



This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, unpublished, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. However, under no circumstances should the appellant's reinstatement be delayed based on any dispute regarding back pay.

### ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. Accordingly, the Commission modifies the removal to a 180 calendar day suspension. Pursuant to *N.J.A.C. 4A:2-2.10*, the appellant is entitled to receive mitigated back pay, benefits and seniority from the conclusion of the 180 calendar day suspension until the actual date of reinstatement. An affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10*, the parties are encouraged to make a good faith effort to resolve any dispute as to back pay. However, under no circumstances should the appellant's reinstatement be delayed based on any dispute regarding back pay.

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

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

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 17<sup>TH</sup> DAY OF FEBRUARY, 2021



Deirdre L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
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Christopher S. Myers  
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Attachment



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

**INITIAL DECISION**

OAL DKT. NO. CSR 07412-20

AGENCY DKT. NO. N/A *2021-127*

**IN THE MATTER OF VICTOR BERMUDEZ,  
CUMBERLAND COUNTY,  
DEPARTMENT OF CORRECTIONS.**

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

**Charles A. Fiore, Esq.**, for respondent, Cumberland County Department of Corrections (Marmero & Associates, LLP, attorneys)

Record closed: December 23, 2020

Decided: January 21, 2021

BEFORE **ELAINE B. FRICK, ALJ**:

**STATEMENT OF THE CASE**

Appellant, Victor Bermudez (Bermudez) was removed from his position as a Corrections Officer by respondent, Cumberland County, Department of Corrections (CCDOC), effective July 1, 2020, regarding his actions on April 5, 2018, having been videotaped in uniform, with another individual who was running for a political office, and

the video subsequently having been posted on a social media site. The sustained charges by CCDOC against Bermudez were:

1. N.J.A.C. 4A:2-2.3(a)(6): conduct unbecoming a public employee;
2. N.J.A.C. 4A:2-2.3(a)(12): other sufficient cause;
3. Cumberland County policy 3.02A, also known as 84-17, section G-Inappropriate release of information;
4. Cumberland County policy 3.02A, also known as 84-17: section R- political activity during work hours;
5. Cumberland County policy 3.02A, also known as 84-17: section T-violation of a Rule, regulation, policy, procedure, order or administrative decision (\*I theft);
6. Cumberland County policy 3.02A, also known as 84-17: section C-personal conduct: subsection C8-falsification: intentional misstatement of material fact in connection with work, employment application, attendance, or in any report, investigation or proceeding;
7. Cumberland County policy 3.02A, also known as 84-17: subsection C10-Divulging confidential information without proper authority;
8. Cumberland County policy 3.02A, also known as 84-17: subsection C11-Conduct unbecoming a public employee; and
9. Violation of N.J.S.A. 2C:20-8 theft of services.

Appellant contests the discipline imposed for the sustained charges. CCDOC seeks affirmation of its disciplinary action of removal of appellant for all sustained charges.

### **PROCEDURAL HISTORY**

Respondent removed appellant from his position of employment, effective July 1, 2020. Appellant appealed. The matter was transmitted to the Office of Administrative Law (OAL) where it was determined in mid-August of 2020, that the appeal was perfected on July 23, 2020, and the matter was docketed at the OAL to be heard as a contested matter. N.J.S.A. 52:14B-1 to 14B-15; N.J.S.A. 52:14F-1 to 14F-13.

During a pre-hearing telephonic conference with counsel, hearing dates were established to commence as of November 2020. The initial hearing dates were adjourned due to motion filings and to accommodate oral argument on same. Respondent, CCDOC, filed a Motion to Stay and Motion to Compel Discovery, seeking sanctions to be imposed upon appellant and/or appellant's counsel in each filing. After oral argument on November 5, 2020, an Order Regarding Pre-Hearing Motions and Amended Pre-Hearing Order was entered, denying CCDOC's motion to stay and granting in part and denying in part CCDOC's motion to compel discovery. CCDOC's request to impose sanctions upon Bermudez and/or Bermudez's counsel were denied.

Appellant filed a motion seeking redactions of respondent's expert report and other relief regarding respondent's expert's anticipated testimony. After oral argument was heard on November 10, 2020, an Order Regarding Expert Report was entered, granting in part and denying in part the relief sought by Bermudez.

The hearing date of November 20, 2020, was adjourned due to a personal emergency that arose for CCDOC's then counsel of record. A pre-hearing Motion to Sanction Bermudez's counsel for failure to enter into joint stipulations prior to the hearing, was filed by then counsel of record for CCDOC. That motion was held in abeyance at the request of CCDOC's now counsel of record, and was not pursued during the hearing.

Due to the COVID-19 pandemic and the public health emergency declared in Executive Orders issued by the Governor of New Jersey, in-person proceedings at the OAL have been suspended since approximately March 19, 2020, and the time to complete administrative decisions has been extended. The hearing commenced via Zoom remote platform by consent of the parties on November 30, 2020, and continued via Zoom on December 10, and December 11, 2020. Written summations were submitted by the parties. The record closed on December 23, 2020.

**FACTUAL DISCUSSION AND FINDINGS**

**Victor Bermudez** was called to testify on behalf of the CCDOC and provided rebuttal testimony on his own behalf. He was hired as a Corrections Officer (CO) for the CCDOC and began his employment on July 28, 1997. He went through a two week orientation training conducted by CCDOC. He later attended the police academy in 1999. He was assigned to the CCDOC transportation unit for nearly ten years as of April 5, 2018. He denied ever having received any training specific to the transportation unit, transportation of inmates, nor any training regarding the use of social media. He has served as president for the Cumberland County Policeman's Benevolent Association ( CC PBA) Local #231. He executed the Collective Negotiations Agreement between Cumberland County Board of Chosen Freeholders and CC PBA Local #231, on behalf of the CC PBA as President, on January 17, 2017. (R-5, R-0068.)

As of April 5, 2018, Bermudez was a CO in the CCDOC transportation unit. He continued to be so employed until he was suspended on May 22, 2018, by Preliminary Notice of Disciplinary Action (PNDA) issued as a result of the incident in question which occurred on April 5, 2018, seeking removal. (R-1.) An amended PNDA issued on May 31, 2018. (R-1) He was reinstated to his position of CO as of February 17, 2019. He was suspended as of April 2, 2020, regarding another matter, which is currently in departmental hearing status. The Final Notice of Disciplinary Action (FNDA) for this matter, regarding the incident of April 5, 2018, was entered on July 1, 2020, implementing removal as discipline, effective July 1, 2020. (R-2.)

On April 5, 2018, Bermudez reported to work and clocked in at 7:58 a.m. (R-10, R-0177.) He learned that his assignment that day was to transport an inmate from CCDOC to Turning Point, a drug treatment facility, located in Paterson, New Jersey. (R-10, R-0176; R-10, R-0188.) He previously had been to that location approximately ten times. He was teamed with CO Rich Brown for the transport, not his usual partner. His usual transport CO partner was apparently out sick that day. CO Brown drove the transport van. Bermudez was the passenger CO.

Bermudez could not recall how much time it took to drive from CCDOC to Paterson on April 5, 2018. He estimated it could take three to three and a half hours to get there. When they arrived at Turning Point in Paterson, Bermudez escorted the inmate into the facility. He stayed with the inmate during the intake process inside Turning Point, until the inmate was turned over to the custody of that facility. Bermudez estimated the intake process that day took approximately two and a half to three hours.

While inside Turning Point, Bermudez sent text messages at 12:22 p.m. to an attorney from the area with whom he was acquainted, and to Alex Cruz (Cruz), a fellow local PBA Union President, indicating that he was in Paterson at the Turning Point facility on Broadway. (R-16, R-0271.) Bermudez intended to get a recommendation from the attorney and from Cruz to find a place to eat lunch in Paterson. The attorney responded via text at 12:36 pm that he was in Trenton. (R-16, R-0273.) Bermudez replied at 12:37 p.m. "Ok no problem. I'll check out Alex Cruz for mayor. Good friend lol." (R-16, R-0273.)

Cruz responded at 12:54 p.m. by text, to Bermudez's initial text of 12:22 p.m., that Cruz was in Paterson and could "swing by to say whats up[.]" (R-10, R-0266.) Bermudez replied at 12:55 p.m., "Want me swing [sic] there or you here?" (Id.) The next text in that message thread was sent by Bermudez to Cruz at 4:12 p.m.: "Good seeing you bro[.]" (Id.)

Bermudez's phone records of "talk activity" on April 5, 2018, indicate there was an incoming call at 1:13 p.m. to him, which was four minutes in duration, from the number 973.897.9029. (R-16, R-0274.) Bermudez testified he was not sure whose number that was, yet confirmed he had a four minute telephone call with Cruz. He acknowledged that his talk activity phone records indicate that he placed a call to that number at 1:41 p.m., reflecting that his call "origination" location was "Paterson, NJ", the destination was "Pomptonlks, NJ" [Pompton Lakes, NJ] and the duration was one minute. He received an incoming call from the same number at 1:54 p.m. for two minutes, and he placed a call at 1:55 p.m. to the same number, with his call originating from "Paterson, NJ", for a duration of one minute. (R-16, R-0274.) He acknowledged that Cruz arrived at Turning Point shortly after 1:55 p.m. The talk activity records later reflect an incoming call from the same



telephone number at 5:24 p.m. that evening, for the duration of one minute. An outgoing call was placed by Bermudez to that number from the origination of Bridgeton, NJ to destination Pomptonlks, NJ, at 5:25 p.m., for the duration of four minutes. (R-16, R-0275.)

Bermudez denied planning with Cruz prior to April 5, 2018, to meet with him in Paterson that day. Bermudez denied that he invited Cruz to Turning Point, asserting that Cruz came there voluntarily.

Bermudez was standing outside of the Turning Point facility and first saw Cruz approaching on foot. Cruz was walking with another man, whom Bermudez did not know, and was placing election signs in the ground along the way. He later indicated in recall testimony that the other man got out of a vehicle and he had not observed Cruz get out of the vehicle. The "interview" that occurred thereafter was spontaneous. Cruz never requested Bermudez to speak on camera. Bermudez acknowledged he never told Cruz not to record the conversation.

A video of their meeting outside of Turning Point, by the facility sign, was recorded by the other man who was with Cruz. The video depicts Cruz greeting Bermudez and the two begin to speak. (R-15.) Bermudez appears from the waist up, standing to the left of Cruz. He is in his CCDOC uniform which is a black baseball hat with the CCDOC insignia on the front of the cap and he is wearing a black zip front jacket, with his name "V. Bermudez" on his right chest area, and the CCDOC insignia on the right upper portion of his sleeve. He is at first facing Cruz, who is standing to the right in the video, dressed in a business suit, also seen from the waist up in the frame.

The recording begins with Bermudez stating "you see where I'm from" and reaches his left hand across his chest and grasps the top of his right sleeve, looking down at the CCDOC insignia stating "Cumberland County" then looks directly into the camera stating "and I'm up here in Paterson." (R-15.) Bermudez testified that he was looking towards the street, where the man with the "nice" handheld "expensive" camera was, at first thinking he was taking pictures, but later realized they were being videoed.

The video continues with Bermudez, while still looking into the camera, holding up what appears to be shackles, and states "This opioid problem is not a Paterson problem, this is a New Jersey problem." (R-15.) He places the shackles on his waist belt stating "I'm coming here from two and a half hours away" indicating he is taking one of their people [from CCDOC] there for treatment and to get answers. Cruz interjects about not just locking up individuals and Bermudez comments that hopefully with the new Governor the opioid and mental health issues can be tackled. (R-15.)

The two men continue to face one another and Cruz engages in further conversation regarding the opioid problem, referencing Narcan being a miracle drug, and talking about the community having to get involved. Bermudez nods and indicates assent to Cruz's comments. Cruz turns to the camera commenting that as a candidate, he will get a hold on the crisis. Bermudez continues to look at Cruz and his facial expression begins to show concern as Cruz's comments become more politically driven speaking about his candidacy, directly into the camera, then turning back and forth from Bermudez to the camera.

