



STATE OF NEW JERSEY

In the Matter of Douglas Burkholder
South Woods State Prison, Department
of Corrections

DECISION OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NO. 2021-879
OAL DKT. NO. CSR 00716-21

ISSUED: JULY 2, 2021 BW

The appeal of Douglas Burkholder, Senior Correctional Police Officer, South Woods State Prison, Department of Corrections, removal effective December 11, 2020, on charges, was heard by Administrative Law Judge Kathleen M. Calemme, who rendered her initial decision on May 25, 2021. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and replies, the Civil Service Commission (Commission), at its meeting on June 30, 2021, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision, including her order that the appellant undergo training and a psychological evaluation prior to his return to work.

As 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 the date six months after his initial separation from employment until the date of actual reinstatement. *N.J.A.C.* 4A:2-2.12(a) provides for the award of counsel fees 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 the disciplinary appeal is the merits of the charges. See *Johnny Walcott v. City of Plainfield*, 282 N.J. Super. 121.128 (App. Div. 1995); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, the charges were sustained and major discipline was imposed. Consequently, as appellant has failed

to meet the standard set forth at *N.J.A.C.* 4A:2-2.12, 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 However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, unpublished, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. However, under no circumstances shall the appellant's reinstatement be delayed pending any back pay dispute.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore modified the removal to a six-month suspension. The Commission further orders that the appellant undergo diversity training and a psychological examination prior to his return to work. Should he be found unfit for duty based on the results of that examination, new disciplinary charges should be filed at that time.

Pursuant to *N.J.A.C.* 4A:2-2.10, the appellant is entitled to mitigated back pay from the date six months after his initial separation from employment until the date of actual reinstatement or subsequent removal based on the results of the psychological examination. 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.

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

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division. Under no circumstances shall the appellant's reinstatement be delayed pending any back pay dispute

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 30th DAY OF JUNE, 2021



Deirdre L. Webster Cobb
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Civil Service Commission

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 00716-21

AGENCY DKT. NO. N/A

2021-879

**IN THE MATTER OF DOUGLAS A.
BURKHOLDER, SOUTH WOODS
STATE PRISON**

Arthur J. Murray, Esq., for appellant, Douglas A. Burkholder (Alterman & Associates, LLC, attorneys)

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

Record closed: May 14, 2021

Decided: May 25, 2021

BEFORE KATHLEEN M. CALEMMO, ALJ:

STATEMENT OF THE CASE

Appellant, Douglas A. Burkholder (Burkholder), appeals his removal from his position as a Senior Correctional Police Officer (SCPO) with the New Jersey Department of Corrections (NJDOC) by respondent, South Woods State Prison (South Woods), for posting an offensive and racially discriminatory comment on his social media Facebook account on June 20, 2020. In his Final Notice of Disciplinary Action (FNDA), South Woods sustained the following charges:

1. N.J.A.C. 4A:2-2.3(a)(6): conduct unbecoming a public employee;
2. N.J.A.C. 4A:2-2.3(a)(12): other sufficient cause;
3. Human Resources Bulletin (HRB) 84-17, as amended: C-11, conduct unbecoming an employee;
4. HRB 84-17:C-31, violation of NJDOC policy prohibiting discrimination, harassment or hostile environments in the workplace; and
5. HRB 84-17:E-1, violation of a rule, regulation, policy, procedure, order, or administrative decision.

Appellant stipulated and conceded that his admitted actions violated N.J.A.C. 4A:2-2.3(A)(6) and HRB 84-17:C-1, constituting conduct unbecoming a public employee. He also stipulated and conceded that his conduct violated HRB 84-17:E-1, violation of a rule, regulation, policy, procedure, order, or administrative decision. Appellant contested the remaining two charges and the discipline of removal as not warranted for the sustained charges.

South Woods seeks affirmation of its disciplinary action of removal of appellant for all sustained charges.

PROCEDURAL HISTORY

On July 20, 2020, the respondent issued a Preliminary Notice of Disciplinary Action (PNDA), seeking appellant's removal. Appellant requested a hearing which was held on November 23, 2020. On December 11, 2020, respondent issued its FNDA, sustaining the charges and removing appellant from his employment with NJDOC. The appellant filed a timely appeal. The matter was transmitted to the Office of Administrative Law (OAL) and perfected on January 15, 2021, for hearing as a contested case. N.J.S.A. 52:14B-1 to 15 and 14f-1 to 13. The appellant did not file a waiver of the 180-day rule.

Due to the COVID-19 pandemic and the public health emergency declared in Executive Orders issued by the Governor of New Jersey, in-person proceedings at the OAL have been suspended since approximately March 19, 2020. The hearing was held on April 20, 2021, via Zoom remote platform by consent of the parties. Written summations were submitted by the parties. Thereafter, the record closed on May 14, 2021.

FACTUAL DISCUSSION AND FINDINGS

The following facts are not in dispute; therefore, I **FIND** as **FACT**:

1. Burkholder has been a SCPO for twenty-three years and five months, having served his entire career at South Woods. He was hired by NJDOC on February 15, 1997. He was never promoted from the rank of SCPO. Prior to his removal, Burkholder was assigned as a commissary officer.

