adversely affect morale and impede the operations of the DOC, and that they were violative of DOC rules and regulations and standards of conduct. Appellant's conduct demonstrates a significant lack of judgment. However, based upon the totality of the evidence, including the fact the appellant's Facebook page was private, that all but one of his posts were repost of existing images and content without any further comment, and that while he is identified as a Lieutenant and as law enforcement on his Facebook page, he did not identify himself as same in any of the posts themselves, and with due consideration to the concept of progressive discipline including appellant's lack of any discipline over the course of twenty-three years of employment with the DOC and his commendation for charitable work benefiting another DOC employee, I **CONCLUDE** that the original penalty of removal should be **MODIFIED** to a 180 day suspension without pay. I further **CONCLUDE** that as a condition of reinstatement, the appellant be required to submit to training including but not limited to diversity, inclusion, and equity training, anti-discrimination training, and other training which respondent deems to be 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. If further states that the inmate population is predominately African-American, and 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. Moreover, it argues that since the appellant posted or shared multiple offensive images and comments, his actions were egregious and that this matter is most similar to other recent Commission decisions where it did impose removal for

similar offensive social media postings. *See e.g., In the Matter of Wayne Pearson* (CSC, decided September 22, 2021) and *In the Matter of Ernest Farley* (CSC, decided October 6, 2021).

In his reply, the appellant states that based on his 23-year unblemished career the ALJ appropriately reduced the penalty. He further contends that the cases cited by the appointing authority in its support of the removal are factually different. Rather, it contends that the ALJ's determination is more in line with a recent Commission decision where a superior officer with a long, mostly unblemished record had a removal modified to a 90 working day suspension. *See e.g., In the Matter of Robert Curry* (CSC, decided June 2, 2021).

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 regarding the charges. 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 Lieutenant 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 Correctional Police Lieutenant is a higher-level 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.*

Initially, the Commission notes that it has recently decided several cases regarding correctional custody employees where the issue was social media postings. In those decisions, the Commission has, **based on the facts and**

circumstances presented, imposed penalties ranging from a 90 working day suspension to removal. Regardless, the Commission's determination of the proper penalty in any matter is necessarily guided by the facts of the case before it, and its prior determinations are not precedential, but may be used as guidance in arriving at the penalty in a current matter.

In this matter, the appellant posted or reposted many offensive and inflammatory postings. In this regard, while somewhat factually similar to the *Farley, supra*, matter, this matter is most *factually* similar to the recent case *In the Matter of Samantha Chirichello* (CSC, decided October 6, 2021). In that case, Chirichello posted or reposted several offensive and discriminatory items on Facebook. In that case, the ALJ sought to modify the removal to a six-month suspension. However, the Commission upheld the removal. The Commission stated in upholding the removal:

> 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.

In this matter, the appellant's misconduct is quite similar to the misconduct in *Chirichello*, and even where different, is extremely egregious since he displayed numerous inappropriate posts spanning several categories. In fact, absent mitigating factors, the Commission would have no pause in imposing the removal. However, different from *Chirichello*, and more akin to *Curry, supra*, and *Burkholder, supra*, the appellant has a long history of service with no discipline as well as one commendation. Thus, the Commission weighed those mitigating factors against his egregious misconduct to decide whether the lesser penalty recommended by the ALJ was appropriate. In the regard, the Commission finds that, in weighing those factors, the appellant's misconduct is not sufficiently mitigated by his record of service to support a reduction of the penalty. The Commission is extremely disturbed that the appellant, a high-level superior officer, would act in such an irresponsible and reprehensible manner on a medium that can be easily accessed by the public.[1] The fact that the appellant posted or shared numerous inappropriate

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[1] The ALJ's decision indicates that the appellant had approximately 750 Facebook friends who could access his postings and that several of the postings were "shared." However, there is nothing in the decision indicating how many of his Facebook friends actually viewed the postings or how many other individuals viewed the postings that were ultimately shared. For example, there is

posts is different from the misconduct engaged in by Curry, also a superior officer with a long, mostly unblemished record, who "liked" one offensive post. In that matter, the Commission found that Curry's record of service did serve as sufficient mitigation to permit a reduction in penalty. Such is not the case here. Moreover, while Burkholder's penalty was reduced based on his long record of mostly unblemished service, Burkholder, who was not a superior officer, made only one offensive post. 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 Eric Lange.

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 17th DAY OF NOVEMBER, 2021

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Allison Chris Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

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information in the record that at least one other Correctional Police Lieutenant, who was not friends with the appellant on Facebook, observed and reported several of the appellant's postings.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. CSR 03703-21
AGENCY DKT. NO. N/A
2021-1426

IN THE MATTER OF ERIC LANGE, EDNA MAHAN CORRECTIONAL[1] FACILITY.

