STATE OF NEW JERSEY

In the Matter of Robert Curry,
Department of Corrections

CSC DOCKET NO. 2021-326
OAL DOCKET NO. CSR 10174-20

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUNE 8, 2021 ACM

The appeal of Robert Curry, a Correctional Police Sergeant with Bayside State Prison, Department of Corrections, of his removal effective September 3, 2020, on charges, was heard by Administrative Law Judge Dorothy Incarvito-Garrabrant (ALJ), who rendered her initial decision on April 26, 2021. Exceptions were filed on behalf of the appellant, and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on June 2, 2021, accepted and adopted the Findings of Fact as contained in the attached ALJ's initial decision. However, the Commission did not adopt the recommendation to uphold the removal. Rather, the Commission modified the penalty to a 90-working day suspension.

DISCUSSION

The appellant was removed, effective September 3, 2020, on charges of conduct unbecoming a public employee, other sufficient cause, violation of the State Policy Prohibiting Discrimination in the Workplace, and a violation of a rule, regulation, policy, procedure, order or administrative decision. Specifically, the appointing authority alleged that the appellant "liked" a Facebook post from another employee that depicted inappropriate racial content. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In her initial decision, the ALJ set forth that on June 22, 2020, while not physically in his workplace at Bayside State Prison, the appellant saw a link to a 1936 image in his Facebook timeline, of an African-American man being publicly hung at the gallows surrounded by Caucasian law enforcement and civilian males. The image was posted on the Facebook page of a Senior Correctional Police Officer who works at South Woods State Prison. The appellant clicked on the image, which was a hyperlink to a webpage, and he educated himself in depth about the historical significance of the event. After educating himself in depth, the appellant reflected on the image's impact and significance in the climate and environment of 2020 society. He associated the media's efforts to change law enforcement actions and policies in 1936 to the media's efforts in 2020 to reform law enforcement and the justice system. However, the appellant did not provide any explanatory comment on the post for his "like." The ALJ noted that, despite this knowledge, and with his 19 years of experience in the Department of Corrections, after reviewing the image, with its complex, sensitive, and emotionally charged history, the appellant hit the "like" button and was published on the Senior Correctional Police Officer's post. Although the Senior Correctional Police Officer commented in his post that "[w]e need to bring this back," it could not be determined that the appellant liked the post before or after the comment was made.

The ALJ concluded that the appellant's act of "liking" the image alone, without reasonable explanation, and publishing his "like" knowing that it would be made public via the timelines of his Facebook friends with public settings, was sufficiently egregious to serve as a basis on which to pursue disciplinary charges. The ALJ noted that two members of the public saw that the appellant "liked" the image and the Senior Correctional Police Officer's post. In this regard, the ALJ determined at least one member of the public clearly associated the appellant's "like" with his position as a Correctional Police Officer and called into question the appellant's ability to fulfill his job responsibilities fairly and without bias. Moreover, the appellant acknowledged that inmates' friends and relatives could have seen the "like" and conveyed that information to inmates, thus bringing the impact of the post into the inmate population. Additionally, the ALJ found that the appellant did not report the Senior Correctional Police Officer's post, as he is required, and that his lack of reporting further enhanced and defined his "like" of the image's content. Therefore, as the appellant never disavowed his post or the comment until he was confronted with a Special Investigations Division (SID) interview, the ALJ determined that the appellant acted in a discriminatory manner.

Although the appellant argued that his liking the post was constitutionally protected speech, the ALJ noted that law enforcement agencies have the ability to regulate speech under certain circumstances. Therefore, even when it occurs outside of the workplace, Correctional Police Officers may be disciplined for their spoken words should those words be egregious, offensive, violative of a policy, or bring disrespect to the speaker or the department. The ALJ found the appellant's

argument that a "Pickering/Garcetti" analysis was required to evaluate his speech and guarantee his First Amendment Constitutional protections was unpersuasive. *See Pickering v. Board of Education* 391 *U.S.* 563 (1968); *Garcetti v. Ceballos* 547 *U.S.* 410 (2006). In that regard, the ALJ determined that the appointing authority's interest in maintaining a professional, nonbiased, and fair relationship with the inmates trusted to its care outweighs the appellant's right to support, like, and perpetuate discriminatory content and prejudice. Accordingly, the ALJ sustained all of the charges against the appellant. While the appellant had an insignificant disciplinary history during his 19 years of employment with the appointing authority and multiple witnesses attested to his character, the ALJ determined that based on the egregiousness and severity of the sustained charges, the appellant's removal should be upheld.

In his exceptions, the appellant maintains that the ALJ's findings were not supported by sufficient, competent, and credible evidence in the record. In this regard, despite the appellant's testimony that he was a "history buff" who educated himself about various domestic and international histories, the ALJ indicated that his testimony "lacked sincerity" and disabled his credibility. He also states that SID did not undertake any forensic analysis of the Facebook post at all, but the ALJ afforded the testimony proffered in this regard substantial weight. However, there was no demonstrable proof as to when the appellant "liked" the post in relation to the Senior Correctional Police Officer's comment "[w]e need to bring this back." The appellant also notes that he was unaware of any Equal Employment Division (EED) investigation and he was never interviewed by EED. Significantly, the appellant states that the ALJ failed to offer the same weight to the testimony submitted by the appellant's five witnesses regarding the quality of his employment over his 19-year career and his service to the community.

In response, the appointing authority submits that there was sufficient evidence to support the ALJ's determination. It also maintains that the ALJ's credibility determinations were correct and that the penalty of removal is not excessive.

Upon its *de novo* review of the record, the Commission agrees with the Findings of Fact of the ALJ and concludes that the appointing authority has met its burden of proof in this matter. However, for the reasons set forth below, the Commission determines that the appellant's removal should be modified to a 90-working day suspension.

The Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human

experience that are not transmitted by the record." *See In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004).

In this case, the ALJ specifically found that the appellant's pride in his interest in history and his desire to educate himself about it lacked sincerity, as he did not appear to appreciate the content, feelings, emotions, and concerns that would be evoked by "liking" the image and its content without explanation, with or without the inclusion of the Senior Correctional Police Officer's comment. She further explained that the appellant's lack of understanding about and appreciation of the painful feeling embodied in and conveyed by the shocking image regarding social injustice and discrimination were inconsistent with the thoughtful, inquisitive, and considerate persona of an amateur historian that he attempted to portray of himself. Further, the ALJ did in fact accept the brief statements made by the appellant's character witnesses to be their general impressions about the appellant in response to the limited questions asked of them. However, these witnesses did not testify specifically regarding the appellant's "like" of the image or about his interest in history. Therefore, the Commission finds that the appellant has not presented any evidence to disturb the ALJ's credibility determinations or her Findings of Fact. Accordingly, the Commission upholds all of the charges against the appellant.

In determining the proper penalty, the Commission's review is also *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In assessing the penalty in relation to the employee's conduct, it is important to emphasize that the nature of the offense must be balanced against mitigating circumstances, including any prior disciplinary history. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007).

In this case, the appellant's conduct displayed a significant lack of judgment

when he "liked" a posted discriminatory image. This action raised concerns that he could not fairly discharge his duties to those he supervised and the inmate population without bias and with respect and fairness. However, other than a five-day suspension for turning in a questionnaire late, and a few written reprimands, the appellant has never received major discipline in his 19-year career. Moreover, it cannot be ignored that the appellant has received commendations for providing basic and advanced life support aid to an African-American female officer until paramedics arrived and transported her to a hospital in 2017, a commendation for performing CPR on an unresponsive African-American male inmate in 2015 until his pulse returned, and has served in a voluntary capacity as an EMT in various municipalities for over 30 years. While the Commission is cognizant of the seriousness of the sustained charges, these factors certainly bear on the severity of the penalty. Accordingly, the foregoing circumstances provide a sufficient basis to modify the appellant's removal to a 90-working day suspension. *See N.J.S.A.* 11A:2-19 and *N.J.A.C.* 4A:2-2.9(d). This penalty should impress upon the appellant that further infractions will not be tolerated and could lead to more severe disciplinary penalties, up to and including removal.