Bermudez testified "you could see I started getting uncomfortable" when the topic changed from what he thought was the opioid epidemic to Cruz's comments becoming more politically driven regarding his candidacy for Mayor. (T1 105:9-13.)<sup>1</sup> Cruz provided commentary about bringing in jobs to the city [of Paterson]; stabilizing the tax rate; giving residents the possibility of the American dream of owning a home; and that the entire community, including administration, must work together. (R-15.) Bermudez realized after the video was posted on social media that it was a political endorsement.

As the video continues, Cruz asks Bermudez, "coming from Cumberland County," how many times does he come to the Turning Point facility. Bermudez responds they come there once or twice per week, and it takes approximately two and a half hours to get there. He did not believe that statement revealed sensitive CCDOC information, because he did not give details about dates and times, other particulars about the facility, nor did he reveal the identity of the inmate who was transported there.

Cruz continues to speak to the camera about offering residents the same services that “brother Bermudez” offers to his residents. Bermudez then states “I’d like to say something about brother Alex Cruz here. I’m from Cumberland County. And I’ve been following him for awhile through PBA, PBA standpoint, and one thing, he’s a humble, humble person, I can honestly say that, I’ve watched what he has done for foundations and charity groups he’s done great things I was really impressed what he done for the people of Puerto Rico hurricane effort.” He goes on to refer to the passion Cruz has and when Cruz says something, he does it, including collecting pallets of water for the hurricane effort. (R-15.) Cruz speaks about the water collection and other references to the Hispanic community of the area. Bermudez indicates that Cruz is not just talking, he does things, and that Bermudez has seen what Cruz did for the PBA and that the Hispanic population is diverse and Cruz knows about diversity and is a great candidate, “A4” and hopefully he will be “Mayor Cruz.” (R-15.) The video concludes with further comments by Cruz about the community and moving Paterson forward, and commenting that Bermudez is doing “God’s work” and thanks him. The men shake hands, hug and part ways. The video ends with a far away shot of the men facing one another and speaking while standing next to the Turning Point sign. (R-15.) The video was approximately nine minutes.

Bermudez indicated the total conversation with Cruz as depicted on the video, was the length of his conversation with Cruz, which he estimated as being approximately eight to fifteen minutes, not knowing the exact time, without referencing the timer on the video. He acknowledged he could have stopped the interview from being videotaped, but he regrettably did not. He had no prior knowledge that Cruz would be coming with a cameraman. Cruz had not asked Bermudez if he could be interviewed. Bermudez believed it to be a spontaneous interview.

Bermudez denied that his comments were an endorsement for Cruz for mayor. He was “speaking good on him” and acknowledged that he was in support of Cruz. Bermudez did not believe that any of his statements were derogatory towards Cumberland County, the CCDOC, any inmates, COs, administration, County Administrators, or politicians. He

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<sup>1</sup> T1 refers to the transcript from the first OAL hearing date of November 30, 2020, with reference to page

did not disclose any information about an inmate, did not disclose the details of the day regarding the route taken, nor did he disclose their procedures. He asserted that members of the general public would know it was a CCDOC vehicle pulling up to the facility, as the van has CCDOC logos and the name on the outside of the vehicle, and his uniform displays the CCDOC logos as well.

As soon as the conversation depicted on the video concluded between Bermudez and Cruz, Bermudez got into the transport van and left, with CO Brown driving. They did not go to lunch in Paterson. They wanted to head out to beat traffic, and the lunch recommendations he had received from Cruz were for sit down restaurants and he knew CO Brown did not like to stop and eat lunch.

They headed directly back to the CCDOC facility and stopped once along the way, at a rest area, where Bermudez used the restroom and got Nathan's fast food to eat. He returned to the CCDOC facility and clocked out for the shift at 17:08 (5:08 p.m.), which reflected some overtime. (R-10, R-0177.) CO Brown clocked out at 17:09 (5:09 p.m.), also which reflected some overtime. (R-10, R-0178.) Bermudez's normal shift hours as of April 5, 2018, were from 8:00 a.m. to 4:00 p.m.

Bermudez did not seek authorization from any superior officer or County officials before submitting to the interview with Cruz on April 5, 2018. Prior to that time, Bermudez never asked for permission from his superiors or administration, before he was photographed in uniform, and then the photos appeared in magazines or print. For example, when two officers became chaplains, his photograph in uniform with the officers was printed in a magazine and he recalled having appeared in print on behalf of "Walk Out of Darkness" a suicide prevention/awareness program in which he participated. In hindsight, he realized it was wrong to take it for granted that he did not have to ask permission to be videotaped in uniform with Cruz on April 5, 2018. He realized after the video was made that when being in full uniform, he could easily lose focus of the importance of representing the CCDOC uniform, when being in the context of another setting and expressing personal views when he is "just being Victor Bermudez."

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and line number(s).

The Bermudez/Cruz video was later posted on a social media site by someone, whom Bermudez later heard was Cruz's publicist. A screen shot from the video, posted on a Facebook page, shows Bermudez standing to the left of Cruz, with a printed line beneath the photo: "[ALE]XCRUZFORMAYOR.COM 4A√". (R-10, R-0197.) Bermudez denied posting it on his PBA local's website or Facebook page, believing that it appeared there because the person who published the video online tagged the video clip with a hashtag for his local PBA, so the clip appeared there.

CCDOC Warden Smith had a meeting with Bermudez after April 5, 2018, for a different purpose. At the end of that meeting, the Warden brought up the topic of the Bermudez/Cruz video. That is when Bermudez realized the Warden "had a problem" with the video, so he sent a text message immediately to Cruz. On April 11, 2018, Bermudez's text to Cruz was: "Take interview down warden investigating me. Thanks[.]" (R-16, R-0266.) Bermudez further texted to Cruz that he got charged "with media violations and misconduct during work hours in uniform. I messed up. Just take down when [you] get message bro. Thanks[.]" (R-16, R-0267.) Bermudez became aware sometime thereafter that the video was taken down from the social media site.

Bermudez was interviewed by the CCDOC Special Investigations Unit (SIU, also known as Internal Affairs, or IA) on April 19, 2018, with his attorney present. (R-10, R-0139 through R-0165.) He later was issued the PNDA of May 22, 2018, and the Amended PNDA of May 31, 2018. (R-1.) He was suspended without pay from May 22, 2018, until he was permitted to return to his position as CO on February 17, 2019. He was subsequently suspended as of April 2, 2020, regarding another matter. The Final Notice of Disciplinary Action (FNDA) regarding the incident of April 5, 2018, was entered on July 1, 2020, removing him from his employment. (R-2.)

Bermudez does not believe he revealed sensitive information or posed a security risk by the statements he made in the video. He asserted that there are multiple Turning Point facilities throughout the state; the CCDOC insignia is clearly displayed on the transport vans and their uniforms so it is not a secret that CCDOC travels to Paterson; and

he stated in the video he was from Cumberland County, as a geographical area, and did not state he was from CCDOC, but acknowledged that he was wearing his CCDOC uniform in the video.

Bermudez denied having knowledge of the Cumberland County policy 5.06, entitled "political activity." (R-6.) He denied ever having received it, and denied that he had the ability to access the policy via the internet or that it was provided to him. He asserted the policy applies to county employee unions such as UAW. He is a PBA union member and under civil service, confirming that policies which would apply would be CCDOC policy 3.02A and 84-17.

Bermudez testified that COs working the eight hour shift are entitled to a thirty minute lunch break and two ten-minute breaks. He considered the time that he participated in the interview with Cruz to be during his lunch break.

Bermudez was aware of the CCDOC media policy, policy number 1.5. (R-12.) He admitted that he violated the policy and recognized that he should be disciplined, but does not believe that removal from his CO position for the violation of that policy is appropriate discipline. Bermudez contended that he did not know the interview was going to be used for a political purpose. In hindsight, he should have recognized that at the time. He and Cruz are dear friends, "older" and not tech-savvy like kids. They are face-to-face-type people. He believed Cruz wanted to stop by to see him, say hello, give him a hug, and check him out because that is the type of people they are in their Latino culture.

He acknowledged his understanding of his prior disciplinary history, and understands that a suspension of six or more days is considered major discipline. He recalled having three major discipline infractions: 2003 for having left his post; 2009 or 2010, for failing to write a use of force report, in a situation in which he utilized force; and 2013, he received a ten day suspension for a conduct unbecoming charge.

**Loren Joynes**, an Acting Captain for CCDOC, testified for respondent. Captain Joynes began his career with CCDOC in 1998 as a CO, then became Sergeant,

Lieutenant, and as of October 2017, promoted to Acting Captain. His job duties include safety and security at the facility, policy and procedures, and disciplinary matters, which he handles along with another Captain. Regarding safety and security at the facility, he makes sure that everyone has what they need for repairs and maintenance at the facility, such as for the video cameras. Regarding disciplinary matters, Captain Joynes will sit in on hearings, assist superiors with disciplinary issues, and administer proper disciplinary sanctions.

Captain Joynes does daily rounds at the facility. On a day sometime after April 5, 2018, as he was doing rounds, he heard "scuttlebutt" from other COs and civilian employees that Bermudez made a video which was posted on the social media site Facebook.

Captain Joynes went to the Warden's office. When he arrived by the secretary's area, the Warden and Deputy Warden were there, already engaged in a conversation about the Bermudez Facebook video. They went into the Warden's office and Captain Joynes was asked if he had a Facebook account. He did, but he needed to re-activate it. He logged into Facebook using his county issued cell phone, reactivated his Facebook account, and was able to locate the Bermudez video, which was posted on the CC PBA Local 231 Facebook page. He assumed Bermudez posted the video there, as he understood that Bermudez maintained that page. He was not aware if the video had been hashtagged by someone else and thus appeared on the CC PBA Facebook page. He assumed Bermudez had control of the page.

The Warden, Deputy Warden, and Captain Joynes watched the video using Joynes' county issued cell phone. He played the video again, and while holding his cell phone, the Deputy Warden recorded the Bermudez/Cruz video onto the Deputy Warden's cell phone. They mentioned they would be contacting Special Investigations Unit (SIU) about the matter.

Captain Joynes left the Warden's office. He thinks he may have submitted a report to SIU about the video, but could not specifically recall doing so. He was not interviewed

by SIU. He did not play any role drafting the charges against Bermudez, the PNDAs that issued, nor the FNDA. He was not involved in presenting the disciplinary matter. He was not involved in Bermudez's discipline whatsoever regarding the video of April 5, 2018.

**Charles Warren**, Deputy Warden of the CCDOC, testified on behalf of respondent. He is considered second in command to Warden Richard Smith at CCDOC. He was hired as Deputy Warden for CCDOC in 2017. He has approximately twenty-six years experience in the New Jersey Department of Corrections, about half that time as a CO and the other half in administration.

He is involved in the daily operations of the facility and is involved with discipline of employees. One of his tasks related to discipline when he was hired by the warden was to address the backlog of disciplinary matters at CCDOC. He sometimes functioned as a hearing officer in departmental hearings. Generally, if an IA investigation has been conducted through the SIU, the information will be presented to the Warden and then Deputy Warden Warren will be privy to it. Someone from Human Resources may type up the PNDA and speak to him about the charges to be included in the PNDA. He will make a recommendation to the Warden for the disciplinary action to be taken. The PNDA is then presented to the Warden for his review and approval.

Deputy Warden Warren knew Bermudez since 2017. He was aware of the April 5, 2018 Bermudez/Cruz video which he deemed a political PSA [public service announcement]. Deputy Warden Warren had verbal input with the human resources department regarding the charges to be included in Bermudez's PNDA. He acknowledged when additional information came to fruition, the PNDA was amended and the 2C theft charge was added. (R-1.) The Amended PNDA was prepared and then given to Warden Smith for his review and signature. Deputy Warden Warren confirmed that Bermudez's matter was never referred to the Cumberland County Prosecutor's office for investigation regarding the 2C theft charge. He confirmed the decision to include the theft charge was made without input from the Prosecutor's office. It was an administrative charge. All the charges were related to the April 5, 2018 Bermudez/Cruz video incident.