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

Kendall J. Collins, Deputy Attorney General, for the Department of Corrections, Edna Mahan Correctional Facility, respondent (Andrew J. Bruck, Acting Attorney General, attorney)

Record Closed: September 20, 2021 Decided: October 8, 2021

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

STATEMENT OF THE CASE

Appellant, Eric Lange, (appellant or Lt. Lange) appeals the action of the respondent, Department of Corrections, Edna Mahan Correctional Facility (herein collectively referred to as the DOC), removing him from his position as a Correctional Police Lieutenant, based on disciplinary charges relating to various postings he made on the Facebook social media platform. Appellant is charged with conduct unbecoming a

[1] Edna Mahan Correctional Facility (EMCF) is the only respondent listed on the transmittal to the Office of Administrative Law; however, respondent's cross-motion for summary decision is filed on behalf of both the DOC and the EMCF.

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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, (HRB 84-17), as amended, C11, Conduct Unbecoming and Section E1, violation of a rule, regulation, policy, procedure, order, or administrative decision. Appellant contends his posts are protected First Amendment speech that does not constitute conduct unbecoming or violate a rule, regulation, policy, procedure, order, or administrative decision.

PROCEDURAL HISTORY

On August 18, 2020, the respondent issued a Preliminary Notice of Disciplinary Action. On August 24, 2020, respondent conducted a Loudermill hearing. On March 22, 2021, respondent issued a Final Notice of Disciplinary Action, which sustained the charges against appellant and terminated his employment.

The appellant timely requested a hearing. The appeal was perfected on April 8, 2021, and the matter was transferred to the OAL on April 13, 2021. N.J.S.A. 52-14B-1 to 15 and 14F-1 to 13. An initial telephone prehearing conference was held on May 17, 2021. On June 1, 2021, the parties confirmed that, as the facts were not in dispute, they intended to proceed via motions for summary decision and a briefing schedule was set. Cross-motions for summary decision and joint stipulations of fact were filed on July 9, 2021. Responses were filed on July 29, 2021. Oral argument was held on September 8, 2021. On September 20, 2021, based on issues raised at oral argument, appellant filed a supplemental certification and the parties filed supplemental stipulations of facts. The record closed on that date.

FACTUAL DISCUSSION AND FINDINGS

Stipulation of Facts

The parties jointly stipulate to the following facts. Accordingly, I **FIND** as **FACT**:

1. Lt. Eric Lange has been employed by the New Jersey Department of Corrections since August 30, 1997;

2. In or around 2012, Lt. Lange was promoted to the rank of Sergeant;

3. In or around 2018, Lt. Lange was promoted to the rank of Lieutenant;

4. Lt. Lange had been assigned to the Edna Mahan Correctional Facility since he was promoted to the rank of Lieutenant in 2018;

5. Lt. Lange worked at the Mountainview Youth Correctional Facility from 1997 until his promotion to the rank of Lieutenant in 2018;

6. Lt. Lange maintained a page on the Facebook social media platform at all times relevant to this matter;

7. Lt. Lange's Facebook page was not open to the public, but could be accessed by individuals with whom he was "Friends" on the Facebook social media platform.

8. Lt. Lange's Facebook page contained at least one photograph from 2013 in which then Sergeant Lange is wearing his DOC-issued uniform. Lt. Lange did not post the photo himself, but it was posted to his Facebook page when his wife posted the photo on her own Facebook page and "tagged" him in the photo, which had the effect of then posting it on his Facebook page;

9. On or about June 27, 2020, Lt. A. Washington filed a Special Custody Report alleging that on June 24, 2020, she had observed what she considered to be inappropriate and racially discriminatory photos posted on social media "by a lieutenant who currently works in EMCF," which she subsequently confirmed to be Lt. Lange (a true and correct copy of which is attached to the parties' cross motions for summary decision as Attachment A, Bates No. DOC/EMCF 062-063);

10. Lt. Washington's complaint was referred to the New Jersey Department of Corrections' Special Investigations Division ("SID") on June 30, 2020. SID conducted an investigation and issued a report on August 17, 2020 (a true and correct copy of which is attached to the parties' cross motions for summary decision as Attachment B, Bates No. DOC/EMCF 019-061);

11. SID's investigation included a review of Lt. Lange's Facebook page

including various posts that Lt. Lange made on his page (a true and correct copy of which is attached to the parties' cross motions for summary decision as Attachment B, Bates No. DOC/EMCF 019-061);

12. SID also interviewed Lt. Washington on July 8, 2020, regarding her complaint (a true and correct copy of the video recording of the interview is attached to the parties' cross motions for summary decision as Attachment C);

13. SID interviewed Lt. Lange regarding his Facebook postings on July 23, 2020. Although the SID Report indicates this was a videotaped interview (see attachment B at Bates No. DOC/EMF 023, ¶3) only an audio recording is available of this interview (a true and correct copy of which is attached to the parties' cross motions for summary decision as Attachment D);

14. SID conducted a follow-up videotaped interview of Lt. Lange on August 10, 2020 (a true and correct copy of which is attached to the parties' cross motions for summary decision as Attachment E);