Since the removal has been modified, the appellant is entitled to mitigated back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10 from 90 working days after his initial removal date to the date of actual reinstatement. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), an award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. Mar. 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this case, the Commission upheld the charges against the appellant and imposed major discipline. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Superior Court of New Jersey, Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* 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. In the interim, as the court states in *Phillips, supra,* if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore modifies the removal to a 90-working suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority following his 90-working day suspension through the day of his actual reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and 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 shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2ND DAY OF JUNE, 2021

Dolores Gorczyca

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Member
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 10174-20
AGENCY DKT. NO. n/a 2021-326

IN THE MATTER OF ROBERT CURRY,
BAYSIDE STATE PRISON.

Frank Crivelli, Esq., for Robert Curry, appellant (Crivelli & Barbati, LLC, attorneys)

Elizabeth A. Davies, Deputy Attorney General, for Bayside State Prison, respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: April 19, 2021 Decided: April 26, 2021

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

STATEMENT OF THE CASE

Appellant, Robert Curry, a Sergeant Corrections Officer at Bayside State Prison (Bayside), appeals his removal, effective September 3, 2020, from his position by respondent for conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12); Human Resource Bulletin (HRB) 84-17, as amended; C(11), conduct unbecoming an employee; C(31) violation of New Jersey Department of Corrections (NJDOC) policy prohibiting

discrimination, harassment or hostile environments in the work place; and E(1) violation of a rule, regulation, policy, procedure, order or administrative decision. (R-1, R-3.)

The appellant denies the allegations that his actions were unbecoming, showed bias, or were discriminatory, when he liked a historical picture on social media. He contends that his actions were appropriate, subject to an inaccurate interpretation, and were Constitutionally protected speech.

PROCEDURAL HISTORY

On July 10, 2020, respondent issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications against appellant. On August 3, 2020, respondent issued a second PNDA setting for the charges and specifications against appellant. The respondent waived his right to appear at a Departmental Hearing. Subsequently, the respondent issued two Final Notices of Disciplinary Action (FNDA) on September 3, 2020, sustaining the charges in the PNDA and removing appellant from his position. (R-1, R-3.) Appellant filed a timely notice of appeal of both FNDAs.

The matter was transmitted to the Office of Administrative Law and perfected on October 26, 2020, for hearing as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The parties agreed the date for perfected service was October 26, 2020. The appellant did not file a waiver of the 180-day rule. The matter was heard on March 4, 2021, and March 9, 2021. The parties filed post-hearing briefs. Thereafter, the record closed on April 19, 2021.

FACTUAL DISCUSSION

Testimony

For Respondent

Timathy Gonzalez (Gonzalez) is a Senior Investigator in the NJDOC Special Investigations Division (SID), Professional Standards Unit (PSU) in Trenton, New Jersey. Gonzalez testified that he has worked in the SID for six years and has had the Senior

Investigator title for three and one-half years. SID receives public complaints, documents, or referrals, which are then assigned for investigation to determine if any State policies have been violated. Interviews are often part of the investigatory process.

Relative to the appellant, SID received a referral from the Chief Investigator. The matter was assigned to Senior Investigator, John Kline. Kline is now retired. Gonzalez was assigned to assist Kline with the interviews. Gonzalez materially participated in the appellant's interview. (R-28.) Gonzalez did not write the investigatory report. (R-5.) The report is regularly produced as document in their investigations. Gonzalez testified that he had reviewed the document. He stated that there was nothing in the document that he did not hear during the interview.

The referral included a copy of a Facebook post made by Wayne Pearson (Pearson), a Senior Correctional Police Officer (SCPO), who is assigned to South Woods State Prison (South Woods), from a member of the public. Some of the materials accompanying the referral were provided by a member of the public, Sherwood Collins (Collins). Collins' post included a History Images[1] copy of a photograph depicting the last public execution by hanging at the gallows. The image is that of an African American man at the gallows with ten to twenty thousand Caucasian onlookers.

The accompanying post appears to be authored by Pearson. Pearson commented on the image as follows: "[w]e need to bring this back." (R-12.) Gonzalez testified that the question for investigation was in what context were appellant and Pearson liking the image or making a remark about it. (R-11, R-12.) Gonzalez testified that the document was presented to the appellant, during his interview. Gonzalez did not know if appellant's Facebook account was public or private at the time of this post. He testified that at some point it became public and his like post was seen by the public. (R-11.) Pearson's Facebook account was public.

Gonzalez testified that during appellant's recorded statement, (R-28), the appellant produced a document reflecting a narrative conversation between appellant and Collins

[1] History Images was identified as a public website which publishes historical information and images.

related to the post. (R-13.) The appellant admitted he liked the post. Collins indicated that the appellant was racist and that he had concerns, because appellant was a corrections officer. There were concerns for the inmate population under his supervision. Appellant answered questions about this document during his interview.

Appellant was asked about Pearson's post during his interview. (R-28.) Appellant did not report Pearson's post. Gonzalez testified that during his interview that appellant admitted to being familiar with the post. The appellant also mentioned being contacted by another person and being called a racist by that person, who he identified as Vaunte.[2] Gonzalez explained that appellant was asked about whether he thought any other DOC employees would have concerns. The appellant was questioned about whether diverse members of his colleagues or diverse members of the inmate population could see the content because it was public. The appellant was questioned about how that could affect them or cause distrust in the department.

Appellant admitted he liked the image, but provided a historical context indicating that he enjoys history. When asked if he liked the picture when the comment, "we need to bring this back," was on the picture, the appellant indicated that he had no recollection one way or the other.

Gonzalez acknowledged that the Investigation Report was signed by Kline. Gonzalez did not write the report. He sat through the two interviews. Gonzalez acknowledged that Kline expressed some opinions based on his review of all the information. Gonzalez stated Kline wrote the summary section of the report. (R-5.)

On cross-examination, Gonzalez testified that relative to the print-out of the post, 7:54 at the top is the phone time of the screen shot. In the black portion of the screen shot it shows 7:01, which is a phone time. (R-11.) Gonzalez testified that there is a circle around "Robert Curry +2." The Facebook like symbol is to the left. At top of the screen shot it says, "Done 1 of 52" and below that there is some text. It then reads Wayne

[2] The accurate spelling of this person's name is unknown.

Pearson and some text, which is undiscernible.[3] Gonzalez agreed there was not any discernable text or comments under Wayne Pearson's name. Gonzalez testified that he did not know who produced the document with the screen shot, and the materials were presented to SID as print-outs only.

Gonzalez testified that he and SID did not contact Facebook in an effort to ascertain when Pearson made his post and on what page the appellant clicked the "like" button. He and SID also did not contact Facebook to authentic the times at which the posts were made. SID had no authority to obtain a Cellular Data Search Warrant, because this was an administrative investigation. SID did not undertake any forensic analysis of the Facebook posts. Gonzalez testified that he did not know the actual times of the post or comment.

Gonzalez detailed exhibit R-12 which included the name, Wayne Pearson, the word yesterday, and "[w]e need to bring this back." It also included History Images, the last public execution in the United States on August 14, 1936. Gonzalez acknowledged this was not on exhibit R-11. He also detailed that the like symbol was not on R-12.

Collins was not interviewed to Gonzalez's knowledge, because he was not a NJDOC employee.

El-Rhonda Williams-Alston (Williams-Alston) is the Director of the Equal Employment Division and Ethics (EED)at the NJDOC. She has been employed with the NJDOC for one month and a few days. She did not do the investigation. The EED investigation was done by Investigator Sharon Felton.[4]

In her position as Director, Williams-Alston receives complaints alleging violations of the DOC's policy prohibiting discrimination in the workplace as part of her job

[3] During the hearing it was agreed that the unclear text was a Facebook proprietary advertisement, which was unrelated to the post.

[4] Petitioner's objection and application to bar respondent from utilizing Investigator Felton's report, which included a summary of the SID report, during the hearing was granted, because it had not been provided or identified in discovery. Appellant maintained he was unaware of any EED investigation and had not been interviewed by Investigator Felton.

responsibilities. (R-22.) Williams-Alston also receives Conscientious Employee Protection Act complaints as part of her job duties. The NJDOC policy prohibiting discrimination in the workplace is "to avoid making others feel uncomfortable or threatened or intimidated by either co-workers and/or those who are above them." Williams-Alston testified that the policy applies to employees while they are at work and outside of work. There are no exceptions to the policy. Also, there does not have to be an intent to discriminate or harass by the person about whom the complaint is made. The policy does not specifically say social media; however, it is included under this policy. Williams-Alston stated that, "[d]isplaying or distributing material (including electronic communications) in the workplace that contains derogatory or demeaning language or images pertaining to any of the above protected categories is prohibited." (R-22.) She testified that every DOC employee receives a copy of the policy against discrimination as part of their employment.