The Amended PNDA was either personally served or mailed to Bermudez. Deputy Warden Warren confirmed that after the July 1, 2020, departmental hearing, the FNDA issued with the charges sustained and the discipline of removal to be imposed. The FNDA decision is issued and signed by the hearing officer from the departmental hearing.

Deputy Warden Warren first became aware of the Bermudez/Cruz video while at a luncheon in which Camden County Department of Correction officials were in attendance. Another representative of an outside agency, referring to another warden or correctional facility administrator, advised him that there was a CO from CCDOC in uniform in a video.

At some point thereafter, the exact days or weeks thereafter he was not certain, he saw the video when Captain Joynes showed it on his cellphone from a Facebook posting. He was present with Captain Joynes and Warden Smith. Deputy Warden Warren was not sure if the video was posted to the Alex Cruz for mayor page or the local PBA Facebook page. He recorded the video played by Captain Joynes to his own cell phone. They had a discussion and he was directed to give the video to SIU/IA. He transferred the video from his phone to his computer. He turned it over to Sergeant Holbrook from SIU, believing that IA downloaded the video from his computer.

Deputy Warden Warren acknowledged that a CO working an eight hour shift gets a thirty minute lunch break and two ten minute breaks. If the CO is transporting an inmate, they cannot take that time until they are no longer with the inmate. He indicated that if the processing of the inmate took a longer time, as alleged in this matter, then CO's cannot just park and sit for fifty minutes. They can begin the drive back to the facility and stop to eat lunch. He acknowledged there was no written policy and procedure for transportation about this, but Bermudez would just know the process. The transportation COs are supposed to contact the supervisor and take their break while moving in the van. He assumed the COs received training specific to the transportation unit. His testimony regarding how the CO's should be taking a lunch break was his understanding as to how the transportation CO's operated.

The charge of inappropriate release of confidential information was sustained

against Bermudez because he stated the time it took to get to the facility in Paterson. If someone had a vendetta with an inmate being transported there, the individual could be waiting for the inmate to arrive at Turning Point. He acknowledged there was no prior discipline for the charge of political activity during work hours. He acknowledged that no citizen or resident complained about the Bermudez/Cruz video. He acknowledged that Bermudez did not make derogatory comments about the administration, the county, any elected officials, or the inmate. He believed Bermudez caused a two hour delay, based upon his understanding of CO Brown's testimony, which resulted in the overtime and thus the theft charge.

He supported the decision of removal based upon the totality of Bermudez's disciplinary record. He did not agree that Bermudez should be considered at step one for discipline under progressive discipline and that he should only receive an official written reprimand (OWR). He takes the decision to implement suspension without pay or removal very seriously and not a decision to be made lightly. He was in complete agreement with the Warden on the decision to terminate Bermudez, due to the importance for the safety of the operations of CCDOC.

He was aware that Bermudez was fully reinstated as of February 17, 2019, until April 2, 2020. He was not involved in the reinstatement decision. He is not aware of any "settlement" agreement to reinstate Bermudez. The decision to reinstate was done by someone in Administration, without his input.

**Richard Smith**, Warden of the CCDOC, testified on behalf of respondent. He has served as warden of the CCDOC facility since 2017. He is familiar with CO Bermudez. Warden Smith signed the Bermudez PNDA and Amended PNDA, which outlined the charges Bermudez allegedly violated related to the April 5, 2018, Bermudez/Cruz video. (R-1.) Warden Smith indicated that PNDA's are generally drafted by the Deputy Warden and shared with him for review. The documents here were probably prepared by Deputy Warden Warren, and an employee from human resources. When the warden is satisfied with the document, he will sign it. Warden Smith would be considered the individual who

"selects" the charges since he oversees the Deputy Warden and he signs off on the charges in the PNDA.

Warden Smith first learned about the Bermudez/Cruz video when he was attending a luncheon with other county facility wardens. A warden from a different facility advised him there was a video posted online with one of his CO's making a political PSA. Warden Smith was thereafter in the CCDOC meeting room/conference room, having a discussion on unrelated matters with the Deputy Warden and they were joined by Captain Joynes. The Captain had a video on his phone, from some form of social media, which the Deputy Warden copied onto his cellphone. They watched the Bermudez/Cruz video. The Deputy Warden then turned the copied video over to SIU/IA. Warden Smith signed off for Sergeant Holbrook to start an SIU investigation.

Warden Smith was advised that SIU had substantiated charges against Bermudez as a result of their investigation. Mr. Milbourne did the investigation. Warden Smith was presented the PNDA, which he signed. The recommendation for removal as discipline was made after reviewing the charges and looking at Bermudez's discipline history. He felt that Bermudez's discipline history was substantial enough to warrant removal.

The multiple charges Bermudez received in this matter were for the same factual predicate, the Bermudez/Cruz video and Bermudez's actions thereafter. Warden Smith believed that Bermudez had violated 3.02 for inappropriate release of confidential information, by stating on the video where he was from; how long it took him to get to Paterson; and the number of times per week that CCDOC would go to the Turning Point facility. By putting such information out there to the public, it could cause an issue for the safety of the officers and the inmates. Despite that the transport vans have CCDOC logos and the officers are wearing uniforms with the CCDOC logo, the CCDOC does not want to voluntarily publicize transportation information to the public, such as what Bermudez stated in the video.

The video was an inappropriate political PSA, because Bermudez was encouraging people to vote for Cruz, and at the end of the video it indicated the content was approved

by Cruz and paid for by Cruz for mayor. Bermudez never sought permission from the Warden, nor from any of his superiors, to appear in the political PSA video.

Warden Smith believed that Bermudez violated a rule or regulation of the CDDOC by committing theft. The theft was due to Bermudez receiving overtime pay for the April 5, 2018, trip, which would not have occurred had the officers just dropped off the inmate and then returned directly to the facility. He acknowledged that the time to transport an inmate and have them processed for intake at a facility such as Turning Point, can vary. The situation is very fluid and may exceed the standard eight hour work shift for the transportation COs. He acknowledged the COs would still be entitled to a thirty minute lunch break and two ten minute breaks and are not required to skip breaks to stay within the eight hour shift. The transport team has to work it out amongst themselves when they are taking breaks. In this situation, Bermudez would be entitled to break time, but the Warden would want the transportation team back at the facility as soon as possible and give them the opportunity to take a break upon their return. He does not want COs stopped at a location for an extended period of time.

Warden Smith did not believe that the videotaping event was unplanned. He was aware of CO Brown's statement asking Bermudez what the holdup was and CO Brown having observed the vehicle pull up and someone got out of the vehicle with a camera and a boom mike. He believed that such actions by Bermudez demonstrated conduct unbecoming because Bermudez was aware that no political activity was to be done during work hours. Bermudez did not follow the rules. The concept of conduct unbecoming is all encompassing, usually referencing someone not following a rule, regulation, or policy.

The amended PNDA included the "2C" theft charge. Warden Smith confirmed that he maintains a standing policy if the County Prosecutor's Office is investigating the situation, he will have SIU "stand down" with their investigation until the Prosecutor's office is done. He did not refer this matter to the Prosecutor's office for review. Thus, there is no "clearance letter" from the Prosecutor's office indicating they completed an investigation into the matter.

The decision to remove Bermudez from his position was made after looking at the nature of the charges and his disciplinary history. Warden Smith acknowledged that the civil service discipline for the charges against Bermudez ranged from OWR to removal. He further understood that only sustained discipline is to be considered when reviewing a discipline history in the context of progressive discipline.

Bermudez was suspended without pay due to the PNDA and Amended PNDA which issued regarding the April 5, 2018 Bermudez/Cruz video. (R-1.) Warden Smith acknowledged that after he consulted with others, he agreed to return Bermudez to work on February 17, 2019. He signed and approved bringing Bermudez back to work. He believed it to be extending an olive branch regarding contract negotiations with the union. He believed it to show good faith with the understanding there would be communications and negotiations regarding the union contract. Warden Smith stated he has made mistakes as a warden, and the decision to bring back Bermudez was one of those mistakes.

**Theodore E. Baker** did not testify personally in the OAL proceeding. He testified in the Bermudez departmental hearing on November 30, 2018. The transcript of his testimony was entered into evidence without objection. (P-12.) Mr. Baker was County Counsel for the County of Cumberland. He was counsel for CCDOC during the departmental hearing, conducting direct and cross-examination of witnesses. He testified as a fact witness, on direct examination by Melissa Strickland, Assistant County Counsel, and cross-examination by Bermudez's counsel, regarding training Mr. Baker gave to CCDOC officers in the CCDOC gymnasium in May of 2014.

The County was required to provide training regarding discrimination and sexual harassment. Attorney Baker developed the materials for the training and conducted the training. Other topics were covered during that training. Mr. Baker would utilize a DVD as part of the training materials, which he obtained from the County's insurance carrier. The DVD covered the training topics of workplace violence; Whistleblower/CEPA matters; harassment and discrimination; and the fourth topic was conflicts of interest. Mr. Baker would elaborate on each topic during the training. He elaborated on the topic of political

activity because that was covered in the fourth topic regarding conflicts of interest on the DVD.

Attorney Baker would advise participants in the training session that political activities while employed were prohibited. The DVD tape indicates that, in approximately a two to three minute portion. He would elaborate upon the information, based upon New Jersey statutes and specifically the local finance and ethics laws, and explain to participants at the training that not only was it prohibited under the policy, it was prohibited under state law that they not use their positions of employment "for an object or a game [sic] that would not be available to other citizens while they were performing official duties." (P-12, November 30, 2018, minu-script page 196-197.) He would advise those attending the training that employees could not use county resources if they were engaging in politics during work hours, such as not making phone calls during county time, and not make photocopies, and they could not use any County materials such as a paper clip or post-it note, in connection with political activities. He advised the individuals at the training that they could be fined up to \$500 by the local finance and ethics board, and that they could lose their job.

He supplemented and elaborated on the political activities topic because the video did not address those details and he thought it was important for the employees to know the information. Attorney Baker acknowledged he did not have handouts or other materials regarding this topic during the training. He candidly stated at sixty-six-years-old, he does not prepare power point presentations.

The total training session with the DVD training, would be about an hour and twenty minutes to an hour and forty minutes. The main emphasis was the topic of harassment and discrimination. The time devoted to the political activity topic from the video and his lecture on the political activity topic would be approximately seven to eight minutes of the overall training time.

There was a sign in sheet for the training Attorney Baker conducted for CCDOC employees in May of 2014. Victor Bermudez signed the sheet, reflecting that he attended

the training. There is a photocopy of a DVD entitled "No Tolerance Workplace Harassment, Discrimination and Wrongdoing" in the evidence materials. (R-10, R-0191.) The next page in R-10 is a photocopy of the purported sign in sheet which has a line towards the bottom of the sign in sheet with the handwritten date of "5-1-14" and the handwritten name of "Victor Bermudez" with a signature next to it and a sign in time of "9:00 a.m." sign out time of "10:30" and in the final column of the line is handwritten "Harassment Training 1<sup>st</sup> since 1997[.]" (R-10.)

**Alex Cruz** did not personally testify in the OAL proceeding. His testimony at Bermudez's departmental hearing, on November 30, 2018, was admitted by consent into evidence. (P-12.) He is a detective with the Paterson police department, where he has been employed for more than twenty four years. He has served as president of the New Jersey PBA, where he first met Bermudez.