15. SID did not receive any complaints related to any of Lt. Lange's aforementioned Facebook postings from anyone other than Lt. Washington, although Lt. Washington stated in her SID interview that other employees at EMCF had brought the postings to her attention;

16. The only people interviewed by SID as part of its investigation in this matter were Lt. Washington and Lt. Lange;

17. SID also reviewed the Department of Corrections Law Enforcement Personnel Rules and Regulations (a true and correct copy of which is attached to the parties' cross motions for summary decision as Attachment F, Bates No. DOC/EMCF 064-084) and the State of New Jersey Department of Corrections Standards of Professional Conduct Policy (a true and correct copy of which is attached to the parties' cross motions for summary decision as Attachment G, Bates No. DOC/EMCF 085-087);

18. Lt. Lange acknowledged receipt of all applicable Rules and Regulations, Policies and Procedures (true and correct copies of which are attached to the parties' cross motions for summary decision as Attachment H, Bates No. DOC/EMCF 104 – 120);

19. A true and correct copy of the Civil Service Job Specification for the position of Correctional Police Lieutenant is attached to the parties' cross motions for summary decision as Attachment I, Bates No. DCF/EMCF 121-124;

20. During the relevant time period, the Department of Corrections did not have a policy that specifically addressed social media posts;

21. The DOC issued a Preliminary Notice of Disciplinary Action (31-A) to Lt. Lange on August 18, 2020 and a Final Notice of Disciplinary Action (31-C) to Lt. Lange on March 22, 2021 (a true and correct copy of which is attached to the parties' cross motion for summary decision as Attachment J, Bates No. DOC/EMCF 001-003);

22. Lt. Lange provided a copy of and read a written statement into the record before the Administrator during his August 24, 2020, Loudermill Hearing explaining his posts (a true and correct copy of which is attached to the parties' cross motions for summary decision as Attachment K);

23. A true and correct copy of Human Resources Bulletin ("HRB") 84-17 as amended is attached to the parties' cross motion for summary decision as Attachment L, Bates No. DOC/EMCF 088-103;

24. A true and correct copy of Lt. Lange's Work History is attached to the parties' cross motions for summary decision as Attachment M, Bates No. DOC/EMCF 125;

25. A timely appeal was subsequently filed with the Office of Administrative Law.

26.[2] Lt. Lange stated during his first investigatory interview with SID only that this Facebook page identified him as a Lieutenant and a member of law enforcement. He was not asked whether his Facebook page identified his employer. The exact colloquy is as follows:

> SID: Um. Do you po...do you have it listed on your Facebook page what your job title is?
>
> EL: I believe so. Uh...if you looked into my uh home page

[2]Stipulations #26-30 represent supplemental stipulations submitted by the parties following oral argument.

I guess on Facebook, and dug into that, yeah, you'd see it said Lieutenant…

SID: And you post photos of yourself in uniform?

EL: Me?

SID: Yes.

EL: I don't post photos of myself in uniform. No.

SID: Have you ever been tagged in a photo with yourself in uniform?

EL: Probably, yeah.

SID: Ok. So that this would be safe to say you were tagged in this photo here?

EL: Many years ago as a Sergeant and that's my wife and we were on our way to a funeral.

SID: Yes. No, that's fine. I'm just …so, you were tagged in it, you didn't post it yourself? Right? Um and also you were tagged in this photo. [overlapping speaking]

EL: That was Dave Bailey's…

ES (Union Rep): Yeah that was Dave Bailey's…

EL: …dinner

SID: Alright. Um…so, it's safe to assume that somebody who is friends with you on Facebook would know that you work in law enforcement?

EL: Yes.

SID: Just like you said earlier like someone who is your friend, correct?

EL: [muffled. Not discernible]

See Attachment D the parties' cross motions, audio recording of July 23, 2020 at 6:51 through 7:45.

27. The parties further stipulate that Lt. Lange did not write the words "I wrote you all a poem" on the post located at Bates No. DOC/EMCF 021. Lt. Lange reposted

the image from another page where the phrase in question had already been added to the post;

28. The parties further stipulate that Lt. Lange did not write the words, "I'm not sad" on the post located at Bates No. DOC/EMCF 024. Lt. Lange reposted the image from another page where the phrase in question had already been added to the post;

29. The parties further stipulate that the photo contained at Bates No. DOC/EMCF 042 is a photo of Lt. Lange and three other individuals. Lt. Lange, however, is the individual at the far left of the photo dressed in civilian clothes (a suit). Lt. Lange did not post the photo, but was tagged in it by someone who attended the event which was a dinner for an organization called "Officer Down," which helps the families of officers who have died in the line of duty or who have died suddenly due to a disease, accident etc.; and

30. The parties stipulate that SID did not obtain any comments made in connection with any of Lt. Lange's Facebook posts as part of its investigation. SID did not have access to any comments that may have been made because Lt. Lange's profile was not accessible to anyone who was not "Friends" with him, and SID never requested that Lt. Lange provide it with access to his Facebook profile.