Williams-Alston testified that supervisors are required to report all allegations of discrimination or harassment to their Equal Employment Division Affirmative Action Officer. If a supervisor fails to report such actions, then the supervisor may be subject to disciplinary action, including potential termination. Williams-Alston testified that NJDOC concluded Pearson's post was discriminatory. Williams-Alston testified that the photograph of an African American man at the gallows for his execution, surrounded by several Caucasian men, brings up historical images of when African American men were killed by Caucasian men. NJDOC considers this posting of this picture to be discriminatory.

EED concluded appellant violated the policy against discrimination in the workplace, when appellant liked the image. Even though not liked during the work day, the NJDOC expects its employees to behave in a certain manner in public. Williams-Alston stated that employees may not behave in a discriminatory manner while they are in public. She stated that when appellant went out into the public arena, via the internet, and posted on a discriminatory photograph, it was seen by a member of the public, who then formally complained.

Willie Bonds (Bonds) testified for respondent. Bonds is the Assistant Commissioner of the Division of Operations at the NJDOC. He was promoted to this position less than a month before his testimony. He has been employed with the NJDOC since 1998 and has been an Officer, Sergeant, Lieutenant, Associate Administrator, and Administrator of South Woods, during his career.

Bonds testified that the conduct of all NJDOC officers, whether they are on or off duty, are subject to DOC policy. The Law Enforcement Personnel Rules and Regulations (Regulations) govern the conduct of all NJDOC law enforcement officers. (R-21.) These Regulations prohibit any action that "might reasonably be expected to create an impression, a suspicion that an officer may be engaged in conduct violative of the public trust as an officer." (R-21.) This applies even when an officer is off-duty. It holds officers to a higher standard of conduct twenty-four hours a day. Officers are prohibited by these Regulations from acting in a manner, which discredits the department. (R-21.) The Standards of Professional Conduct require NJDOC employees to perform their job duties without bias. (R-23.) All employees receive copies of this document. Similar to the Regulations, Bonds testified that these Standards apply to all employees whether they are law enforcement or civilians. It is the framework for conduct of NJDOC employees, who are expected to have a higher ethical conduct while they are on-duty and off-duty. (R-23.)

Bonds testified that DOC concluded that Pearson's post was inappropriate and violated departmental policy. (R-12.) Bonds indicated that the correspondence between Collins and the appellant raised concerns within the DOC that appellant's actions upset the public. (R-13.) Bonds indicated that the DOC was concerned that a member of the public felt that their trust in Correctional Officers had been violated. Appellant's actions raised concerns that he could not fairly discharge his duties without bias, relative to his supervision of other officers and in assuring that all individuals were treated fairly and the same. Bond's testified that appellant had a duty to report Pearson's post and did not.

Bonds testified that HRB 84-17 is the guide for employee disciplinary action. It contains the infractions and the range of sanctions that an employee may receive, if they

are found guilty of the infractions. (R-24.) This was used to determine appellant's discipline. Bonds testified that he was familiar that the appellant had a prior disciplinary history, which included a settlement agreement which was approved by the OAL. (R-14.)[5]

On cross-examination, Bonds testified that the NJDOC promulgated a policy that regulates an employee's behavior on social media, and in essence, views a member's behavior on social media as being an extension of the work place. However, Bonds admitted that this policy was not in place when the appellant liked the Facebook post. Bonds was not aware of any policy that specifically spoke to social media prior to the implementation of this new policy.

For Appellant

Robert Curry, appellant, testified on his own behalf. He is the sole income earner for his family of four. He has been employed with NJDOC for nineteen years. The appellant has been assigned to Bayside, since 2013. Prior to that, appellant worked at South Woods. He became a Correctional Police Sergeant in late 2013 or early 2014. Appellant went to the Correctional Officer Training Academy (Academy). He has had continuing training each year, in use of force, ethics, and suicide prevention. The appellant testified that he has worked and volunteered as an EMT in Atlantic City, the City of Millville, and Wildwood Crest. He has served in this voluntary service for approximately thirty years.

Appellant had a minor disciplinary infraction with a five-day suspension for turning in a questionnaire late.[6] He has never been suspended, otherwise. Appellant has some written reprimands, regarding time and attendance infractions. (R-10.) Appellant testified that the first entry on his work history is a commendation, which is misdated as occurring in 1998. It occurred in 2017 at the Fred Baker Memorial Service. A female Correctional Officer passed out during the service, as a result of a medical condition. The appellant

[5] Evidence of the appellant's prior disciplinary history was admitted to be considered in the determination of a penalty, if the disciplinary charges were to be sustained.
[6] R-10; see also, footnote 4.

contacted 911 dispatch, provided first aid, and provided basic and advanced life support aid until paramedics arrived and transported her to the hospital. The appellant testified that the female officer was African American.

Also, the appellant received a commendation for an incident involving an inmate on August 27, 2015. An CPO found an inmate unresponsive in his cell. That officer dragged the inmate out of the cell and began CPR. The appellant stated that the officer did not possess the correct equipment and as a result, no air was entering the inmate's lungs. When the appellant arrived on the scene, he rendered first aid, including repositioning the inmate's head and using a bag valve mask to establish an airway to deliver oxygen through the administration of CPR. As a result of the appellant's actions, the inmate's pulse returned. (A-1.) This inmate was an African American male.

Appellant testified that he has a Facebook account. He uses it to catch up with family, friends, and other people he has not seen in years. He posts and reads posts on Facebook. Appellant's Facebook account is private and only his friends are able to view or read his content. The appellant has approximately 2,500 Facebook friends. Appellant could not recall his Facebook profile ever being public. The appellant testified that when he posts his 2,500 friends can see his content. He further acknowledged that if his friend's settings are public, then the public may be able to see his posts and content.

Appellant knows Pearson is a SCPO at South Woods. They were classmates in the Academy. Pearson was a Facebook friend of appellant. During his testimony the appellant posited that he may have liked the image on the History Images page, and then it may have transferred over to Pearson's timeline and become public.

In June 2020, he saw a History Images post. History Images' pages show posts about American and world history, including about World War II and Japanese History from the 1500s.

When interviewed and testifying, the appellant indicated that he visited the Last Public Execution in America page on the History Images page to educate himself about the event's historical significance. He stated to Kline and testified in this matter that he

liked the post for its historical content. Appellant said he liked the image because it showed we are done with this type of hanging and the actions of the people associated with this incident. He stated that our society is now civilized. Appellant did not remember if he liked the image on History Images or elsewhere. Appellant did not remember if he liked the image on Pearson's timeline or post.

The appellant testified that when he saw the post he clicked on the History Images hyperlink. He learned that the photograph was taken in Kentucky in 1936. It showed an African American man, who allegedly raped, robbed, and murdered a seventy-year old female. The appellant testified that it was a female sheriff who charged the man and that he was not convicted of the crime of murder. He found it interesting that the sheriff was female because it was odd for the time period. The appellant testified that the man had led the sheriff to the stolen jewels, in order to spare his life. He was still executed for rape. The appellant testified that he was disgusted that the sheriff only charged him with the rape in order to hang him. The appellant stated that having 20,000 people watch the hanging was horrendous. The appellant added that the man's "family did not do anything wrong." The appellant explained that the media outrage led to a moratorium on such executions. Appellant associated this with the way the media is changing the way "we police," currently.

When he first saw the picture, appellant believed it was Pearson who had posted it. The appellant also testified that he did not remember if he liked it on History Images or elsewhere. Appellant did not recall seeing Pearson's comment, when he saw the picture and hit the like button. He testified that if he had seen Pearson's comment, then he would not have liked the post because it was a "pro-public execution comment and I oppose that."

Appellant stated that he was familiar with the fact that Facebook posts may be edited after they are liked. He indicated that the like symbol would remain on the page, even after the content that was liked was edited. The appellant believed that Pearson added the comment, after the appellant had liked the image. The appellant explained that exhibit R-11 showed the likes "Robert Curry +2," but on exhibit R-12 it said "Yesterday and 8:00 a.m." Above the comment it said 8:16 a.m. The appellant explained that that

meant it was very likely that the comment was not there when he liked the image. The appellant indicated that this signified that 8:16 a.m. was when Pearson posted his comment. (R-12.) Appellant did not recall ever seeing the comment, until it was brought to his attention by the State.