As of April 5, 2018, Cruz was a candidate for the position of Mayor of Paterson. On that date, he was with his videographer making small video clips throughout the city, to create campaign material. He received a call from Bermudez, indicating where he was in Paterson and asking for a recommendation for a lunch location. Cruz told Bermudez he was nearby and would be there to see him in a few minutes. He did not know that Bermudez was coming to Paterson on that date. There was no pre-planned campaign event between the two men. It was a spur of the moment meeting.

Cruz arrived by van at the Turning Point location and got out and greeted Bermudez. His videographer stayed inside the van, "and the next thing you know we were just conversating and now our videographer he's actually—he starts videotaping just our interaction and stuff like that." (R-12, November 30, 2018 minu-script page 119-120.) He and Bermudez were having a conversation about the opioid crisis and its impact on the community. He did not ask Bermudez to engage in such a conversation so they could be videotaped. He did not ask Bermudez for permission to video tape the conversation and did not ask Bermudez for permission to use the video and post it online. This was Cruz's first time running for office. He only had social media when he was running for mayor and no longer had social media at the time he testified at the departmental hearing. He

expected that the videographer would take clips of him and then get his approval before posting any videos online, but he never got that.

Cruz admitted that the conversation turned from the opioid crisis into a discussion about his candidacy for mayor, where Cruz was telling the community residents to make sure they vote for him if they wanted a change and to address the opioid crisis. He agreed that Bermudez vouched for his character and that was videotaped.

Cruz recalled that Bermudez commented to him, at some point during their conversation, that Cruz did not plan on posting the video on social media. He could not recall specifically when Bermudez made the comment, but he recalled Bermudez telling him something like “by the way, this is not going to be posted[.]” (R-12, November 30, 2018 minu-script page 151-153.) Bermudez had raised the concern at some point, whether it was at the beginning, middle, or end of their conversation on April 5, 2018, that the video should not be posted, but it did get posted, and Cruz acknowledged “that’s my fault.” (R-12, November 30, 2018 minu-script, p. 156-157.) Bermudez “just told me that to make sure it’s not posted.” (R-12, November 30, 2018, minu-script, p. 176.)

Candidate Cruz got a call from Bermudez at some point after April 5, 2018, asking Cruz to take down the video of their conversation which was posted online. Cruz contacted his videographer and told him to take the Bermudez/Cruz video down and not to post anything else without his approval. Cruz’s videographer had sent the video to the campaign social media guy, and then he posts videos on social media sites such as Facebook and Twitter. Cruz was adamant that Bermudez had nothing at all to do with posting the Bermudez/Cruz video. (R-15.)

Cruz was never contacted by anyone from CCDOC, or any other agency, regarding the Bermudez/Cruz video. He acknowledged that he did not reach out or call anyone at CCDOC regarding Bermudez and the video tape matter.

**William Holbrook** testified for the County. He began working for CCDOC in 2017, as a CO. He was promoted to the position of Sergeant and as of April 2018, was assigned



to SIU. He was somewhat familiar with the "video incident" of April 5, 2018, regarding Bermudez. He was asked by Investigator Milbourne to sit in on some of the interviews Milbourne conducted of witnesses related to the matter, recalling he sat in on the interviews of Bermudez, CO Rich Brown, and then transportation supervisor, Sgt Ricardo Martinez. Sgt Holbrook did not provide any input or opinions regarding the investigation or the conclusion of the substantiation of charges by SIU.

**Richard Brown**, CO for CCDOC, did not personally testify in the OAL hearing. His sworn testimony from Bermudez's departmental hearing conducted on October 26, 2018, was admitted into evidence without objection. (P-11.) As of 2018, CO Brown was employed for almost twenty nine years by the CCDOC and was a CO assigned to the transportation department for approximately six years.

On April 5, 2018, CO Brown was teamed with Bermudez, not his usual partner, for the transportation of an inmate to the Turning Point facility in Paterson, New Jersey. CO Brown was the driver. He indicated the drive from CCDOC to Turning Point takes approximately two and a half hours, depending upon traffic. He and Bermudez left CCDOC between approximately 9:30 a.m. to 10:00 a.m. and they arrived at Turning Point approximately two and one half hours later, just before noon. During the ride to the facility, Bermudez was on his telephone, and remarked that Bermudez is "always on his telephone." (P-11 at minu-script page 48.) He described Bermudez as a "union man" who is "always doing union business[.]" (P-11 at minu-script page 56.) He did not hear Bermudez making plans with anyone over the phone to arrange any type of political interview.

CO Brown indicated that when they transport an inmate to Turning Point for admission, the intake process is "one of the longest ones" and can take an hour and a half to two and a half hours. On April 5, 2018, when they arrived at Turning Point, Bermudez accompanied the inmate into the facility while CO Brown sat in the van. To get the inmate out of the van, he had to double park. He then found a parking spot in the lot across the street from the facility. After waiting approximately one hour, he went into the facility to use the bathroom and to check on Bermudez and the inmate. He saw them seated, waiting,

with nothing amiss. CO Brown returned to the van and waited for Bermudez. Approximately an hour later, he saw Bermudez exit the facility and was standing on the steps. CO Brown pulled out of the lot and as he pulled up to the side of the facility he observed a black vehicle, such as a Tahoe SUV, parked by the facility and a guy got out of the driver's side with a badge behind the crack of his back, whom he thought was a cop. That individual was putting on a coat and approaching Bermudez. Another guy was there with a camera. CO Brown saw Bermudez signal to him by making a circular motion with his finger, to ride around the block, which Brown did.

When he circled back to the Turning Point facility, CO Brown saw Bermudez and the men still standing in front of the facility. CO Brown circled around the block a second time then parked the van about ten to fifteen cars away from the facility, facing towards the entrance so that he could see when Bermudez was done. He observed Bermudez talking face to face with the man who had gotten out of the Tahoe with the badge, and the other man was filming them. CO Brown remained parked for approximately one hour while Bermudez continued to talk to the man and the other guy was filming them.

CO Brown estimated he and Bermudez left Turning Point at approximately 3:30 p.m. CO Brown asked Bermudez on the ride back to CCDOC, "what was that about[.]" (P-11, page 43 of minu-script.) Bermudez told CO Brown that the man he was speaking to was a friend of his who was running for mayor of Paterson. CO Brown recalled that when he and Bermudez were coming into the city, Bermudez had pointed out a mural on the side of a building, mentioning that he knew the guy, who apparently was Cruz depicted in the mural. CO Brown figured that Bermudez was handling union business. Bermudez did not tell CO Brown anything about reaching out to Cruz or an attorney in the area to find a place to go to lunch. CO Brown was not aware that there was going to be some sort of a filming event in Paterson that day.

They returned to CCDOC at approximately 5:00 p.m. on April 5, 2018. He recalled there was bumper to bumper traffic driving into Paterson and driving out of Paterson. He did not recall stopping on the return trip to CCDOC during his direct examination testimony, but stated during cross-examination that he recalled stopping at a road stop along the

Turnpike, probably for him to use the bathroom. He thought he had food in the van, such as a bag of chips or nuts and ate that. CO Brown really does not eat much, will keep food in the van, and everyone knows that he does not like to stop and sit and eat somewhere. He prefers to stop at a Wawa and grab something to eat from there. He did not recall what Bermudez did during the stop along the Turnpike, whether he used the bathroom or got food from Nathan's. It would not surprise him if Bermudez got food at Nathan's because he "likes to eat." (P-11 at minu-script page 71.)

CO Brown later saw the Bermudez/Cruz video on Facebook. He believed he saw it the day after April 5, 2018, but it could possibly have been the evening of April 5, 2018. He did not perform any search to find the video. It just popped up on his Facebook page from the Cumberland PBA 231 website, a group in which he is member. He did not recall seeing the caption along the bottom of the video. When he was shown the video during his testimony in the departmental hearing, he assumed that Cruz must have posted the video.

CO Brown knew there had to be an employment policy prohibiting political activities during work hours in uniform, he just was not familiar with it. He opined that it is "common sense when it comes to that. No, we're not allowed to do it." (P-11, page 47 minu-script.) He confirmed there was no special rule or policy about taking a lunch break while doing a transportation run.

**Kevin Milbourne** did not personally testify in the OAL proceeding. The transcript of his testimony from the departmental hearing was entered by consent. (P-11 minu-script pages 76-96, October 26, 2018; P-12 minu-script pages 5-115, November 30, 2018.) His job title is Confidential Employee (CE). He conducted investigations for the CCDOC internal affairs SIU, and began that employment in May 2017. He conducted the SIU investigation of Bermudez in the spring of 2018, regarding the Bermudez/Cruz video, which he guessed was captured and posted on YouTube, which had been filmed during a transportation run of a CCDOC inmate to a facility program.

The Bermudez/Cruz video was brought to his attention by Captain Loren Joynes. Captain Joynes showed the video from his telephone to CE Milbourne, which depicted

Bermudez in an interview with Cruz, who was running for mayor of Paterson. CE Milbourne took a video with his cellphone, of the video shown by Captain Joynes from his phone. The video CE Milbourne captured on his phone was then recorded to a DVD. Approximately two days after Milbourne was shown the video by Captain Joynes, the warden authorized an internal investigation to be conducted, which Milbourne began on April 11, 2018.

As part of his investigation, CE Milbourne collected documentation and interviewed CO Brown, Sgt Ricardo Martinez, and Victor Bermudez. He completed a written report, which outlines the information he gathered and the statements made by the individuals he interviewed. (P-11, minu-script page 95; R-10 at R-0121 thru R-0200.)

CE Milbourne's SIU "Conclusion Report" contained in the SIU file states beneath the caption of the report that the allegations of violation of Conduct Unbecoming, County Policy 5.06 Political Activity, and misuse of county property, were concluded as being substantiated. (R-10 at R-0198 through R-0200.) The Conclusion Report outlines that the Bermudez/Cruz video depicts the interview between Bermudez and Cruz while Bermudez is in uniform and identifies that he is from Cumberland County and points to the CCDOC patch on his uniform shoulder. The video further depicts Cruz, who appears to be giving a campaign speech; Bermudez mentions how often he is at Turning Point and the time it takes to get there; Bermudez comments about Cruz's character and that hopefully Cruz will be elected as Mayor of Paterson. (R-10 at R-0198.) The Conclusion Report further outlines that CO Brown personally observed the Bermudez/Cruz interview; Sgt Martinez believed that Bermudez appeared to be engaging in something political and did not have permission from Warden Smith to conduct an interview; and Bermudez admitted the video was recorded on April 5, 2018, and part of the content was about voting and he did not have permission from the Warden to do such an interview. (R-10 at R-0199 through R-0200.)

CE Milbourne concluded in his report that based upon a preponderance of the evidence he accumulated during his investigation, it was substantiated that Bermudez

violated the "Media policy," apparently referring to CCDOC DOC policy number 1.5. (R-10 at R-0200; R-12.)

**Edmond Cicchi** testified for appellant. He was qualified without objection as an expert in the field of penology and the administration of county correctional facilities, including disciplining employees of said facilities. (P-4.) Expert Cicchi was contacted on behalf of Bermudez to render an expert opinion regarding the disciplinary action taken by CCDOC against Bermudez with respect to the April 5, 2018, Bermudez/Cruz incident. He authored a written report, dated September 29, 2020. (P-5.) He rendered his opinion based upon his review of materials provided to him, as enumerated on the first page of his report, and an approximate one hour discussion he had with Bermudez.

Expert Cicchi's opinions were rendered within a reasonable degree of probability and certainty, consistent with his education, training and experience set forth in his curriculum vitae. (P-4; P-5.) He concluded that termination is "usually sought when an employee knowingly commits an offense which creates serious harm to someone or the department." (P-5, page 7.) He did not find that Bermudez knowingly committed an offense which created serious harm to anyone or the department. Rather, Bermudez practiced "poor judgement" and should receive a written reprimand, and be returned to full duty. (P-5, page 7)

Expert Cicchi believed CCDOC would rely upon the alleged theory that Bermudez had pre-planned with Cruz to meet and film a political endorsement, to sustain the charges against Bermudez. Cicchi determined the video was not a professionally staged political commercial by candidate Cruz for Mayor of Paterson. He found the video to be an impromptu, amateurish "ad" but not a political ad. He anticipated Cruz to testify and support Bermudez's assertion that the April 5, 2018, event was not planned, but "a chance meeting that only occurred when C.O. Bermudez called him regarding lunch." (P-5, page 4.) Cicchi further outlined that Cruz would testify that he happened to be in the area and the video was made only for use on the New Jersey PBA website, which can only be viewed by PBA members.