In addition to the above stipulated facts, having reviewed the briefs filed on behalf of the cross motions for summary decision and the attachments appended thereto, as well as the briefs submitted in reply, and the supplemental submissions submitted following oral argument on the motions, I further **FIND** as **FACT**:

Appellant estimated that in June 2020, when the events giving rise to this matter occurred, he had approximately 750 "friends" on his Facebook account. See Supplemental Certification of Lt. Eric Lange.

Lt. Washington was not one of appellant's Facebook friends. Lt. Washington reported observing several photos posted by appellant on social media. One of the photos observed by Lt. Washington included an image depicting the shooting of an individual who is dressed in black and is holding a knife to the throat of a man who appears to be a law enforcement officer. See Attachment B, DOC/EMCF 020. See also appellants letter brief at pg. 14.

Appellant acknowledged making Facebook posts consisting of:

- An image of an individual dressed in black with his/her face fully covered and with a flag-like object draped around his/her neck.[3] The individual is standing behind a man dressed in what appears to be a law enforcement officer's uniform and is holding a knife to the throat of the man in uniform. On the top portion of the image is a hand firing a handgun at the head of the individual dressed in black with blood splatter appearing on the opposite side of this individual's head. See Attachment B, DOC/EMCF 020. Above the image, appellant added the caption "Fixed it." Id. This post received thirty-six "emoji reactions"[4] consisting of a thumbs up, heart, and what appears to be a face with an open mouth and/or a surprised face, and twelve comments.[5] Id.

- A reposting of an image of Hillary Clinton with her hair in what appears to be cornrow hair braids[6] containing the caption, "The new name and face of Quaker Pancakes and Syrup Aint Japresident." Id. at DOC/EMCF 021. This post received nine emoji reactions of what appears to be a laughing or smiling face. The posting also had two "shares."[7] Id.

- A reposting of an image of Jeffrey Epstein containing the caption, "Roses are red the government is violent Epstein was killed." This post received one thumbs up emoji reaction. Id.

- A reposting of an image of a noose the word "NASCAR" imposed over it containing the caption, "Unlike Epstein NASCAR did kill itself." No emoji reaction or share information is indicated for this post. Id. at DOC/EMCF 024.

- A reposting of an image of cone shaped paper water cooler cups containing the caption, "This just in: Someone left KKK hoods next to the cooler in @Bubba Wallace garage." The posting received six emoji reactions consisting of what

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[3] The SID investigation report attached to the Stipulations of Fact reflect that the draped object is red and white on one side and blue and white on the left.
[4] A response to a post through use of a small image or icon that conveys an idea or emotion.
[5] As indicated in the stipulation of fact #30, the actual comments to the postings were not obtained by SID.
[6] According to Wikipedia, cornrows are a traditional style of braids in which the hair is braided very close to the scalp. The braids are considered a protective styling on "African curly hair" as they allow for easy and restorative growth.
[7] Indicating that the post was shared via Facebook two others.

appears to be a laughing or smiling face, a thumbs up, and a heart. The post also had one share. Id. at DOC/EMCF 025.

- A reposting of an image of the following statement, "Are you trying to tell me that a professional NASCAR driver, crew chief, engineers, mechanics, utility crew, pit crew, and NASCAR officials needed the FBI to tell them it's a door pull? –William Layne." This post received ten emoji reactions consisting of a thumbs up and what appears to be a laughing face. Id. at DOC/EMCF 026.

- A reposting of an image of a tire iron containing the caption, "Breaking: Bubba Wallace finds burnt cross in his garage stall. Id. at DOC/EMCF 027. The post received seventeen emoji reactions consisting of what appears to be a laughing or smiling face, a thumbs up, and a face with one tear. The posting had three shares. Id.

POSITIONS OF THE PARTIES

Respondent contends that the offensive and inappropriate social media posts made by appellant do not constitute protected First Amendment speech. In support of its position, respondent relies on the recent decision in In the Matter of Robert Curry, DOC, Bayside State Prison, OAL Docket No. CSR 10174-2020, Initial Decision (April 26, 2021), modified, Final Decision (June 8, 2021) in which disciplinary charges against a correction officer, of conduct unbecoming a public employee and other sufficient cause consisting of violation of a rule, regulation, policy, procedure, order or administrative decision were sustained based on appellant's "liking" of a Facebook post of an African American man being publicly hanged on the gallows while surrounded by Caucasian males and a crowd of onlookers which contained the comment, "We need to bring this back." The Final Decision affirmed the charges but modified the penalty to a ninety-day suspension.

Respondent contends that appellant's actions constitute conduct unbecoming a public employee and other sufficient cause consisting of violation of a rule, regulation, policy, procedure, order, or administrative decision. Respondent contends that as a Correctional Police Lieutenant, appellant is held to higher standard of conduct. It argues that the DOC's interest in maintaining order, decorum, and professionalism outweighs

petitioner's right to promote offensive images on social media. Respondent also argues that the lack of social media policy does not justify or mitigate appellant's conduct. Accordingly, respondent contends that the penalty of termination is appropriate and should be sustained.