Appellant testified that he works with uniformed and non-uniformed employees at the NJDOC who are diverse and members of various protective classes. He has never been accused of engaging in racist acts. He has never been accused of being prejudiced by any co-workers or inmates. He has never been investigated by the EED before. Appellant never received a letter from EED that he was being investigated for this incident.

The appellant testified that he never intended to cause harm to the NJDOC by liking that post. He never intended to have the public potentially and allegedly question his actions in any way. The appellant stated that he appreciated the concerns from last summer about racial prejudice and bias of law enforcement.

Appellant's SID interview dated June 22, 2020. The appellant was interviewed by Kline and Gonzalez as part of the SID investigation. His responses during the interview were consistent with his testimony. The appellant indicated that another member of the public named Vaunte also asked the appellant through messages if the appellant was a racist. The appellant indicated that he "surmised" after his review of Collins' public Facebook pages that a colleague from South Woods sent the post to Collins. The appellant maintained that anyone can interpret or make an opinion about what they see. The appellant conceded that in the absence of any explanatory comment, the public may not be able to distinguish what he had liked, if the post was edited after he liked it. The public would also not be able to know, if he liked the image before Pearson posted his comment. The appellant acknowledged that inmates have access to social media and to their friends and relatives, who could see the like and convey that information to them.

Tracey Sparacio (Sparacio) testified on behalf of the appellant. Sparacio is employed by the NJDOC as a Corrections Police Lieutenant at Bayside. She has been employed by the NJDOC for twenty-four years. Sparacio went through the hiring process with appellant. She supervised the appellant at South Woods and at Bayside for a total

of approximately seven to eight years. She testified that the appellant has been a great employee. She indicated she could always depend on him. Sparacio testified that the appellant was always professional when interacting with inmates and had a good rapport with all of the inmates under his care. She testified that the appellant always treated all inmates and co-workers without bias or favoritism, no matter an individual's race or creed.

Irvin Watson (Watson) testified on behalf of the appellant. Watson is a diesel mechanic and friend. He knows appellant through his employment for the last twenty to twenty-five years. Watson has never known the appellant to exhibit any behavior, to speak in any way, or to engage in any type of actions that would lead Watson to believe that the appellant was prejudiced or biased toward any race, color, creed, or nationality.

Eric Gould (Gould) testified on behalf of the appellant. Gould is employed by the NJDOC as a SCPO. He has been employed by the NJDOC for nineteen years and has spent his entire employment working at South Woods. Gould and the appellant attended the Academy together and worked together for ten years at South Woods. Gould testified that the appellant is a good correctional officer. He stated that he does his job thoroughly and does exactly what he is supposed to do. Gould testified that he never observed the appellant engage in any action that could be interpreted as being biased toward an inmate or co-worker, based upon them being a member of a protected class.

Joseph Sterling (Sterling) testified on behalf of the appellant. Sterling is an elected official in Maurice River Township, New Jersey and is retired from the NJDOC as a SCPO. Sterling has known the appellant for approximately fifteen years. They met while they were volunteering in the Emergency Rescue Services, EMS, and fire department. Sterling never observed the appellant exhibit any behavior that could be interpreted as being biased or prejudiced toward any person. Sterling testified that had he seen the appellant act in a biased manner or exhibit prejudice he would have distanced himself from the appellant.

Lance Crenny (Crenny) testified on behalf of the appellant. Crenny is employed by the NJDOC as Correctional Police Lieutenant. He has been employed by the NJDOC for twenty-four years, and is currently assigned to Bayside. The appellant has reported

directly to Crenny, since 2016. Crenny worked side by side with the appellant four to five days per week. Their contact during the work day was frequent.

Crenny testified that the appellant is a very effective Sergeant and is very fair. Crenny said that appellant was an officer, who resolved conflict. He was able to de-escalate situations, in which staff or inmates were involved. Crenny testified that the appellant treated the inmate population fairly without any bias toward race or national origin. Crenny testified that the majority of the prison population is African American. Crenny never received any complaints about the appellant being biased.

Credibility

Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be

a reasonable one. Renan Realty Corp. v. Cmty. Affairs Dep't, 182 N.J. Super. 415, 421 (App. Div. 1981).

Here, the appellant maintained that he was a self-educated history buff, who traveled to Savannah and to the South, as much as his time permitted. The appellant stated that he tried to educate himself about various domestic and international histories and often visited the History Images page. He specifically clicked on the image and read about the public execution to educate himself about it in depth. However, that pride in his interest in history and that he wished to educate himself about it lacked sincerity. Appellant consistently did not appear to appreciate the context, feelings, emotions, and concerns that would be evoked by liking the image and its content without explanation and with or without the inclusion of Pearson's comment. His justification was hollow and appeared contrived to reasonably excuse his actions. Appellant's lack of understanding about and appreciation of the painful feelings embodied in and conveyed by the shocking image, regarding social injustice and discrimination, were inconsistent with the thoughtful, inquisitive, and considerate persona of an amateur historian that he attempted to portray of himself. This disabled his credibility and his allegations that he liked the image for academic or socially progressive reasons. His testimony appeared especially insincere in light of his higher level of knowledge about the history of the South and his first-hand travel experiences to the South to study history.

Appellant uses Facebook regularly. He posts and reads posts on Facebook. He has 2,500 Facebook friends. It is extremely unlikely that anyone in our country, especially those using social media or employed in law enforcement, could have escaped the coverage and had no knowledge or awareness about the national events, protests, and competing discourse involving social injustice, discrimination, and bias in the justice system and law enforcement, during 2020. It is with this backdrop that the appellant would like this tribunal to believe his liking of the image, on June 22, 2020, was innocent and academic. The appellant would also like this tribunal to believe that he was "disgusted" by the execution, and believed society had progressed away from such racial discrimination. However, he never reported Pearson for his post. As a result, this tribunal cannot reach those conclusions. That context, along with the fact that appellant was a Correctional Police Sergeant assigned to the Farm Unit at Bayside, a facility in which a

majority of the inmate population is African American, further made his testimony not credible.

The testimonies of appellant's five friends produced little information about the appellant's actions on June 22, 2020. While this tribunal accepts their brief statements to be their general perceptions about appellant in response to the limited questions asked of them, their collective testimonies appeared to be five friends attempting to aid their mutual friend. Their testimonies failed to demonstrate that appellant's reason for liking the image was believable and did little to rehabilitate his testimony. As a result of those relationships, and that they did not testify specifically regarding the appellant's like of the image or about his interest in history, their testimonies were attributed little weight.

FINDINGS OF FACT

After carefully reviewing the exhibits and documentary evidence presented during the hearing, and after having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following as **FACT:**

Appellant has been employed by the NJDOC for nineteen years. He has served in a supervisory position as a Correctional Police Sergeant since 2013. The appellant is assigned to the Farm Unit at Bayside. Prior to his assignment to Bayside, the appellant worked at South Woods. The majority of the inmates incarcerated at Bayside are African American. During his career, appellant received continuing training about the use of force, ethics, and suicide prevention. The appellant works with uniformed and non-uniformed NJDOC employees, who are diverse and members of various protected classes. The appellant worked and volunteered as an EMT in various municipalities in South Jersey, during the last thirty years. As an NJDOC employee appellant received copies of the Regulations, Standards, and the policies pertinent to this matter. (R-21, R-22, R-23 and R-24.)

Appellant has a Facebook account, which he uses to catch up with family, friends, and other people he has not seen in years. The appellant has approximately 2,500 Facebook friends. He regularly posts and reads posts on Facebook. Appellant's

Facebook account is private and only his Facebook friends are able to view or read his content. Some of the appellant's Facebook friends' accounts are public. In those instances, the public may view or read the friend's posts and content. The public may also view and read the appellant's content, posts, or likes if they are posted to or entered on one of his friend's public Facebook pages.

On June 22, 2020, the appellant saw a posted image in his Facebook timeline, while not physically in his workplace at Bayside. The image was posted on Pearson's public Facebook page. Pearson is a SCPO at South Woods. The appellant and Pearson attended the Academy together. Pearson was the appellant's friend and worked with him at South Woods.