Bermudez advised expert Cicchi that he did not know his meeting up with Cruz was going to be videotaped and when recording began, he thought of it as a video being used to help a fellow PBA member, and did not think he needed permission from the Warden to be videotaped. Cicchi did not believe that any of the statements made by Bermudez in the video were “political statements.” (P-5, page 5.) Cicchi described the meeting and the videotaping as being an impromptu event for Bermudez. Had Bermudez planned to do a video in his uniform, that would be contrary to good judgment and totally out of the norm.

He assessed Bermudez as having exercised poor judgment by allowing himself to be put in such a situation where he was videotaped while working—during his lunch break. Whether it was considering on his lunch break, or not, expert Cicchi conceded it did not excuse Bermudez’s actions.

He opined that rank and file COs within CCDOC, such as Bermudez, do not receive sufficient training on the CCDOC and county employee policies, of which Bermudez was charged. The SIU did not provide confirmation of Bermudez having been so trained. He found this to a problem, especially as to social media. Bermudez told expert Cicchi during their interview that he did not have access to the County employee policy regarding prohibition of political activity. Expert Cicchi did not see anything to indicate CCDOC had any policy regarding social media. He acknowledged that ignorance of the law is not a defense in the criminal realm, but quipped that it is in civil service. He did acknowledge that ignorance of the law in civil service still does not absolve one of their actions. He stood by his opinion regarding the lack of training regarding the charges against Bermudez, and would only change his opinion if shown documented information from Bermudez’s file that he was trained on the issues for which he was charged, and Bermudez signed off as having attended such training.

Expert Cicchi emphasized that progressive discipline is to be implemented for civil service employees, such as Bermudez. He viewed only two major disciplinary actions in 2010 and 2012 in Bermudez’s discipline history. Going from two major disciplines in Bermudez’s twenty-one-year career to termination for the April 5, 2018, matter, was “not using the idea of progressive discipline at all.” (P-5, page 7.) Termination would be

“disproportional to the transgressions committed and an affront to the notions of progressive discipline.” (P-5, page 7.) If anything, Cicchi opined that Bermudez “practiced poor judgement” by allowing himself to be recorded in uniform. (P-5, page 7.) He asserted that “poor judgment” is not conduct unbecoming, which is knowing what you can and cannot do and disregarding that.

Cicchi did acknowledge the importance of rules and procedures and preserving the security of the facility, the inmates, and the employees. He acknowledged the particular importance of confidentiality of transportation of inmates and transportation routes taken, to protect the security of the inmates, officers, and citizens. He believed the information by Bermudez stated in the video was part of the unplanned discussion that was haphazard and “all over the place.” He conceded he was sure Bermudez knew he was being recorded and chose not to stop it.

Expert Cicchi testified that Bermudez’s actions were at best “stupid” and CCDOC cannot remove an individual for “not being smart” when they should be re-training the individual. He asserted that the concept of steps in discipline and the penalty to be imposed under a system of progressive discipline supports his opinion that the appropriate discipline to be implemented against Bermudez would be a written reprimand. He asserted that a written reprimand was appropriate over termination, due to the lack of training, lack of documented training, and reviewing the twenty year plus employee career for Bermudez, which revealed only two major disciplinary issues, the last one being several years ago. Cicchi explained that to go from “zero to sixty” to impose termination, which is the ultimate penalty, is not progressive discipline in this circumstance and is inappropriate. He also relied upon the fact that Bermudez was suspended without pay, then was brought back to work. An employer usually seeks removal because they find the employee to be a detriment to the entire department. He could not understand why CCDOC would bring back Bermudez.

**Oscar Aviles** testified on behalf of the County. He was qualified, without objection, as an expert in Corrections Administration and Government as to DOC operations. (R-4, R0024-R0029.) Aviles was engaged by CCDOC to render his expert opinion regarding the

disciplinary action of removal assessed against Bermudez, stemming from Bermudez's actions while on assignment on April 5, 2018. (R-4, R0015.)

Expert Aviles authored a written report. (R-4, R0015-R0023.) He found that Bermudez failed to comport himself appropriately, as required of a law enforcement officer, in violation of his responsibilities to the CCDOC. He took into consideration Bermudez's conduct on April 5, 2018, within the context of Bermudez's entire span of employment with CCDOC. Expert Aviles opined, within a reasonable degree of professional certainty, and within his experience in DOC matters and in county governance, that the disciplinary charges of "unbecoming conduct" and "other just cause" were adequately established and the disciplinary sanction of removal was justified under the facts of the matter. (R-4, R0022-R0023.)

Aviles reviewed a "multitude of documents" as part of his assessment of the matter, which documents are enumerated in his report, including reviewing the Bermudez/Cruz video (R-15) and the "Summary of Counseling and Disciplinary Notices setting forth 45 disciplinary incidents" of Bermudez with CCDOC, "dating back to May 7, 1998[.]" (R-4, R0015-R0016.) He focused his evaluation of the matter on the charges set forth in the PNDA and the Amended PNDA, identifying that both "asserted within their charging sections as the primary bases for discipline conduct unbecoming a public employee ([sic] NJAC 4A:2-2.3(a)(6) and other Sufficient Causes ([sic] NAJC [sic] 4A:2-2.3(a)12, misconduct as alleged therein falling within those two enumerated disciplinary provisions[.]" (R-4, R-0017.) He did not conduct interviews with anyone in the process of evaluating the matter and rendering his opinion.

He considered Bermudez's long time career with CCDOC, his lengthy disciplinary history, and that Bermudez had served as President of the PBA union, to determine that Bermudez knew or was at least familiar with the policies of CCDOC and the County. Aviles stressed that it is common knowledge for any law enforcement officer that their uniform is worn for official duties only. It is general knowledge, and reinforced upon law enforcement officers, that it is inappropriate to wear the uniform for any other purpose. The uniform is put on for work and can be worn on your way home. It is common



knowledge an officer would not wear their uniform when going into a bar and it is frowned upon for a uniformed officer to stop at a convenience store, knowing that you become a target to others by appearing in uniform.

Aviles found Bermudez to have violated County and DOC policies by his actions on April 5, 2018. Regarding County of Cumberland Policy No. 5.06, prohibiting political activity during work, expert Aviles found the Bermudez/Cruz video to be a political endorsement. Bermudez specifically endorsed Cruz for mayor. He was in uniform while being videotaped, showed his CCDOC insignia to the camera, and engaged in conversation with Cruz about the opioid problems statewide and specifically to the City of Paterson, which was the city Cruz was seeking to be elected as mayor. Whether Bermudez had pre-planned to tape the endorsement, or if it came about by happenstance, as a law enforcement officer, Bermudez's first reaction should have been "why is he being recorded" and he should have immediately recognized it was inappropriate to be in uniform, while on company time. Aviles also found it hard to believe Bermudez did not know this was a political advertisement being recorded, based upon the conversation he engaged in with Cruz and his reference to Cruz as being a good guy. Expert Aviles determined Bermudez's actions were a violation of County Policy 5.06, regarding political activity being performed while on company time.

Aviles also determined that CCDOC policy number 1.5, relationship with public, media and other agencies, was violated by Bermudez. Aviles found that Bermudez's discourse on the video was that Bermudez routinely traveled to Paterson with CCDOC inmates. Aviles opined it does not make a difference that members of the public could look up transportation routes to and from the CCDOC and the facility in Paterson. Any DOC does not want to advertise such information to the public about regularly going to a particular location. Specific to this situation, Aviles stated that the City of Paterson is "not a safe place" and to have an officer circling the block in the transport van while the political infomercial was being filmed placed both officers at risk. The mission that day was to transport the inmate to Paterson and return to CCDOC. Bermudez strayed from that mission. He found that Bermudez had no basis to meet with any individual "on the streets

of Paterson” and no basis to discuss the county’s business, nor any matter involving CCDOC, or state his political preference and endorse Cruz for mayor.

Aviles determined, based upon a totality of the circumstances and his belief that the county and DOC policies were violated by Bermudez, that such conduct by Bermudez “could not be considered less than unbecoming conduct[.]” (R-4, R0022.) It did not matter whether Bermudez had preplanned the videotaping or if the event occurred by chance. If Bermudez claims this to have been a “happenstance” occurrence, that would contravene the commonsense Bermudez had to possess, and would be contrary to the testimony Bermudez provided to the SIU and the findings of the SIU report.

Expert Aviles did consider Bermudez’s prior disciplinary history when he concluded that removal of Bermudez was appropriate discipline, but he was more focused on the specific charges regarding the April 5, 2018, incident. Aviles recognized that some of the discipline listed on Bermudez’s disciplinary summary sheet was not substantiated or otherwise overturned. However, there were some prior charges he found to be “alarming” which he did consider in determining that removal was appropriate.

Expert Aviles acknowledged that there were differences in how he handled disciplinary matters, when he was Warden of the Hudson County correctional facility, versus how discipline is handled by CCDOC. He empowered his Captains to make disciplinary determinations regarding charges to impose upon the COs and what discipline to impose. In Hudson County, the departmental hearing officer would ultimately make a determination regarding a sanction to impose involving major discipline and the hearing officer would go through the prior disciplinary history. When Aviles was Warden, he handled discipline involving only the Captains and would select the charges for the PNDA and candidly commented that he did not have to review prior disciplinary summaries because he had everything in his head, being in the climate of corrections and working with individuals for many years, he just knew everything about those individuals. He would not render an opinion regarding the methodology and procedures used by CCDOC’s Warden regarding discipline, not knowing the climate or “culture” of the CCDOC facility, deferring to the Warden’s discretion.

### Credibility

A fact finder is obligated to weigh the credibility of witnesses. The fact finder must choose to accept or reject whether a witnesses' testimony is credible. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). Credibility is the value given to a witness' testimony. It is best described as that quality of testimony or evidence that makes it worthy of belief. "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observations of mankind can approve as probable in the circumstances." In re Estate of Perrone, 5 N.J. 514, 522 (1950), (citations omitted).

A credibility determination requires an overall assessment of the witness' story "in light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). The fact finder should also consider the witness' interest in the outcome, or any motive or bias. The fact finder may reject testimony because it is inherently incredible, improbable, inconsistent with common experience, contradicted by other testimony, or it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Bermudez candidly admitted that he violated at least one of the charges and should be subject to discipline is appreciated. His testimony of this "admission" was not detected to be delivered as remorseful, yet more to save face and garner a less harsh disciplinary penalty. He had to be credible in his description of the actions which were videotaped, as they could be replayed and viewed. I deem his testimony as credible as to the documented facts. I recognize the self-serving motivation of his reluctance and hesitancy to testify more specifically or even estimate the timing of some events on April 5, 2018, which were not time stamped or documented in some fashion.

The other witnesses from CCDOC testified credibly. The Warden, Deputy Warden, and Acting Captain, testified in a straightforward and business-like manner. The Warden

candidly revealed making mistakes in his role as a Warden. CO Brown did not personally testify at the OAL, but the written transcript of his testimony during the departmental hearing carried a tone of the longtime employee testifying frankly, and earnestly as if in his defense of himself, and stating what he recollected and whether he was estimating or approximating matters. It was also detected that he did not wish to be put in the position to be testifying against a fellow CO, yet frankly answered all questions in a genuine manner, such as when he stated Bermudez most likely got something to eat at the rest stop, and quipped that Bermudez "liked to eat."