Appellant contends that his social media posts constitute speech by a private citizen on matters of public concern and is therefore protected First Amendment speech. Appellant argues that the respondent has no justification for treating him differently from a private citizen because the posts do not impede the performance of his job duties, call into question his fitness for duty, or impede the operations of the DOC. He contends that the posts were not intended to offend anyone.

Appellant contends that even if the DOC had cause to discipline appellant, his unblemished, twenty-three years of service, and the DOC's lack of a social media policy at the time of the posts were made demonstrate that the penalty of termination is excessive and should be overturned.

LEGAL ANALYSIS AND CONCLUSIONS

Standard for Summary Decision

The standards for determining motions for summary judgment (referred to as summary decision in administrative proceedings) 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.

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).

Here, the parties have stipulated to the facts in this matter and are in agreement that the material facts are not in dispute.[8] I agree. Accordingly, I **CONCLUDE** that this matter is ripe for summary decision.

Having determined that this matter is appropriate for summary decision, I next analyze the law regarding the substantive legal issues raised in this matter.

Appellant's rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to -12-6 (the Act), and its implementing regulations, N.J.A.C. 4A:1-1.1 to -10-3.2. A public employee who commits a wrongful act may be subject to major discipline for a wide variety of offenses connected to his or her employment. N.J.A.C. 4A:2-2.3(a). Major discipline for such offenses 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).

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). That is, 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).

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[8] In its reply brief, appellant contends that certain facts pertaining the issue of the number, nature, and source of alleged complaints made to Lt. Washington by others concerning appellant's posts have not been stipulated. Appellant further contends that Lt. Washington's report and recorded SID interview which are referenced in and appended to the stipulations of fact, the parties' moving briefs, contain inadmissible hearsay. As the parties have stipulated to the facts, appellant is now precluded from challenging those facts. See. N.J.A.C.1:1-15.11. Moreover, despite appellant's contentions, at oral argument the parties reiterated their agreement that the *material facts* in this matter are not in dispute and that the matter remains ripe for summary decision.

First Amendment Protection

The First Amendment of 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 peaceable to assemble, and to petition the government for a redress of grievances.

Speech of a Private Citizen v. a Public Employee

In Pickering v. Board of Education, 391 U.S. 593 (1968), the U.S. Supreme Court noted that a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment. Id. at 568. However, the Court also recognized that the State's interests as an employer in regulating its employees' speech differs significantly from its regulation of citizen speech. Id. The goal is to balance the interests of the employee, as a citizen, in commenting on matters of public concern, with the State's interest, as an employer, in promoting the efficiency of its public services. Id.

In Garcetti v. Ceballos, 547 U.S. 410 (2006), the Court found that the controlling factor in determining if speech is a matter of public concern is whether it is made pursuant to the employee's official duties. Id. at 421. When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their speech from employer discipline. Id. at 421. In Lane v. Franks, 573 U.S. 228 (2014) the Court distinguished speech based on information acquired during one's public employment from speech made pursuant to carrying out official employment duties. Id. at 239. Thus, the critical question under Garcetti is whether the speech at issue is ordinarily within the scope of an employee's duties, not whether it merely concerns those duties. Id. at 240.

If an employee speaks as a citizen on a matter of public concern, then the possibility of a First Amendment claim arises. Garcetti, 547 U.S. at 418. The question is whether the relevant government entity had adequate justification for treating the

employee differently from other members of the general public, based on a balancing of both employee and employer interests. Id.

The Court noted that employers may restrict employee speech if it has the potential to affect employer operations: "[a] government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." Garcetti, 547 U.S. at 418.

Here, appellant acknowledged making seven Facebook posts relating to a variety of topics including: the shooting of an individual draped in black who is holding a knife to the throat of a man who appears be a law enforcement officer; presidential candidate Hillary Clinton; Jeffrey Epstein's death; and NASCAR's and the FBI's investigation into a noose like rope found at the garage of African-American race car driver, Bubba Wallace. See, Attachment B, DOC/EMCF 020, 021, 024-027. Appellant contends that he made these posts in his capacity as a private citizen.

It is undisputed that appellant's duties as a Correctional Police Lieutenant did not involve making social media posts. See Attachment I, Job Specification. Additionally, there is no allegation that the posts were made on DOC time or while using DOC computers. Further, as a Correctional Police Lieutenant, appellant's job duties had nothing to do with Hillary Clinton or her presidential campaign. Nor did his duties involve NASCAR's or the FBI's investigation into a possible hate crime aimed at Bubba Wallace. Thus, as to these posts, it is clear that appellant made them in his capacity as a private citizen. Similarly, even though as a Correctional Police Lieutenant, the appellant was responsible for the care and custody of inmates, his official duties did not involve the care or custody of Jeffrey Epstein. Thus, as to this post, appellant acted as a private citizen in reposting an image and caption commenting on the manner of/theories surrounding Epstein's death. Accordingly, I **CONCLUDE** that the appellant acted as a private citizen when he reposted the above referenced images and content. See Attachment B, above referenced posts at DOC/EMCF 021, 024-027.