The appellant clicked on the image, which was a hyperlink to either a History Images page or to Wikipedia. He educated himself in depth about the historical significance of the event. In this regard, the appellant educated himself in great detail about the image. He learned that the image posted on Facebook that depicted an African American man being publicly hung at the gallows surrounded by Caucasian law enforcement and civilian males. He learned that there was media outrage that an African American man was executed without due process and made a public spectacle. He learned that the photograph was taken in Kentucky in 1936. It showed an African American man, who allegedly raped, robbed, and murdered a seventy-year-old woman. The female sheriff charged the man with murder, rape, and robbery. He learned that the man was executed based on the rape charge, so that he could be executed and hung in public. He learned that, in an attempt to spare his life, the man had led law enforcement to the jewels he had stolen. He learned the man was not convicted of the murder charge and that law enforcement did not pursue that charge, because then the man would have been executed in an electric chair and not in public. He learned that tensions related to issues of social injustice and discrimination in law enforcement policing and the justice system were inflamed by the event. He learned that the media was outraged and its efforts became focused on ending these unjust, racially biased driven executions. He learned that this was the last public execution by hanging at the gallows in the United States.

After educating himself in depth, the appellant, by his own admission, reflected on the image's impact and significance in the climate and environment of 2020 society. The appellant admittedly associated the media's efforts to change law enforcement actions and policies in 1936, to the media's efforts in 2020 to reform law enforcement and the justice system. Despite this knowledge and with his nineteen years of experience as a Correctional Officer and Sergeant, after reviewing the image with its complex, sensitive, and emotionally charged history, the appellant hit the like button and his liked symbol was published on Pearson's post. The appellant did not provide any explanatory comment for his like.

Appellant's testimony about his observation of Pearson's comment was inconsistent, at best. He could not recall when he saw Pearson's comment. The SID did not conduct any forensic analysis regarding the sequential order of appellant's like and Pearson's post. It cannot be determined with any certainty that the appellant liked Pearson's post before or after Pearson added the comment, "[w]e need to bring this back." Notwithstanding this, the reason for respondent filing disciplinary charges was not entirely based on the appellant having liked the image after Pearson's comment.

When interviewed, the appellant conceded that in the absence of any explanatory comment, the public may not be able to distinguish what about the image and its content he had liked and why. He also conceded that the public would also not be able to know, if he liked the image before Pearson posted his comment. The appellant's act of liking the image alone without reasonable explanation and publishing his like knowing that it would be public via the timelines of his Facebook friends with public settings, was sufficiently egregious to serve as the basis for the respondent to pursue the disciplinary charges against the appellant.

When the appellant liked Pearson's posted image of the hanging, the appellant's private like of the image's content became public through Pearson's public Facebook account. Two members of the public, Collins and Vaunte saw that the appellant had liked the image and Pearson's post. The appellant believed that one of Pearson's colleagues at South Woods saw the post, its image, Pearson's comment, and that appellant had liked the post. Appellant believed that that person had provided the post to Collins. Collins

and Vaunte each contacted the appellant via Facebook Instant Messenger, and called the appellant a racist. Collins wrote: "[a]re you really a [correctional officer] [shaking my head] good luck to ur (sic) union." Collins further wrote that "[u]r (sic) a racist and have 0 business being a [correctional officer] guarding black inmates I can imagine the torture you've taken them through." (R-13.) Collins clearly associated the appellant's like with his position as a NJDOC Officer. For Collins, it called into question the appellant's ability to fulfill his job responsibilities fairly and without bias. The appellant acknowledged that inmates have access to social media and could have seen his post. The appellant further acknowledged that inmates' friends and relatives could have seen the like and conveyed that information to the inmates, thus bringing the impact of the appellant's post into the inmate population at Bayside.

Appellant's Facebook post was provided by Collins to the NJDOC. It was brought to the attention of the Chief Investigator, who made a referral to SID for an investigation. Kline and Gonzalez interviewed the appellant. (R-28.) Kline authored an investigatory report.[7] (R-5.)

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[7] This exhibit, (R-5), the Investigation Report, was admitted into evidence over the hearsay objection of appellant's counsel. Hearsay may be admitted as evidence in administrative proceedings. Judicial rules of evidence do not apply to administrative agency proceedings, except for rules of privileges or where required by law. N.J.R.E. 101(a)93); DeBartolomeis v. Bd. of Review, 341 N.J. Super. 80, 82 (App. Div. 2001); N.J.S.A. 52: 14B-10(a); and N.J.A.C. 1:1-15(c).

Hearsay are statements other than ones made by the declarant while testifying at a hearing, offered into evidence to prove the truth of the matter asserted. N.J.R.E. 801(c). Hearsay is usually not admissible because it is deemed untrustworthy and unreliable (N.J.R.E. 802), unless it falls within an exception set forth in N.J.R.E. 803 or 804. However, hearsay is admissible in an administrative proceeding such as this one subject to the "residuum rule," which mandates that the administrative decision cannot be predicated on hearsay alone. Weston v. State, 60 N.J. 36 (1972).

> [A] fact-finding or legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal competent evidence in the record to support it. Id. at 51.

The Uniform Administrative Procedure Rules governing administrative agency proceedings codify this doctrine by requiring that "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(c). In assessing hearsay evidence, it should be accorded "whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability. N.J.A.C. 1:1-15.5(a).

The appellant had a duty to report Pearson for his comment, once appellant read it. The appellant did not report Pearson as required. Appellant's lack of reporting further enhanced and defined his like of the image's content. In this regard, the appellant stated that had he seen Pearson's comment, then he would not have liked the post because it was a "pro-public execution comment and I oppose that." Other than summarily saying that what occurred was disgusting and the execution event horrific, the appellant never expressed a thorough appreciation of the issues of discrimination, or remorse for the impression he created. He appeared to focus on Pearson's statement being solely about bringing back public executions. Appellant lacked the perspective and understanding that is expected from someone in his position, who works in law enforcement and at Bayside. Appellant never disavowed his post or Pearson's comment until confronted in his SID interview.

The appellant acted in a discriminatory manner when he liked the image and its content. The image is discriminatory. The appellant liked the historical event and its racially biased surrounding circumstances and content. He broadcasted that message. No competent evidence was produced to support that the appellant was expressing his socially progressive or academic beliefs relative to his liking of that post. Appellant's like of the image was not speech protected by the First Amendment. Such post was inappropriate given the appellant's sensitive position in public trust.

Two PNDAs were issued to the appellant. The first was issued on July 10, 2020. It charged the appellant with conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12); Human Resource Bulletin (HRB) 84-17, as amended; C(11), conduct unbecoming an employee; C(31) violation of New Jersey Department of Corrections (NJDOC) policy prohibiting discrimination, harassment or hostile environments in the work place; E(1) violation of a rule, regulation, policy, procedure, order or administrative decision. (R-4.)

Based on the testimony and documentary evidence there was a residuum of competent proof in the record to all for its admission.

The second was issued on August 3, 2020. It repeated the charges from the July 10, 2020 PNDA and charged the appellant with conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12); Human Resource Bulletin (HRB) 84-17, as amended; C(11), conduct unbecoming an employee; and C(31) violation of New Jersey Department of Corrections (NJDOC) policy prohibiting discrimination, harassment or hostile environments in the work place. This second PNDA did not include the charge of E(1) violation of a rule, regulation, policy, procedure, order or administrative decision. (R-2.) The Specifications attached to the second PNDA were slightly different than those attached to the first PNDA. The second PNDA's Specifications removed reference to Pearson by name. They were also more fact specific to the HRB 84-17, as amended, C(31) charge. (R-2.)

For these charges on September 3, 2020, the appellant was issued two FNDAs, sustaining the charges and removing appellant from his employment as a Correctional Police Sergeant. The first FNDA numbered 2100107 charged appellant with conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12); specifically violations of Human Resource Bulletin (HRB) 84-17, as amended; C(11), conduct unbecoming an employee; and C(31) violation of New Jersey Department of Corrections (NJDOC) policy prohibiting discrimination, harassment or hostile environments in the work place. (R-1.) The attached Specifications were the same as those attached to the second PNDA, dated August 3, 2020.

The second FNDA numbered 2100106, also issued on September 3, 2020, repeated the same charges as those in the first FNDA, and added a charge for E(1) violation of a rule, regulation, policy, procedure, order or administrative decision and repeated the charges made in the first PNDA. (R-3.) The attached Specifications were the same as those attached to the first PNDA, dated July 10, 2020.