The experts were both well skilled and experienced in their areas of expertise. Expert Cicchi testified in a relaxed, straight forward, and folksy manner. Expert Aviles testified in a business like, professional manner. Both were found to be credible in their assessment of the facts presented, but completely divergent in the recommended penalty to be assessed. The expert testimony is to be helpful to the fact finder. I cannot deem either position taken by each expert as truly persuasive in my ultimate determination.

Expert Cicchi characterized Bermudez's actions as stupid, rightfully so, but opined that the least amount of discipline, OWR would be appropriate considering the lack of training and longtime career. Expert Aviles opined that removal was appropriate, claiming to focus specifically on the charges at hand and not necessarily relying upon the lengthy disciplinary history. He was hesitant to speak negatively, hesitating to critique the actions of the CCDOC Warden, and often responded by deferring to the Warden's actions, not being familiar with the culture and history of the CCDOC. As counsel jested during cross examination, Aviles was hired to render an expert opinion, yet stopped short of providing his expert opinion, which might reflect negatively upon the client whom retained him. Both men were highly professional and credible in their assessment of the situation, but their respective extreme positions regarding the discipline to be imposed, were not overtly persuasive.

Based upon a review of the evidence presented and having had the opportunity to hear the testimony of the witnesses and assess their credibility, I **FIND** as **FACTS** the following:

Victor Bermudez was hired by CCDOC and began his employment as a CO on July 28, 1997. On April 5, 2018, he was working as a CO in the transportation unit of CCDOC. He clocked in for work at CCDOC on April 5, 2018, at 7:58 a.m. He learned that he was assigned to transport an inmate that day from CCDOC to Turning Point, a drug treatment/rehabilitation center, located in Paterson, New Jersey. He previously had been to that location approximately ten times. Bermudez was teamed with another CO, Richard Brown, for the transport on April 5, 2018. CO Brown drove the transport van. Bermudez was the passenger CO. They left CCDOC between approximately 9:30 a.m. and 10:00 a.m. It takes approximately two and one half hours to travel to Turning Point in Paterson, depending upon traffic and the route taken.

CO Brown and Bermudez arrived at Turning Point at approximately twelve noon. Bermudez escorted the inmate into the facility. He stayed with the inmate during the intake process until he was turned over to the custody of Turning Point. He could not recall how much time the intake process took. CO Brown waited in the van, parked in a lot across from Turning Point, while Bermudez was inside the facility. After approximately one hour of waiting, CO Brown went into the facility to use the restroom and observed Bermudez and the inmate seated, waiting in the course of the intake process.

While inside Turning Point, Bermudez sent text messages at 12:22 p.m., to an attorney from the area and to his friend, Alex Cruz, whom he knew through PBA Union events. Bermudez sent the text message with the alleged intent to find a place to eat lunch in Paterson. The attorney responded via text that he was in Trenton. Bermudez responded that he was going to "catch up with Alex Cruz for mayor."

Bermudez spoke to Cruz by phone at 1:55 p.m. Cruz arrived at the Turning Point facility shortly thereafter. CO Brown observed Bermudez stepping outside of the facility, before Cruz arrived. CO Brown started the van, pulled out of the lot to the side of the facility, when he saw Cruz getting out of a vehicle and go up to Bermudez with another man who had a video camera. Bermudez signaled to CO Brown to go around the block, which he did, two times, until he parked along the street in a location where he could watch

Bermudez to see when he was done so that CO Brown could then pick Bermudez up and begin the return trip to CCDOC.

The Bermudez/Cruz video depicts Cruz greeting Bermudez and the two begin to speak. The other man with Cruz was taking video footage of Bermudez and Cruz while they were speaking, which was outside of the Turning Point facility, near the facility sign. Bermudez is in his CCDOC uniform, with his hat and jacket displaying the CCDOC logo. The men engage in a conversation focusing on the opioid epidemic in the state and in Paterson. Bermudez states that he is from Cumberland County, gestures to his CCDOC logo on his jacket sleeve, holds up what appears to be shackles, and states that it takes approximately two and one half hours to get to Paterson, and that they make the trip to Paterson about one or two times per week. The conversation shifts to a political PSA, with Cruz referring to his candidacy for mayor and Bermudez endorsing Cruz, urging people to get out and vote, and attesting to the community service and goodness done by Cruz. His statements were an endorsement for Cruz.

The video of Bermudez and Cruz was later posted on the social media site, Facebook, by someone affiliated with Cruz's campaign promotion. A written message was superimposed as a banner at the bottom of the video, referring to the Cruzformayor website and to vote for Cruz for Mayor of Paterson, with a check mark next to "A4" apparently referencing the column of Cruz's name on the ballot. The video was hash tagged to the PBA local 231 Facebook page, which is the union Bermudez is affiliated with, sometime shortly after it was recorded on April 5, 2018.

The video was viewed by CO Brown, and others, including administrative officials from another county facility, who so advised Warden Smith and Deputy Warden Warren when they attended a luncheon function sometime after April 5, 2018. The Warden, Deputy Warden, and Acting Captain Joynes met at some point thereafter, when Captain Joynes was able to display the video on his phone for the Warden and Deputy Warden from his Facebook page, and the video was recorded onto another cell phone and provided to SIU. Warden Smith authorized SIU to begin an investigation into Bermudez

regarding the video. Bermudez did not seek permission from the CCDOC administration or any of his superiors, prior to participating in the video.

The Warden spoke to Bermudez about the video and Bermudez immediately thereafter sent a text message to Cruz on April 11, 2018, to take down the video and acknowledged that he "messed up."

A PNDA issued May 22, 2018, alleging Bermudez committed violations of multiple charges: N.J.A.C. 4A:2-2.3(a)(6): conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(12): other sufficient cause; Cumberland County policy 3.02A, also known as 84-17: section G-Inappropriate release of information; Cumberland County policy 3.02A, also known as 84-17: section R- political activity during work hours; Cumberland County policy 3.02A, also known as 84-17: section T-violation of a Rule, regulation, policy, procedure, order or administrative decision (\*I theft); Cumberland County policy 3.02A, also known as 84-17: section C-personal conduct: subsection C8-falsification: intentional misstatement of material fact in connection with work, employment application, attendance, or in any report, investigation or proceeding; Cumberland County policy 3.02A, also known as 84-17: subsection C10-Divulging confidential information without proper authority; and Cumberland County policy 3.02A, also known as 84-17: subsection C11-Conduct unbecoming a public employee. The incident giving rise to the charges was that Bermudez was assigned to the transportation unit on April 5, 2018, and transported inmate(s) to Turning Point Inc., located in Paterson, New Jersey. After turning the inmates(s) over to the facility, he was met by Paterson Mayoral Candidate Alex Cruz and a film crew. Bermudez was filmed, identifying himself as being from Cumberland County, displayed CCDOC insignia and equipment, engaged in a discussion regarding the opioid issue and endorsed candidate Alex Cruz for mayor. During Bermudez's interview with Special Investigations Unit (SIU) he is alleged to have made false and misleading statements regarding his actions and the events that occurred on April 5, 2018. The PNDA of May 22, 2018, sought removal of Bermudez from his position of employment as a Corrections Officer with CCDOC.

An amended PNDA issued on May 31, 2018, amending the charges to include N.J.S.A. 2C:20-8 theft of services, for having allegedly spent two hours in delay, waiting and/or preparing for the film crew on April 5, 2018, while working for CCDOC and Bermudez failed to seek prior permission for his actions. He allegedly attempted to hide these facts and received payment(s) from the CCDOC for actions not authorized.

Bermudez was suspended without pay when the initial PNDA issued. He was reinstated to his position of CO as of February 17, 2019. He was suspended as of April 2, 2020, regarding another matter, which is currently in departmental hearing status. The Final Notice of Disciplinary Action (FNDA) for this matter, regarding the incident of April 5, 2018, was entered on July 1, 2020, implementing removal as discipline, effective July 1, 2020. The FNDA sustained all charges as listed in the Amended PNDA.

### **LEGAL ANALYSIS AND CONCLUSIONS**

A civil service employee's rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an inducement to attract qualified individuals to public service positions, and is to be liberally construed toward attainment of merit appointments and broad tenure protections. Essex Council No. 1, N.J. Civil Service Association v. Gibson, 114 N.J. Super. 576, 581 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972), citing Mastrobattista v. Essex County Park Commission, 46 N.J. 138, 145, 147 (1965).

A civil service employee who commits a wrongful act related to their employment may be subject to discipline, which may be a reprimand, suspension, or removal from employment, depending upon the incident. N.J.S.A. 11A:1-2; 11A:2-20; N.J.A.C. 4A:2-2. Public entities should not be burdened with an employee who fails to perform their duties satisfactorily or they engage in misconduct related to their duties. N.J.S.A. 11A:1-2(a). Thus, a public entity may impose major discipline upon a civil service employee, including termination/removal from their position. N.J.S.A. 11A:1-2; N.J.A.C. 4A:2-2.2.



The appointing authority employer has the burden of proof to establish the truth of the disciplinary action brought against a civil service employee. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is by a preponderance of the credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); and see, Atkinson v Parsekian, 37 N.J. 143, 149 (1962). Evidence is considered to preponderate “if it establishes the reasonable probability of the fact.” Jaeger v. Elizabethtown Consolidated Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) citation omitted. The evidence must “be such as to lead a reasonably cautious mind to a given conclusion.” Bornstein v. Metro Bottling Company, 26 N.J. 263, 275 (1958).

Appellant’s status as a CO subjects him to a higher standard of conduct than an ordinary public employee. In re Phillips, 117 N.J. 567, 576-77 (1990). Law enforcement employees, such as a CO, 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), cert. denied, 47 N.J. 80 (1966). In military-like settings such as police departments and prisons, it is of paramount importance to maintain strict discipline of employees. Rivell v Civil Service Commission, 115 N.J. Super. 64, 72 (App. Div.), cert. denied, 59 N.J. 269 (1971); Newark v Massey, 93 N.J. Super. 317 (App. Div. 1967).

Here, it was determined in the FNDA that there were nine sustained charges against Bermudez, warranting his removal as a CO at CCDOC, effective July 1, 2020. (R-2.) Each charge is enumerated and addressed as follows:

**1. N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming**

Bermudez is alleged to have violated “conduct unbecoming a public employee” as codified at N.J.A.C. 4A:2-2.3(a)(6). The term “unbecoming conduct” has been broadly defined and identified as conduct that adversely affects the morale or efficiency of the government unit, or has the tendency to destroy the public’s respect for public employees and destroy the public’s confidence in the delivery of government services.

Karins v City of Atlantic City, 152 N.J. 532, 554 (1998); In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

CCDOC asserts that Bermudez violated “unbecoming conduct” by appearing in the video while in uniform with Cruz, an individual who was running for the position of Mayor for the City of Paterson; the statements made by Bermudez in the video; and the video thereafter being posted to a social media website, with a banner superimposed upon the bottom of the video, urging voters to vote for Cruz. Bermudez contends this charge should be considered a lesser included charge of political activity during work hours, and should be dismissed.

Bermudez is in uniform while the video was recorded. His uniform hat and jacket both have the CCDOC logo. He states he is from Cumberland County, points to the CCDOC logo on his uniform jacket, holds up what appears to be shackles, references that it takes approximately two and one half hours to get to Paterson, and that they make the trip one or two times per week. He engages in conversation about the opioid crisis with Cruz, which conversation morphs into a political endorsement of Cruz, by vouching for his credibility and public service. The video was then posted to the social media site Facebook, where it is hash tagged to the PBA local union Facebook page, for which Bermudez was serving as President of that union. That video was viewed by others, including his fellow CO, CO Brown, and representatives of other county correctional facilities.

The video was shot at the entrance to the Turning Point facility and the facility sign is seen in the video. While the video was being recorded, CO Brown, who was the driver of the CCDOC transport van that day, had to circle the block two times, then park on the street and wait while Bermudez was with Cruz doing the video tape.