The remaining post is the image, more fully described above, depicting the shooting of the knife wielding individual draped in black. Id. at DOC/EMCF 021. Appellant

added to this image the comment, "Fixed it." In his July 2020 SID interview, appellant explained that he saw an original image of the post[9] and thought it was a little "off" but then saw a revised depiction of the image [the one he posted]. See Appellant's Brief at pg. 20. Appellant contends he believed the revised image depicted, "a justifiable use of force for an officer who was about to be murdered." See, Appellant's Brief at pg. 20. Appellant further contends that he noted that "Corrections Lieutenants are permitted to use deadly force against someone to protect the life of another and that the original image depicted the officer's throat already slit and blood pouring out." Id. at 21.

While appellant does not identify himself as a correction officer in this or any of his other posts that are the subject of this disciplinary action, he acknowledges identifying himself on his Facebook homepage as a "Lieutenant" and a "member of law enforcement." See Stipulation of Fact #26. As a Correctional Police Lieutenant, appellant's duties included exercising "full police powers" and acting as a "peace officer at all times for the detection, apprehension, arrest, and conviction of offenders against the law." See, Attachment I. As a Correctional Police Lieutenant, appellant's duties also included carrying a firearm and other restraint/defense equipment while performing duties or while off duty. Id. Thus, I **CONCLUDE** this remaining post [Attachment B at DOC/EMCF 020] did relate to appellant's official duties as a Correctional Police Lieutenant. Accordingly, I **CONCLUDE** that the appellant acted as a public employee when he made the above post and therefore appellant's First Amendment claim does not apply to this post.

Matter of Public Concern

Having concluded that all but one of appellant's posts were made in his capacity as a private citizen, I further **CONCLUDE** that the issues relating to violence aimed at (and by) law enforcement, presidential candidate Hillary Clinton, the death of Jeffrey Epstein, and NASCAR's and the FBI's investigation into a potential hate crime aimed at an African American race car driver all involve matters of public concern.

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[9] The original version of the post depicts the throat of the law enforcement officer being cut by the black draped individual and does not include the image of the individual being shot. See Attachment B, DOC EMCF 029.

Balance of Interests

Having concluded that all but one of appellant's posts were made in his capacity as a private citizen and involved matters of public concern, I next consider the respondent's interests, as an employer, in regulating appellant's speech versus appellant's right to free speech.

Appellant'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. 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).

As noted above, in Pickering, 391 U.S. 593 (1968), the U.S. Supreme Court recognized that the State's interests as an employer in regulating its employees' speech differs significantly from its regulation of citizen speech. Id.

Appellant argues that the respondent has no justification for treating him differently from a private citizen because the posts do not impede the performance of his job duties, call into question his fitness for duty, or impede the operations of the DOC. Respondent contends that the DOC's interest in maintaining order, decorum, and professionalism outweighs petitioner's right to promote offensive images on social media.

The Law Enforcement Personnel Rules and Regulations, Article III, Professional Conduct provides, "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. Officers are public servants twenty-four hours a day and will be held to the law enforcement higher standard both on and off-duty." Attachment F.

Here, in June 2020, when the posts were made, appellant estimated that he had approximately 750 Facebook friends. While his Facebook page was designated as "private" it is clear that at least one person, Lt. Washington, who was not part of appellant's friend group, observed appellant's posts and was offended by same. It is also clear that in addition to receiving emoji reactions and comments from appellant's Facebook friends, his posts were "shared" with others. See DOC/ECMF 020, 021, and 024-027. As previously noted, appellant is identified on his Facebook home page as a "Lieutenant" and a "member of law enforcement," and is pictured in at least one photo wearing his DOC issued uniform. See Stipulation #26.

The posts made by appellant, in addition to involving issues of public concern, contain offensive, racially insensitive, derogatory, and discriminatory images and content, including images and references to symbols of racial hatred and violence aimed at African-Americans, and images depicting the use of violence and commenting on same.

Appellant contends that his repost of the image and content regarding Hillary Clinton was satirical and intended to make fun of the Democrats loss of the Presidential election. However, he reposted this image and content without further comment, thus his intent or explanation is unknown, and the observer is left to his/her own interpretation. Moreover, the post's use and appropriation of a hair style commonly associated with African American hair and its play on words and allusion to racially stereotypical and offensives images associated with "Aunt Jemima" justify the respondent's interest, as an employer in restricting appellant's speech.