LEGAL ANALYSIS AND CONCLUSIONS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act

related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

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

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

> The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not properly operated, have a capacity to become "tinderboxes."

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

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

Appellant was charged with "conduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also, In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

The primary basis for the charge of conduct unbecoming was that appellant liked a Facebook post of an image and its content, which was discriminatory. It depicted the last public execution in America. It showed an African American man being publicly hung at the gallows, in 1936, surrounded by thousands of Caucasian law enforcement and civilian males, after a trial, during which he was not afforded due process.

As a Correctional Police Sergeant, appellant had a duty to recognize and appreciate that individuals incarcerated in Bayside had lost their freedom, and that he was entrusted to protect the inmates' limited rights, dignity, and safety in that environment in a fair and unbiased manner. Inmates are in a unempowered position in the facility.

Here, the appellant violated the public trust. His actions raised concerns that he could not fairly discharge his duties to those he supervised and to the inmate population without bias, and with respect and fairness. The fact that the appellant alleged that he did not have any discriminatory or biased intent when he liked the image is of no moment. It is not about what the appellant intended, but rather, it is entirely about how his conduct

was perceived by, or how the message his like conveyed, impacted and offended the general public, especially members of protected classes, and at least one known co-worker.

The appellant's attempt to separate his like of the post from the inflammatory and offensive comment made by Pearson is also of no moment. While the appellant's Facebook like which adopted and published his own beliefs, in this case support for the discriminatory content of the image, may be forever publicly linked in the digital world to Pearson's comment, the instant decision is not based on appellant having liked the image after Pearson's statement. Appellant's like of the image stands alone and is sufficiently egregious and shocking, especially in the context of the civil unrest of 2020. As an avid Facebook user, appellant knew he lost control over and privacy to his post, when he liked the image on Pearson's page. However, Pearson's comment is not being considered herein to increase the significance and harm solely resulting from appellant's post.

To the contrary of appellant's argument, the liking of the image in the manner in which he did without explanation or credible reason was an act perpetuating discrimination and bias. The argument that an officer could engage in discriminatory speech outside of the workplace and that it would not have an impact on the public trust or confidence in that officer or the department it without merit. In his position as a Correctional Police Sergeant that act of discrimination, promulgating racially biased content and stereotypes does, in fact, affect his workplace. It affects his colleagues and the inmates he has been trusted to treat fairly and keep safe. The speech of officers is appropriately restricted, unlike general members of the public, by the policies governing their employment. Karins v. City of Atl. City, 152 N.J. 532 (1998). Derogatory statements made by a public employee can have the propensity to interfere with the government's ability to carry out efficient public objectives. Id.

Appellant's argument that liking this post was constitutionally protected speech which precludes the imposition of any discipline was unpersuasive, given the totality of circumstances presented. In this regard, appellant attempts to argue that his speech was protected and thus, his conduct was appropriate. Appellant's conduct is at issue in two respects, the act of posting his like on Facebook and the message he conveyed through

that post. Law enforcement agencies have the ability to regulate the speech of their employees, under certain circumstances. Id. Appellant admitted his conduct and speech are subject to scrutiny while on duty and off duty. Appellant knew he could be disciplined for actions and speech, which occur outside of the workday and workplace. In this light, the appellant's contention that his speech was not made in an "extension of the workplace" is unsupported. Suffice it to say, that it is well-settled that CPOs may be disciplined for their spoken word should it be egregious, offensive, violative of a policy, or bring disrespect to the speaker or the department, even when it occurs outside of the workday and workplace, because their workplace is extended to governing and restricting their conduct and speech in their private lives.

Appellant argues that a "Pickering/Garcetti" analysis is required to evaluate the appellant's speech and guarantee his First Amendment Constitutional protections. Pickering v. Board of Education, 391 U.S. 563 (1968); Garcetti v. Ceballos, 547 U.S. 410 (2006). Appellant contends that his liking the image and content was protected speech. First, appellant concludes that his speech was made as a private citizen and was not made pursuant to his employment duties or among the things he was employed to do. Garcetti, at 421. The post was only tangentially and insubstantially involved in the subject matter of the like and therefore, the appellant was a private citizen when he made it. Pickering, at 17. Second, appellant concludes that his speech may "be fairly considered as relating to any matter of political, social, or other concern to the community." Synder v. Phelps, 562 U.S. 443, 453 (2011). Third, appellant concludes that the respondent did not have adequate justification for imposing the disciplinary removal action, because the interests of the employee and the public's interest in the protection of free speech outweighs the respondent's interest in disciplining the appellant. Garcetti, 547 U.S. 410 (2006).

However, to the contrary, appellant's argument and analysis is unpersuasive and unsupported by the credible evidence in the record. Relative to the first prong, while appellant was not on-duty or physically in the workplace, his conduct and speech are restricted twenty-four hours a day to require and ensure a higher level of conduct, awareness, and sensitivity, because he is a Correctional Police Sergeant. This should not be interpreted to mean that any of appellant's daily speech outside the workplace

cannot be made as a private citizen. Rather, it means that the appellant must be cognizant that his private speech is not afforded automatic guarantee of privacy like that of other members of the public, because he chooses to be employed as a Correctional Police Sergeant and voluntarily accepts the restrictive conditions of his employment, which may limit his First Amendment rights.

Appellant chose to adopt and perpetuate the discriminatory content and negative stereotypes of the image, when he posted his like without explanation. The content of that image and its history substantively relate to and reflect appellant's employment duties. Garcetti, at 421. This is not speech, the subject of which was in any way unrelated to law enforcement or appellant's duties as a Correctional Police Sergeant. The appellant liked the image of an inmate who was wrongfully executed in public because of prejudice, discrimination, and bias in law enforcement, the justice system, and society. Maintaining the inmates' safety, treating them with dignity, assuring that they are treated fairly and without bias are the appellant's employment duties. Appellant's like is exactly the opposite of his duties. It is the opposite of what he has been trained to do and swore to uphold. In this regard, appellant's employment was fundamentally and substantially involved in the subject matter of his communication. As such, the appellant was not simply a member of the general public, when he liked the image and its content. Pickering, at 17. He made this speech as a public employee and the evidence demonstrated that the appellant was identified as a CPO, by two members of the public, who reasonably believed that the content of the image and appellant's duties were substantially the same.

While the liking of the image involved a matter of public concern given the context of 2020, the post did nothing to legitimately advance productive reasonable discourse about issues of social injustice. Synder v. Phelps, 562 U.S. 443, 453 (2011). To the contrary, appellant's statement impaired harmony and order among NJDOC employees. It affected his colleagues. It violated the public trust. It impeded the performance of the appellant's duties and interfered with the regular operation and maintenance of order of the respondent and larger NJDOC. Rankin v. McPherson, 483 U.S. 378 (1987). Appellant's statements struck at the heart of appellant's duties to the NJDOC, respondent, his colleagues, and the inmates entrusted to his supervision. Collins' and Vaunte's

objections are sufficient evidence to show that the NJDOC was discredited. Appellant's speech and conduct fomented already high tensions between African Americans and law enforcement. It disrupted the department. Karins, 152 N.J. 532 (1998)

As a result, after balancing the employee and public's interests in free speech against the government's interest in charging the appellant, the respondent had an adequate justification for imposing the specific penalty upon the public employee, pursuant to Garcetti. The respondent's interest in maintaining order and a professional, nonbiased, and fair relationship with the inmates trusted to their care outweighs the appellant's right to support, like, and perpetuate discriminatory content and prejudice. The speech appellant seeks to interpret as protected to avoid discipline, if unknown to the public, would not deprive the public of information that is especially valuable. The government's action, in this case the respondent bringing disciplinary charges against the appellant, does not impair or unreasonably interfere with appellant's constitutional protections afforded by the First Amendment, under the totality of circumstances presented herein and the lack of credibility of appellant's testimony.

Based on the foregoing, I **CONCLUDE** the appellant's Facebook like of the image and its content, under the totality of facts and evidence was not protected speech.

Additionally, the appellant had a duty to report Pearson for his comment once he read it. The appellant did not report Pearson as required. Appellant's lack of reporting further enhanced and defined his like of the image's discriminatory content as his support for such prejudiced beliefs.