Bermudez admittedly violated the CCDOC “media” policy, referred to as policy 1.5. (R-12) In closing summation, Bermudez concedes that CCDOC has carried its burden of proof that his actions constituted “Political Activity During Work Hours” in violation of CCDOC policy 3.02A, aka 84-17, III-R.

Bermudez's conduct was reckless and posed a security risk for himself, the inmate escorted to the facility, and CO Brown who was caused to operate the CCDOC van unnecessarily around the block in the streets of Paterson then wait in the marked van while Bermudez engaged in the videotaping of what was a political PSA, supporting his friend for the candidacy of Mayor of Paterson. It has not been demonstrated, by a preponderance of the evidence that Bermudez pre-planned meeting up with Cruz and pre-planned that they would record the video. However, Bermudez is an experienced officer and has served his union as president. He visibly was uncomfortable in the video when the discussion turned to politics, which he acknowledged as he reviewed the video during his testimony. I **CONCLUDE** that discomfort was reflective of his knowledge that he was engaged in an inappropriate video recording, while on duty in uniform. He took no action to stop the recording, although he admitted he could have. His candor in admitting now that he violated the media policy and the policy prohibiting political activity during work hours, is appreciated, yet does not excuse his conduct on that date.

It has not been demonstrated by a preponderance of the evidence that Bermudez himself posted the video online. It has been demonstrated that the video was posted to a social media site, was hash tagged to his PBA local union social media page, and that others viewed it. A banner below the video endorsed candidate Cruz. Although Bermudez himself did not post the video online, he placed himself in a position to be recorded by an unknown individual, thus subjecting himself to being recorded in uniform and having no control over where or how the video would be used. I **CONCLUDE** that collectively, Bermudez's actions and statements recorded on the video, later posted on a social media site, effected the efficiency of the operations of CCDOC, by posing a safety risk to himself and others, and exposing information about the operations of CCDOC. I further **CONCLUDE** that Bermudez's appearance in a publicly posted video which was a political PSA for his friend, undermined the public's respect for such employees and undermined the public's confidence in the operations of the CCDOC. I thus **CONCLUDE** such conduct is conduct unbecoming a public

employee, and the charge of N.J.A.C. 4A:2-2.3(a)(6) has been **SUSTAINED** by a preponderance of the evidence, by the CCDOC as to Bermudez.

**2. N.J.A.C. 4A:2-2.3(a)(12), other enough cause**

Appellant was charged with violating N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, which has been described as other conduct, not delineated within the regulation, which would “violate 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.” In re Boyd, Cumberland County Dept of Corrections, CSC Dkt. No. 2019-1198, OAL Dkt. No. CSR 15990-18, Hon. Catherine Tuohy, ALJ; affirmed in final decision, 2019 N.J. CSC Lexis 621.

“Other sufficient cause” is essentially the catchall provision for conduct, otherwise not delineated within the eleven causes listed in N.J.A.C. 4A:2-2.3, as the reason for which an employee may be subject to discipline. CCDOC has also alleged that Bermudez’s conduct violated more specifically delineated policies promulgated by CCDOC and Cumberland County. Each of those is addressed below. I **CONCLUDE** that any substantiated findings of violations of any of the specific CCDOC or Cumberland County policies below, shall also serve as demonstrating “other sufficient cause” warranting the imposition of discipline upon Bermudez, **SUSTAINING** the charge of N.J.A.C. 4A:2-2.3(a)(12).

**3. Cumberland County policy 3.02A, also known as 84-17: section G-Inappropriate release of confidential information**

Appellant asserts that HR 84-17 (R-13, R-14) is a disciplinary action policy promulgated by the New Jersey DOC, and does not apply to county DOC employees. Appellant contends that although CCDOC policy 3.02A specifies that it is “(Also Known as 84-17)” the Freeholders of Cumberland County never confirmed that HR 84-17 was adopted as applicable to CCDOC employees. (R-20.) Respondent alleges CCDOC adopted HR 84-17 and any amendments to same, consistent with a resolution approved on June 25, 2013, and CCDOC policy 3.02A aka HR 84-17, became effective July 1, 2013. (R-20, R-0722 through R-0724; and R-0708.) Respondent concedes “[a]lthough at first glance the resolution may appear to be somewhat confusing . . . it is

clear that what the Freeholder Board intended to incorporate is the State of New Jersey DOC policy as it relates to the CCDOC and all other policies of the County were still applicable. County policy 3.02A was revised to reflect 84-17 and intended to clarify the disciplinary process.” (CCDOC written summation at page 29.)

The resolution is not artfully drafted. It required several reviews and readings of the resolution and multiple cross referencing of the various policies admitted into evidence to make this determination. I **CONCLUDE** that it was the intent of the CC Freeholders to adopt New Jersey DOC HR Bulletin 84-17 As Amended Disciplinary Action Policy (referred to as HR 84-17), with any amendments thereto, to apply to uniformed employees of the CCDOC, and as further set forth in policy 3.02A. The resolution itself references that it is intended to apply. The beginning recitations contained in the “whereas” clauses of the resolution support this conclusion, as well as the policy of 3.02A heading, referencing that it is aka HR 84-17. I thus **CONCLUDE** that HR 84-17 is applicable, including the table of offenses and penalties set forth therein, as well as the table of offenses and penalties set forth within policy 3.02A.

Regarding the allegation of “Inappropriate release of confidential information,” contained in CCDOC policy number 3.02A aka 84-17, offense III Personal Conduct, subsection G (R-20, R-0720), CCDOC alleges Bermudez’s comments on the video about where he is from, pointing to his CCDOC insignia, stating the time it takes to get to Paterson, and that they are there one to two times per week, demonstrates this violation should be sustained. Appellant argues that he did not release “confidential” information, as there is no definition of “confidential” contained with the CCDOC policy, and the CCDOC logos are on their uniforms and on the transport vans, so it is no secret to the public who they are and where they are from.

I **CONCLUDE** that the information Bermudez released on April 5, 2018, was sensitive information which was recorded on a video later publicly posted on the internet to a social media site. The release of the information posed a safety risk to himself, CO Brown, the inmate transported that day, and to future CO’s, inmates, and to the public if someone were to act on the knowledge and attempt to cause harm to the

staff or inmates being transported. This was also a release of sensitive information that incarcerated individuals from CCDOC were being housed at Turning Point, a drug rehab facility. I **CONCLUDE** that Bermudez released information which should have remained confidential, and thus the charge of CCDOC policy number 3.02 aka 84-17, III G, has been **SUSTAINED** by a preponderance of the evidence.

**4. Cumberland County policy 3.02A, also known as 84-17: section R-political activity during work hours**

Respondent alleged Bermudez violated CCDOC policy 3.02A aka 84-17, III Personal Conduct, R. "Political activity during work hours." (R-20, R-0720) Bermudez endorsed candidate Cruz for mayor, while appearing in his uniform during work hours. Even if the time Bermudez was videotaped occurred during his lunch or other permitted breaks, he was still in uniform and still considered on duty. Appellant has conceded in written summation that he violated this policy. I **CONCLUDE** that Bermudez did violate CCDOC policy 3.02A aka 84-17, section III R-political activity during work hours, and this charge has thus been **SUSTAINED** by a preponderance of the evidence.

**5. Cumberland County policy 3.02A, also known as 84-17: section T-violation of a Rule, regulation, policy, procedure, order or administrative decision (\*I theft)**

Respondent contends that Bermudez violated this policy for having received overtime on April 5, 2018, which he would not have received but for the delay he caused in engaging in the recording of the video. (R-20 R-0720.) Appellant asserts he was entitled to a thirty minute lunch break and two ten minute breaks during his eight hour shift. Respondent concedes that Bermudez was entitled to those breaks and there is no written policy regarding when or how transportation CO's may take those breaks. It is an "understanding" that the CO transport team should return immediately and that the team takes their breaks while driving and should work out their break time amongst themselves.

Taking into consideration the testimony of Bermudez and CO Brown regarding the timing of their transportation of the inmate and events of April 5, 2018, I **CONCLUDE** the time Bermudez engaged in the video recording could be deemed as occurring during his permitted break time. Both Bermudez and CO Brown indicated they got a late start to Paterson, estimating they left between 9:30 and 10:00 a.m. It takes approximately two and one half hours to get to Paterson, depending upon traffic. CO Brown estimates they arrived in Paterson at approximately 12 noon. Bermudez indicated he sent the text message to the attorney and Cruz while he was inside the facility, which records confirm was done at 12:22 p.m. CO Brown waited approximately one hour, at which time he entered the facility to use the restroom and saw Bermudez and the inmate seated, awaiting the intake process.

CO Brown saw Bermudez exit the facility about an hour later, which comports with the time reflected in the telephone records, 1:55 p.m., as to when Bermudez spoke to Cruz, just before Cruz arrived. CO Brown estimated he had to wait approximately one hour before Bermudez was done getting videotaped, and estimated they left at approximately 3:30 p.m. An hour of time is not supported by the documentation when both men clocked out upon their return to CCDOC at just after 5:00 p.m. The evidence preponderates that they left Paterson at approximately 2:30 p.m. and they were back at CCDOC at 5:00 p.m. The ride back to CCDOC takes approximately two and a half hours, and they briefly stopped at a rest stop along the return ride home. Therefore, if Bermudez met Cruz on the steps of Turning Point at approximately 2:00 p.m., the evidence preponderates that the videotaping event took approximately thirty minutes. That is the amount of time Bermudez would have been entitled to a lunch break. It is acknowledged that Bermudez is considered still on duty during a lunch break. However, his break time cannot be deemed as an inappropriate delay in their return to CCDOC, resulting in Bermudez and CO Brown receiving overtime for that day. I thus **CONCLUDE** that CCDOC has not sustained its burden by a preponderance of the evidence, that Bermudez violated CCDOC 3.02A aka 84-16, section III T, theft, and thus this charge shall be **DISMISSED**.



**6. Cumberland County policy 3.02A, also known as 84-17: section C-personal conduct: subsection C8-falsification: intentional misstatement of material fact in connection with work, employment application, attendance, or in any report, investigation or proceeding**

Respondent asserts Bermudez violated CCDOC policy 3.02A aka 84-17, section C8 Personal conduct-falsification by intentionally misstating a material fact in connection with the investigation of his conduct on April 5, 2018. (R-13 R-0218.) Respondent asserts that Bermudez made "inconsistent and unreliable statements" which prompted the IA investigation. (CCDOC written summation page 34.) Respondent has not pointed to any specific statement made by Bermudez during the IA investigation that was an intentional misstatement of material fact. Bermudez may have been less than forthcoming, and unable to recollect specific times of the events of April 5, 2018, yet that does not demonstrate he intentionally misstated a material fact. The broad allegation by respondent that Bermudez made inconsistent and unreliable statements falls significantly short of demonstrating any intentional misstatement of a material fact. I **CONCLUDE** that CCDOC has failed to demonstrate that Bermudez violated CCDOC policy 3.02A aka 84-17, section C8 falsification, and thus it shall be **DISMISSED**.

**7. Cumberland County policy 3.02A, also known as 84-17: subsection C10-Divulging confidential information without proper authority**

Respondent contends that Bermudez violated CCDOC policy 3.02A aka 84-17, subsection C10 "divulging confidential information without proper authority." (R-13, R-0219.) This subsection is contained within HR 84-17 (R-13) It is worded similarly to the offense listed in the table of offenses of CCDOC policy 3.02A subsection III G, which is "Inappropriate release of confidential information." (R-20, R-0720.) This is an example of the potential confusion caused by the lack of an artfully drafted resolution, which simply adopted HR 84-17 and incorporated it within CCDOC policy 3.02A. The offense of C10, contained within HR 84-17 is the same as IIIG, contained within CCDOC policy 3.02A. I **CONCLUDE** this is the same offense as already addressed above, regarding

a violation of CCDOC policy 3.02A aka 84-17, section IIIG. I therefore **CONCLUDE** that the charge of a violation of CCDOC policy 3.02A aka 84-17, section C10 is **DISMISSED**.