Appellant's repost relating to Jeffrey Epstein suggests that Epstein did not commit suicide, but was killed by "the government." Appellant contends that this post was intended to be satirical. However, because he reposted the image without further comment, his intent and explanation is unknown, and the observer is left to his/her own interpretation. Further, even though this post does not relate to appellant's specific job duties, the respondent, as an employer, has adequate justification to regulate appellant's speech because it relates to the death of prisoner while in custody and could impede its operations and adversely affect the public trust in its safe and efficient operations at the Edna Mahan Correctional Facility or other correctional facilities operated by the DOC.

Finally, appellant made four posts relating to NASCAR's and the FBI's investigation into a possible hate crime aimed at Bubba Wallace. Appellant contends that these posts were "designed to poke fun at NASCAR and Bubba Wallace for making a big deal out of something that turned out to be nothing." See Appellant's Brief at pg. 31. See also Attachment E. The four posts contained images of and/or references to a noose, KKK hoods, and a burnt cross. These items represent symbols of hate, terror, and violence, including lynchings aimed at African-Americans. Appellant's use and reference to these offensive images of hatred and racially motivated violence justifies respondent's interest, as an employer in restricting appellant's speech.

Finally, even if appellant's post depicting the shooting of the knife wielding individual draped in black was made in his capacity of a private citizen, for the reasons set forth above, the respondent, as appellant's employer, has adequate justification to restrict this speech. 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).

For the above reasons, I **CONCLUDE** that respondent's interest in maintaining order, decorum, professionalism, outweighs petitioner's right to promote satirical and/or offensive, racially insensitive, derogatory, discriminatory, and violent images and content on social media.

DISCIPLINARY CHARGES

Conduct Unbecoming a Public Employee

"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 NJ. 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 noted above, appellant'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, appellant's act in posting the above referenced offensive, racially insensitive, derogatory, discriminatory, and violent images and content fails to meet this implicit standard.

Appellant argues that the DOC received only one complaint--that of Lt. Washington, regarding his post. Appellant also argues that there is no evidence anyone from the public accessed his Facebook page and scrolled through his posts and comments. See Appellant's brief at 16. Thus, appellant contends there is no evidence which demonstrate that his posts and comment affected the morale or efficiency of the governmental unit.

Here, it is clear that at least one person who was not a member of appellant's private Facebook friend group was able to access and view posts made by him. Given the nature of Facebook and social media in general, appellant's posts could have been shared with and continue to be shared with countless other persons outside of the approximately 750 Facebook "friends" for which they were intended. It is therefore reasonable for respondent to conclude that the offensive, racially insensitive, derogatory, discriminatory, and violent images and symbols contained within appellant's posts had

the potential to adversely affect the morale or efficiency of a governmental unit and/or tend to destroy public respect in the delivery of governmental services. As the New Jersey Supreme Court noted , "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 before taking action.'" Karins, 152 N.J. at 561-62, quoting Connick v. Myers, 461 U.S. 138, 152 (1983).

Finally, that appellant as a Correctional Police Lieutenant failed to recognize the inappropriateness of his intended message of "poking fun" at an investigation into a possible hate crime demonstrates a total lack of judgment and failure to comprehend the potential chilling effect that such posts could have on DOC employees who might otherwise wish to report suspected hate, bias, or discriminatory incidents in the workplace.

Accordingly, I **CONCLUDE** that respondent has met its burden of proving that appellant's action in posting the offensive, racially insensitive, derogatory, discriminatory, and violent images and content on Facebook constitutes conduct unbecoming a public employee in violation of N.J.A.C. 4A:2.3(a)(6) and that this charge should be **SUSTAINED**.

Other Sufficient Cause

While "other sufficient cause" is not specifically defined under N.J.A.C. 4A:2-2.3(a)(12), the Civil Service Commission and Administrative Law Courts have routinely interpreted this to be "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." Asbury Park v. Dept. of Civil Serv. 17 N.J. 419 (1955).

Here, the other sufficient cause for which appellant is charged relates to his alleged violations of HRB[10] 84-17, Section C11, Conduct Unbecoming and Section E1, violation

[10] The Human Resource Bulletin Table of Offenses and Penalties is not a substantive policy but rather is a table of various types of offenses which sets forth applicable penalties or range of penalties based on the number of times an infraction was committed. See Attachment L.

of a rule, regulation, policy, procedure, order, or administrative decision. Section C of the HRB relates to personal conduct. C11 concerns conduct unbecoming an employee. Having already concluded that appellant's actions constitute conduct unbecoming a public employee in violation of N.J.A.C. 4A:2.3(a)(6), I similarly **CONCLUDE** that his actions also constitute conduct unbecoming in violation of HRB 84-17, Section C11, and that respondent has met its burden of proving that appellant violated same.

Section E of the HRB relates to general offenses. E1 concerns violation of a rule, regulation, policy, procedure, order, or administrative decision. Specifically, appellant is charged with the following violations of the DOC Law Enforcement Rules and Regulations (Rules and Regulations) and the Standards of Professional Conduct (Attachment F).

> 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 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.