Appellant's conduct was such that it adversely affected the morale or efficiency of the respondent and would have a tendency to destroy public respect in the delivery of governmental services. Under the circumstances presented here, appellant displayed a significant lack of judgment and acted in an egregious manner, when he liked and posted the discriminatory image and content, which violated his obligations and duties. I **CONCLUDE** that appellant's behavior did rise to a level of conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6). I **CONCLUDE** that respondent has met

its burden of proof on this issue. Accordingly, I **CONCLUDE** that this charge against appellant is **SUSTAINED**.

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

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

> In any disciplinary matter, reference must always be made to the collective bargaining agreement covering the disciplined employee, relevant Department of Personnel Rules, appropriate Department bulletins or memoranda, the Handbook of Information and Rules for Employees of New Jersey Department of Corrections, and/or the Law Enforcement Personnel Rules and Regulations. (R-24.)

C(11) Conduct Unbecoming an Employee

As a Correctional Police Sergeant, appellant is held to a higher standard of conduct which is aimed at bringing honor and respect to himself, his coworkers, and the respondent.

In Article I, Section 2 of the Regulations, Correctional Police Officers are specifically prohibited from acting "in any way that might reasonably be expected to create an impression of suspicion that an officer may be engaged in conduct violative of the public trust as an officer." (R-21.) At Article III, Section 3, entitled Professional Conduct, provides as follows:

> No officer shall act or behave in an official or private capacity to the officer's discredit, or to the discredit of the Department. Officers are public servants twenty-four hours a day and will be held to the law enforcement higher standard both on and off-duty.

The NJDOC holds officers to a higher standard of conduct twenty-four hours a day. Further Article III requires that "no officer shall discriminate against or harass any

employee, inmate, parolee, or member of the general public," based upon that individual being a member of a protected class. (R-21.)

Similar to the Regulations, all NJDOC uniformed and non-uniformed employees must abide by the requirements of the Standards of Professional Conduct. (R-23.) The Standards recognize that NJDOC employees "hold a special position of trust as public employees." NJDOC employees are expected to have a higher ethical conduct while they are on-duty and off-duty. (R-23.)

Appellant displayed a significant lack of judgment and acted in an egregious manner when he liked and posted the discriminatory image and content, given his position as a Correctional Police Sergeant. When interviewed, the appellant conceded that in the absence of any explanatory comment, the public may not be able to distinguish what about the image and its content he had liked and why. He also conceded that the public would also not be able to know if he liked the image before Pearson posted his comment. The appellant acknowledged that inmates have access to social media and could have seen his post. The appellant further acknowledged that inmates' friends and relatives could have seen the like and conveyed that information to the inmates, thus bringing the impact of the appellant's post into the inmate population.

Based on the totality of circumstances presented herein, the appellant violated the public trust. His actions raised concerns that he could not fairly discharge his duties to those he supervised and to the inmate population without bias, and with respect and fairness. He supported and perpetuated discriminatory content and beliefs.

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

C(31) Prohibiting Discrimination In The Workplace

Based on the expectation that Corrections Officers must conduct themselves with a higher standard of conduct, they are prohibited from engaging in or using "derogatory or demeaning references regarding a person's race, gender, age, religion, disability, affectional or sexual orientation, ethnic background, or any other protected category." (R-22.)[8] In furtherance of this policy, Section III, entitled Prohibited Conduct, provides in pertinent part an inexhaustive list of examples of behaviors that would constitute a violation of this policy, as follows:

> Displaying or distributing material (including electronic communications) in the workplace that contains derogatory or demeaning language or images pertaining to any of the above protected categories.

Section IV Supervisor Responsibilities provides in pertinent part as follows:

> Supervisors must make every effort to maintain a work environment that is free from any form of discrimination/harassment. Supervisors shall immediately refer allegations of prohibited discrimination/harassment to the NJDOC's Equal Employment Division/Affirmative Action Officer..., or any other individual designated by the NJDOC to receive complaints of workplace discrimination/harassment. A supervisor's failure to comply with these requirements may result in administrative and/or disciplinary action, up to and including termination of employment. For purposes of this section and in the State of New Jersey Model Procedures for Processing Internal Complaints Alleging Discrimination in the Workplace (Model Procedures), a supervisor is defined broadly to include any manager or other individual who has authority to control the work environment of any other staff member (for example, a project leader). (R-22.)

The policy in Section II, paragraph A provides instruction in pertinent part as follows:

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[8]The policy referred to was originally effective on December 16, 1999 and revised on October 8, 2019. (R-22.) Subsequent to the appellant's Facebook post, the NJDOC promulgated a new policy that regulates an employee's behavior on social media and considers a member's behavior on social media as specifically being an extension of the workplace. This policy was not in effect on June 22, 2020. Therefore, it is inapplicable to this matter.

> To achieve the goal of maintaining a work environment free from discrimination and harassment, the State of New Jersey strictly prohibits the conduct that is described in this policy. This is a zero tolerance policy. This means that the state and its agencies reserve the right to take either disciplinary action, if appropriate, or other corrective action, to address any unacceptable conduct that violates this policy, regardless of whether the conduct satisfies the legal definition of discrimination or harassment.

As stated in the policy, prohibited discrimination undermines the integrity of the employment relationship and debilitates morale and productivity. The policy provides, in Section II, paragraph B in pertinent part provides as follows:

> This policy also applies to both conduct that occurs in the workplace, and conduct that occurs at any location which can be reasonably regarded as an extension of the workplace (i.e. any field location, any off-site business-related social function, or any facility where State business is being conducted and discussed).

While appellant has argued that this policy is inapplicable because the liking of the image occurred while he was off-duty, experiencing his private life, and not engaged in workplace activities, that argument is unpersuasive for the reasons set forth above. The appellant's conduct is subject to a higher standard and is restricted even when off-duty or not physically in the workplace. Inherent in this policy is that CPOs and especially supervisors, are serving and reflective of the NJDOC twenty-four hours every day, even while not physically in the workplace facility. As a result, conduct which falls below that higher standard in the appellant's private life is subject to discipline, as if he had been on-duty or physically in the workplace.

Additionally, the general public observed, and may be continuing to observe in the forever permanent digital world, two Correctional Officers engaged in online actions mutually sharing and liking discriminatory posts about law enforcement, the justice system, jail, an African American inmate, and a public execution by hanging without due process observed by 20,000 Caucasian law enforcement officers and civilian men. That image's content is specifically related to the employment both appellant and Pearson hold. As a result, it is reasonable that the public could determine that the online posts

mutually shared and liked by the appellant and Pearson was a business-related social function.

As a Correctional Police Sergeant, appellant had a duty to recognize and appreciate that individuals incarcerated in Bayside had lost their freedom, and that he was entrusted to protect the inmates' limited rights and their dignity in that environment in a fair and unbiased manner. Inmates are in a unempowered position in the facility. Here, the appellant violated the public trust. His actions raised concerns that he could not fairly discharge his duties to those he supervised and to the inmate population without bias, respect, and fairness. The argument that an officer could engage in discriminatory speech outside of the workplace and that it would not have an impact on the public trust or confidence in that officer or the department is without merit.

Here, the appellant displayed and distributed through electronic communications material containing derogatory or demeaning images and content pertaining to a person's race. His actions raised concerns that he could not fairly discharge his duties to those he supervised and to the inmate population without bias, and with respect and fairness. His actions were egregious.

Additionally, appellant is a supervisor. He failed to make every effort to maintain a work environment that is free from any form of discrimination. After appellant became aware of his comment, he failed to report Pearson to the NJDOC's Equal Employment Division/Affirmative Action Officer, in violation of policy.

Therefore, I **CONCLUDE** that appellant engaged in discriminatory behavior which was unbecoming and in violation of N.J.A.C. 4A:2-2.3(a)(11), specifically State Department of Corrections Discipline Policy HR 84-17, as amended, C(31), violation of New Jersey Department of Corrections (NJDOC) policy prohibiting discrimination, harassment or hostile environments in the work place. I **CONCLUDE** that respondent has met its burden of proof on this issue. Accordingly, I **CONCLUDE** that this charge against appellant is **SUSTAINED**.

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

Appellant's actions discredited him, respondent, and his colleagues. Appellant's actions were unbecoming and discriminatory, based on all of the foregoing.