**8. Cumberland County policy 3.02A, also known as 84-17: subsection C11- Conduct unbecoming a public employee**

This charge was already addressed under the charge by CCDOC against Bermudez as outlined in the administrative regulation N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee. Although the charge under CCDOC policy 3.02A aka 84-17 subsection C11 is specific to CCDOC uniformed officers, it is the same charge pursuant to the administrative regulation, which is also applicable to a public employee. I **CONCLUDE** that this is a redundant charge, and therefore a charge under CCDOC policy 3.02A aka 84-16 subsection C11, shall be **DISMISSED**. It has already been determined above that Bermudez violated N.J.A.C. 4A:2-2.3(a)(6) conduct unbecoming.

**9. N.J.S.A. 2C:20-8 theft of services**

Respondent asserts this charge, contained with the New Jersey statutes, should be considered an administrative charge violated by Bermudez for having received overtime pay for hours worked on April 5, 2018, when Bermudez was engaged in the video taping of the political PSA. Respondent concedes it never referred this matter to the Prosecutor's office for review of the matter as a "criminal" charge against Bermudez.

I have already addressed above the charge of CCDOC 3.02A aka 84-17, section III T, theft, and concluded that charge was not sustained. A theft of services charge under N.J.S.A. 2C:20-8 has not been demonstrated by CCDOC. I **CONCLUDE** that CCDOC has not sustained its burden by a preponderance of the evidence, that Bermudez violated N.J.S.A. 2C:208, theft of services, and said charge shall be **DISMISSED**.

Summarizing the sustained charges against Bermudez herein, those four charges are: N.J.A.C. 4A:2-2.3(a)(6): conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(12): other sufficient cause; Cumberland County policy 3.02A, also known as 84-17, section G-Inappropriate release of confidential information; and Cumberland County policy 3.02A, also known as 84-17, section R-political activity during work hours.

## PENALTY

Progressive discipline is to be considered once a determination has been made that an employee has violated a statute, regulation, or rule regarding their employment. West New York v. Bock, 38 N.J. 500 (1962); In re Stallworth, 208 N.J. 182, 195 (2011). When deciding what disciplinary action is an appropriate penalty, the fact finder shall consider the nature of the charges sustained and the appellant's past record. West New York, 38 N.J. at 523-524. The employee's past record is said to encompass their reasonably recent history of promotions or commendations on the one hand, and on the other hand, any "formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated . . . by having been previously called to the attention of and admitted by the employee." Id. Consideration as to the timing of the most recently adjudicated disciplinary history should also be given. West New York, 38 N.J. 524.

The theory of progressive discipline is not a fixed rule to be followed without question. In re Carter, 191 N.J. 474, 484 (2007.) "[S]ome disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." Id. The question for the fact finder is whether the disciplinary action is so disproportionate to the offense, considering all circumstances, to shock one's sense of fairness. Id. Removal has been upheld where the acts charged, with or without prior disciplinary history, have warranted imposition of the sanction. Id. Hence an employee may be removed, without regard to progressive discipline, if their conduct was egregious. Id.

Sworn law enforcement officers are recognized as a "special" kind of public employee. Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), cert denied, 47 N.J. 80 (1966). Their primary duty is to enforce and uphold the law, exercise tact, restraint, and good judgment, and represent law and order to the citizenry. Id. Hence, they must present an image of personal integrity and dependability to garner the respect of the public. Id.

Respondent, CCDOC, seeks the discipline of removal of Bermudez from his position of employment. Appellant asserts his stupid behavior warrants the imposition of an OWR.

I **CONCLUDE** that Bermudez's conduct was not so heinous or egregious to warrant automatic removal, without regard for progressive discipline. His judgment has been characterized as simply "stupid," yet his statements and actions were reckless, taking into consideration his long term career with CCDOC and a lengthy history of being involved in disciplinary disputes. Concentrating on the specific nature of his unbecoming conduct, release of confidential information, and engaging in political activity, was not shocking enough to disregard progressive discipline and go immediately to removal. The circumstances shall be reviewed and weighed to determine what discipline is appropriate, ranging from OWR to removal, pursuant to the regulations.

Discipline for any of the sustained charges here ranges from minor to major discipline. Both unbecoming conduct and other sufficient cause can range from minor to major discipline of removal. A first infraction of CCDOC policy 3.02A aka 84-17, section G-Inappropriate release of confidential information, and a first infraction of section R-political activity during work hours, both list discipline ranging from OWR to removal. If either of those offenses was a second infraction, removal is mandated.

Bermudez's summary of counseling disciplinary actions ledger, or "jacket" as referred to by his counsel, enumerates forty-five incidents. (R-7.) Not all incidents were formally adjudicated, and some were in fact dismissed or otherwise unfounded. There were several instances of minor discipline, imposing less than five days suspension or OWRs, for offenses such as refusing overtime and having been verbally abusive to superiors, with several of these having occurred more than fifteen years ago.

Bermudez had four major suspensions: seven days (sixteen years prior to the April 5, 2018 event); six days (fifteen years prior to April 5, 2018); fifteen days (eight years prior to April 5, 2018); and ten days (six years prior to April 5, 2018). Two of

those involved leaving a post without permission. One involved his failure to fill out a use of force report. The last major offense for use of profanity toward a co-worker, resulting in a ten day suspension, from an incident that occurred in 2012.

Most concerning of the four sustained charges herein is the release of confidential information. Bermudez's statements were done in an impromptu manner on the video, with reckless disregard as to what was coming out of his mouth, yet not with the intent to purposely film himself releasing such information and intending to post the information publicly on the internet. The same analysis and weighing of the Bermudez's conduct which resulted in sustaining the political activity during work hours charge, reveals that the meeting which morphed into a political PSA and endorsement of a friend for candidacy of mayor in Paterson, while in uniform, was not found to have been with the intent of the end result of being videotaped supporting a candidate and then publicly posting the video. Bermudez himself did not post the video, but he did act recklessly in allowing the videotaping to occur, while he was in uniform on the steps of a facility where he just escorted an inmate for admission.

Considering his past disciplinary history, although it may be difficult for one to "unring" the bell of hearing and seeing the lengthy discipline history, the focus must be on the adjudicated disciplinary matters, and the timing of same. In weighing those factors, I find that the length of time that has transpired from the major infractions, during the course of his more than twenty year career, weighs in Bermudez's favor as a mitigating factor not to impose removal. Likewise, considering that the Warden determined it was appropriate to reinstate Bermudez to his position in February 17, 2019, is the mitigating factor which tips the determination in favor of discipline not as harsh as removal. Both experts opined that was an unusual decision to reinstate Bermudez.

Weighing all aggravating and mitigating factors and the proofs presented, including Bermudez's disciplinary history and the totality of the nature and circumstances of Bermudez's behavior resulting in the four sustained charges here, the discipline to be imposed has been pushed to the precipice of the "breaking point" just

shy of removal. I **CONCLUDE** that Bermudez's misconduct does not warrant removal. Considering progressive discipline, I **CONCLUDE** that the imposition of discipline of 180-day suspension without pay, the maximum amount permitted to be imposed as a suspension pursuant to N.J.A.C. 11A:2-20, is appropriate for the charges sustained here: N.J.A.C. 4A:2-2.3(a)(6) conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(12) other sufficient cause; CCDOC policy 3.02A, aka 84-17, section G-Inappropriate release of confidential information; and CCDOC policy 3.02A, aka 84-17, section R-political activity during work hours. I **CONCLUDE** the original removal penalty shall be **MODIFIED** to a 180-day suspension without pay.

### **ORDER**

It is **ORDERED** that the charges of N.J.A.C. 4A:2-2.3(a)(6) conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(12) other sufficient cause; CCDOC policy 3.02A, aka 84-17, section G-Inappropriate release of confidential information; and CCDOC policy 3.02A, aka 84-17, section R-political activity during work hours, from the FNDA of July 1, 2020, have been **SUSTAINED**. All other charges in the FNDA of July 1, 2020, are **DISMISSED**.

It is further **ORDERED** that the disciplinary penalty of removal of Victor Bermudez is **MODIFIED** to a 180-day suspension without pay. It is **ORDERED** that appellant, Victor Bermudez, be returned to his employment as a Corrections Officer with respondent, Cumberland County Department of Corrections, subject to the provisions of this Initial Decision and the accompanying separate Order of this same date.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this

recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

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



January 21, 2021  
DATE

\_\_\_\_\_  
ELAINE B. FRICK, ALJ

Date Received at Agency:

\_\_\_\_\_

Date Mailed to Parties:

\_\_\_\_\_

/dm



**APPENDIX**

**LIST OF WITNESSES**

**For appellant:**

Edmond Cicchi, expert

Victor Bermudez

**For respondent:**

Victor Bermudez

Loren Joynes

Charles Warren, Deputy Warden

Richard Smith, Warden

William Holbrook

Oscar Aviles, expert

**LIST OF EXHIBITS**

**For appellant:**

- P-1 Pre-marked, not moved in (duplicative of R-1, entered)
- P-2 Pre-marked, not moved in (duplicative of R-1, entered)
- P-3 Pre-marked, not moved in (duplicative of R-2, entered)
- P-4 CV of Edmond C. Cicchi
- P-5 Report of Edmond c. Cicchi, dated September 29, 2020
- P-6 Pre-marked, not moved in (duplicative of R-16, entered)  
Bermudez/Cruz text chain

- P-7 Pre-marked, not moved in (duplicative of R-16, entered)  
Bermudez/Cruz/Ziegelheim text chain
- P-8 Pre-marked, not moved in (duplicative of R-16, entered)  
Partial cellular telephone records of Bermudez
- P-9 Pre-marked, not moved in (duplicative information in P-10, entered)  
Interrogatories propounded upon respondent
- P-10 Respondent's interrogatory responses with transcribed interrogatories
- P-11 Transcript October 26, 2018, from departmental hearing, testimony of CO  
Brown and beginning of Investigator Milbourne testimony
- P-12 Transcript November 30, 2018, from departmental hearing, testimony of  
Investigator Milbourne and Alex Cruz
- P-13 Transcript June 30, 2018, from departmental hearing, testimony of  
Milbourne, Warden Richard Smith, and Deputy Warden Warren
- P-14 Pre-marked, not utilized
- P-15 Pre-marked, not utilized

**For respondent:**

- R-1 PNDA, May 22, 2018; Amended PNDA ,May 31, 2018
- R-2 FNDA, July 1, 2020
- R-3 pre-marked, not moved in (duplicative of P-4 and P-5, entered)
- R-4 Expert Report and curriculum vitae of Oscar Aviles, with redactions
- R-5 Collective Negotiations Agreement
- R-6 Policy 5.06 political activity (one page)
- R-7 Disciplinary History-Victor Bermudez
- R-8 Respondent's Written Discovery Responses
- R-9 Appellant's answers to interrogatories
- R-10 IA file R0019-R0200 (picture still shot from video at R0197)
- R-11 Policy 3.02 (pages R0201-R0205)
- R-12 Policy 1.5 (pages R 0206-0211)
- R-13 NJDOC HR Bulletin-Disciplinary Action Policy
- R-14 HR Bulletin 84-17-Attendance Improvement Policy

- R-15 Video of Bermudez/Cruz
- R-16 Petitioner's responses to request for production of documents, supplemental discovery responses (R0261-R0275)
- R-17 Pre-marked, not moved in
- R-18 Pre-marked, not moved in
- R-19 Pre-marked, not moved in (duplicative of P-11, P-12, P-13, entered)
- R-20 Policy 3.02A (a/k/a 84-17)
- R-21 Sign in sheets
- R-22 Policy number 4.6 (Offense charts use from R-20)