Appellant's action in posting offensive, racially insensitive, derogatory, discriminatory, and violent images and content on social media has the potential to create an impression of a violation of the public trust. Appellant's posts demonstrate a total lack of judgment and a lack of an appropriate degree of self-control. In making these posts, appellant acted to the discredit of himself and the DOC. Additionally, appellant's actions demonstrate a failure to use discretion in the performance of his duties, and failure to cultivate the good opinion of the public. Thus, I **CONCLUDE** that appellant's actions violated the following Articles of the (Rules and Regulations) and the Standards of Professional Conduct: Article I, GENERAL PROVISIONS, Section 2; Article II, PERFORMANCE OF DUTIES, Section 4; Article III, PROFESSIONAL CONDUCT, Section 3; and Article III, PROFESSIONAL CONDUCT, Section 5.

While appellant's posts contained offensive, racially insensitive, derogatory, discriminatory, and violent images and symbols, appellant did not himself engage in threating or assaultive conduct. His posts however demonstrate, among other things, a failure to behave in respectful manner. Thus, I **CONCLUDE** that appellant's actions violated Article III, PROFESSIONAL CONDUCT, Section 2(d).

Accordingly, I **CONCLUDE** that respondent met its burden of proving that appellant violated HRB 84-17, Section E1.

Finally, I **CONCLUDE** that respondent has proved by a preponderance of credible evidence, the charge of other sufficient cause, pursuant to N.J.A.C. 4A:2-2.3(a)(12) and this charge should be **SUSTAINED**.

PENALTY

Having sustained the charges against the appellant, I next consider whether the discipline of removal from employment, is appropriate.

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.

HRB 84-17 provides a range of penalties recommended for each offense. (Attachment L). Although not binding on this tribunal, HRB 84-17 offers a reasonable basis for the imposition of a penalty and is considered. Here appellant has no prior disciplinary history. The penalties for a first infraction of Section C11, conduct unbecoming charges, ranges from a three-day suspension to removal. The penalties for a first infraction of Section E1 violation of a rule, regulation, policy, procedure, order, or administrative decision range from an official written reprimand (OWR) to removal.

Respondent contends that the penalty of termination is appropriate and should be sustained. Appellant argues that the concept of progressive discipline does not support removal since he has an unblemished record of twenty-three years of service to the DOC. In addition to the lack of disciplinary history, appellant contends he received a commendation for his work in organizing a charity golf tournament to benefit the family of a former co-worker who passed away. See Lange July 7, 2021 certification.

Appellant further contends that he removed the posts since they were brought to his attention and that moving forward, he will refrain from posting offensive content. Attachment K. Finally, appellant argues that the lack of a social media policy at the time the posts were made renders the penalty excessive.

As an initial matter, the fact that the respondent did not have a social media policy at the time the posts were made, does not wholly excuse appellant's actions. The offensive, racially insensitive, derogatory, discriminatory, and violent nature of the images and content of the posts should have alerted appellant, a Correctional Police Lieutenant since 2018 and with over twenty-three years of employment experience with the DOC, that his posts/reposts had the potential to adversely affect morale and impede the operations of the DOC, and that they were violative of DOC rules and regulations and standards of conduct. Appellant's conduct demonstrates a significant lack of judgment. However, based upon the totality of the evidence, including the fact the appellant's Facebook page was private, that all but one of his posts were repost of existing images and content without any further comment, and that while he is identified as a Lieutenant and as law enforcement on his Facebook page, he did not identify himself as same in any of the posts themselves, and with due consideration to the concept of progressive discipline including appellant's lack of any discipline over the course of twenty-three years of employment with the DOC and his commendation for charitable work benefiting another DOC employee, I **CONCLUDE** that the original penalty of removal should be **MODIFIED** to a 180 day suspension without pay. I further **CONCLUDE** that as a condition of reinstatement, the appellant be required to submit to training including but not limited to diversity, inclusion, and equity training, anti-discrimination training, and other training which respondent deems to be appropriate.

Based on the foregoing, I **CONCLUDE** that respondent's motion for summary decision is **GRANTED in part** as I have **SUSTAINED** the disciplinary charges against appellant. Respondent's motion for summary decision is **DENIED in part** as I have modified the penalty from removal to a suspension. Conversely, I **CONCLUDE** that appellant's motion for summary decision is **DENIED in part** as I have **SUSTAINED** the

disciplinary charges against appellant. Appellant's motion for summary decision is **GRANTED in part** as I have modified the penalty from removal to a suspension.

ORDER

I hereby **ORDER** that the charges against appellant are **SUSTAINED.** I further **ORDER** that respondent's action removing appellant from his position of employment is **MODIFIED** to a 180-day suspension without pay. I further **ORDER** that as a condition of appellant's reinstatement that he submit to training including but not limited to diversity, inclusion, and equity training, anti-discrimination training, and other training which respondent deems to be appropriate.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 8, 2021
DATE

SUSAN L. OLGIATI, ALJ

Date Received at Agency: ______________________

Mailed to Parties: ______________________

SLO/lam