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

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

Finally, appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. As detailed above, appellant's conduct was such that he violated this standard of good behavior and was unbecoming and discriminatory. As such, I **CONCLUDE** that the respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's actions violated N.J.A.C. 4A:2-2.3(a)(12). Accordingly, I **CONCLUDE** that this charge against appellant is **SUSTAINED**.

Based on all of the foregoing, I **CONCLUDE** that the respondent has sustained its burden of proof as to the charges of conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12); Human Resource Bulletin (HRB) 84-17, as amended; C(11), conduct unbecoming an employee; C(31) violation of New Jersey Department of Corrections (NJDOC) policy prohibiting discrimination, harassment or hostile environments in the work place; and E(1) violation of a rule, regulation, policy, procedure, order or administrative decision. The charges brought against appellant in the two FNDAs, dated September 3, 2020, are **SUSTAINED**.

PENALTY

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

The law is also clear that a single incident can be egregious enough to warrant removal without reliance on progressive-discipline policies. See, In re Herrmann, 192 N.J. 19, 33 (2007) (Division of Youth and Family Services worker who snapped lighter in front of five-year-old), in which the Court stated:

> ". . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest."

Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public

interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522–24. Major discipline may include removal, disciplinary demotion, or a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

The penalty sought is removal of appellant from his employment as a Correctional Police Sergeant.

Relative to the existence of mitigating factors, there is no question that appellant had a basically uneventful disciplinary record, during his nineteen years of service. (R-10.) He did not have any prior incidents requiring major discipline. He received three written reprimands which related to time and attendance infractions in 2003, 2008, and 2011, respectively. The appellant received a five-day suspension on May 11, 2010. That discipline arose from work that he had performed and submitted late. Appellant did not receive any discipline between 2011 and the instant incident in June 2020. (R-10.)

The appellant received three commendations. The first was in 2003 and arose from a snow emergency. (R-10.) The second commendation occurred in 2017 at the Fred Baker Memorial Service. A female SCPO passed out during the service, as a result of a medical condition. The appellant contacted 911 dispatch, provided first aid, and provided basic and advanced life support aid, until paramedics arrived and transported her to the hospital. The female officer was African American. (A-1.)

The third commendation arose from an incident involving an inmate on August 27, 2015. An CPO found an inmate unresponsive in his cell. That officer dragged the inmate out of the cell and began CPR. That officer did not possess the correct equipment and as a result, no air was entering the inmate's lungs. When the appellant arrived on the scene, he rendered first aid, including repositioning the inmate's head and using a bag valve mask to establish an airway to deliver oxygen through the administration of CPR. As a result of the appellant's actions, the inmate's pulse returned. (A-1.) This inmate was African American. (A-1.)

The appellant had no prior allegations of discriminatory conduct towards members of protected classes, who worked for the NJDOC or who were incarcerated within its facilities. The character witnesses, all of whom were the appellant's friends, had never observed the appellant engage in any discriminatory behavior or exhibit any bias. Their testimonies were consistent with the appellant's work history and lack of significant prior discipline. However, in weighing their testimonies against the appellant's admitted actions, their statements were insufficient to demonstrate that the appellant did not engage in biased or discriminatory conduct on June 22, 2020. As a result, they were attributed little weight by this tribunal beyond being mitigating facts.

These factors must be evaluated in relation to the following.

Respondent argued that appellant acted in an unbecoming and discriminatory manner by perpetuating negative racial stereotypes and prejudices, when he liked the image and its content on June 22, 2020. Respondent submitted that appellant's conduct brought disrepute to the NJDOC. Respondent contended that appellant's actions were egregious. There is zero tolerance for discriminatory conduct, especially for supervisors. His actions raised concerns that he could not fairly discharge his duties to those he supervised and to the inmate population without bias, and with respect and fairness.

Here, appellant denied the allegations and steadfastly maintained that he was a history buff. He maintained he liked the image and its content to show how far society has progressed, such that public executions by hanging at the gallows no longer occur. After educating himself in depth, the appellant, by his own admission, reflected on the image's impact and significance in the climate and environment of 2020 society. The appellant admittedly associated the media's efforts to change law enforcement actions and policies in 1936, to the media's efforts in 2020 to reform law enforcement and the justice system. However, despite this knowledge and alleged understanding, and his nineteen years of experience in law enforcement, after reviewing the image with a complex, sensitive, and racially charged history, the appellant hit the like button and his liked symbol was published on Pearson's post. The appellant did not provide any explanatory comment for

his like. The appellant did not report Pearson's post, which too would have appeared in appellant's Facebook timeline.

As a regular Facebook poster, the appellant knew that although his account was private, his posts would become public if his friends' accounts were public. The appellant knew that inmates have access to social media and could have seen his post. The appellant further knew that inmates' friends and relatives could have seen the like and conveyed that information to the inmates, thus bringing the impact of the appellant's post into the inmate population.

Appellant excused his conduct by indicating that he cannot control the opinions that others may form about his liking the image and its content. However, appellant eventually and very reluctantly conceded that without an explanation accompanying the post the public's opinion was "plausible." The appellant failed to ever express any remorse or full understanding of the harm his message conveyed.

One event of severe misconduct which is unbecoming in the employee's position may render an employee unsuitable for continuation in that position. Appellant's conduct was egregious. There was simply no competent evidence to support his academic and socially progressive explanations and excuses, or his ignoring Pearson's post. The competent evidence demonstrated that at least two members of the public and one NJDOC employee found the post inappropriate and discriminatory.

Appellant's lack of understanding about and basic appreciation of the discriminatory message and painful feelings he conveyed by liking this image regarding social injustices and bias, given his position as a Correctional Police Sergeant at Bayside, was inexcusable. Without reasonable consideration for his sensitive position of employment in the public trust and in the context of 2020, the appellant chose to broadcast his support for the discriminatory image perpetuate prejudice and bias. Even assuming, *arguendo*, that his lack of judgment was inadvertent, it does not negate that it was still unacceptable. Appellant's actions called into question not only his integrity and credibility, but that of the respondent.

Here, progressive discipline must be bypassed. The maximum penalty of a six month suspension would be wholly insufficient in light of appellant's choices and actions. Appellant's conduct, which according to his character witnesses and his work history, appears out of the norm for his service, was so severe and egregious that the penalty of removal of his employment effective September 3, 2020 is justified.

Accordingly, I **CONCLUDE** that removal is the appropriate discipline for the violations of conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12); Human Resource Bulletin (HRB) 84-17, as amended; C(11), conduct unbecoming an employee; C(31) violation of New Jersey Department of Corrections (NJDOC) policy prohibiting discrimination, harassment or hostile environments in the work place; and E(1) violation of a rule, regulation, policy, procedure, order or administrative decision, be **AFFIRMED**.

ORDER

Accordingly, it is **ORDERED** that the charges entered in the two Final Notice of Disciplinary Action, dated September 3, 2020 of the Bayside State Prison against appellant, Robert Curry, are hereby **SUSTAINED**. I **ORDER** that the action of the appointing authority removing appellant from his position as a Correctional Police Sergeant, effective September 3, 2020, is hereby **AFFIRMED**.

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

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

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

April 26, 2021
DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/lam

APPENDIX

LIST OF WITNESSES

For Appellant:

Robert Curry
Lieutenant Tracy Sparacio
Irvin Watson
SCPO Eric Gould
Joseph Sterling
Lieutenant Lance Crenny

For Respondent:

Senior Investigator Timathy Gonzalez
El-Rhonda Williams-Alston, Director EED
Willie Bonds, Assistant Commissioner

LIST OF EXHIBITS

For Appellant:

A-1 Preliminary Incident Report

For Respondent:

R-1 FNDA #2100107, dated 9/3/20
R-2 PNDA, dated 8/3/20
R-3 FNDA #2100106, dated 9/3/20
R-4 PNDA, dated 7/10/20
R-5 Investigation Report
R-10 Appellant's Work History
R-11 Appellant's Facebook Photo Post

R-12 Facebook Post with Pearson's Comment

R-13 Facebook Messages between Collins and Appellant

R-14 Settlement Agreement, dated 2/8/12

R-18 Facebook Posts

R-21 Law Enforcement Personnel Rules and Regulations

R-22 Policy Prohibiting Discrimination in the Workplace

R-23 Standards of Professional Conduct

R-24 HRB 84-17, as amended

R-26 Job Specifications

R-28 Video Interview of Appellant.