2. On June 20, 2020, Burkholder posted the following on his Facebook account:

I know that I am not the only one sick of seeing black people beating up mostly white men, women and children. Time for this shit to end, if I see anyone getting beat by anyone I for one am not going to stand by and just watch and record. The time has come to start hitting back (muscle emoji) [SIC]

3. Burkholder used his personal computer to type the above post during non-working hours while he was at home.

4. Suzanne Deans (Deans), a NJDOC employee at South Woods, reported Burkholder's Facebook post to the Special Investigations Division (SID), after she was informed of its content from a friend. Deans was offended by the post and considered it racist and discrediting to the NJDOC.

5. In accordance with his stipulation, Burkholder's conduct in posting the

above comment on his Facebook page constituted conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6) and HRB 84-17(C-11) and a violation of a rule, regulation, policy, procedure, order, or administrative decision in violation of HRB 84-17(E-1.)

6. Prior to being served with the PNDA in this matter, Burkholder's prior discipline consisted of three minor offenses for time and attendance resulting in two official written reprimands and one fine.

7. As of the date of this incident, June 20, 2020, NJDOC did not have a policy that strictly applied to the use of social media. As a SCPO, Burkholder never received any training pertaining to his use of social media, including personal use.

Testimony

Ronald Tobolski (Tobolski) is a senior investigator with SID assigned to South Woods. Tobolski has been an investigator with SID for the past three years and was recently promoted to senior status. Prior to his transfer and promotion, Tobolski served as a SCPO with the NJDOC for over five years.

On June 29, 2020, Deans, a thirty-one year employee with NJDOC, notified SID of a social media post allegedly authored by Burkholder. Tobolski interviewed Deans and incorporated his interview notes into his Investigation Report. (R-2.) Deans reported to Tobolski that a friend sent her a text message informing her of a racist post from Burkholder's Facebook page. Tobolski noted that Deans' friend was not a NJDOC employee. When Deans conducted a search on Facebook, she could not find the post, so she reviewed it on a Facebook account belonging to Leah Fahber (Fahber). Deans took a screen shot of the post from Fahber's Facebook with her cell phone and emailed it to Tobolski. Deans reported Burkholder's comments because they were offensive, racist, and judgmental. She was also concerned about the comments being generated from the post and references to Burkholder as a corrections officer. (R-3.)

On cross-examination, Tobolski acknowledged there was no social media training for NJDOC officers. Tobolski received his social media training when he joined SID.

Although Tobolski conducted a search of Burkholder's Facebook account, he did not find Burkholder's post but observed a picture of Burkholder in his uniform. (R-4.) Tobolski acknowledged that posting a picture in uniform was not a violation of any rules or regulations.

In his report, Tobolski included the comments from individuals who responded to Burkholder's post on Fahber's Facebook page. None of the individuals were known to Tobolski and no one had made any complaints to NJDOC or SID.

When Deans brought the post to SID, she raised her concern about the offensive and discriminatory racial connotations of the post. There was nothing in Burkholder's history with NJDOC that reflected any past incidents of racism.

Tobolski interviewed Burkholder and accepted his statements as truthful. Burkholder understood that only individuals, whom he accepted as friends, could view his posts. Burkholder admitted that he edited the post after he learned of complaints about what he had written. He changed his post by taking out all references to race.

Chiqueena Lee (Lee) is a Legal Specialist with the NJDOC. She has been in her position for two years. The NJDOC policy against discrimination in the workplace was adopted from the policy used by the Civil Service Commission and it is a zero tolerance policy. (R-15.) Lee explained that the prohibitions in the policy apply to any form of communication and extend beyond the workplace. Even though the words "social media" are not found within the policy, the words "any communication" covers all forms of communication.

Lee reviewed the post and noted that the disparaging remarks were brought to the attention of SID by a NJDOC employee who was offended. The content of Burkholder's post raised clear concerns. It was discriminatory against African

Americans. Its contents posed an adverse impact on morale in the workplace by offending a NJDOC employee. The implications of the post about violence raised safety concerns given the demographics of the officers and the inmate population at South Woods.

As a NJDOC employee, Burkholder would have received a copy of the policy titled Prohibiting Discrimination In The Workplace. (R-15.) It was his responsibility to be familiar with it.

On cross-examination, Lee stated her understanding that this incident involved only one Facebook post that was brought to the attention of a NJDOC employee who notified SID. She further understood that there was no indication that Burkholder typed this post while on duty or on a NJDOC computer. Lee indicated that none of that mattered because the policy extends to all forms of communication and reaches beyond the workplace.

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.)

[R-15 at 122.]

Lee acknowledged that the word "home" is not included within the policy as an extension of the workplace.

Lee was unaware of any specific training for SCPOs regarding social media but was aware that a draft policy was being considered.

While there is zero tolerance for discrimination in the workplace, Lee understood that a violation of the policy is not an automatic termination. The policy provides for appropriate administrative and disciplinary actions, including training, suspension, or removal. (R-15 at 126.)

Lee explained that all violations are analyzed on a case by case basis with a consideration of the totality of the circumstances. Dean was the only complainant, but this post had far reaching ramifications. The interpretation of Burkholder's post with his use of a strong arm emoji could be viewed as racist and promoting violence.

Brian Labonne (Labonne) has held the rank of Major with NJDOC for the past fourteen months. He has been with the NJDOC for seventeen years. As a Major, his duties include disciplinary matters, reviewing and updating policies and procedures, and ensuring the safety and security of the facility.

Labonne stated that correction officers are never off duty. They must be held to a higher standard to retain the public's trust.

Under the Rules of Conduct, Article I, Section 2:

No officer shall knowingly act in any way that might reasonably be expected to create an impression of suspicion among the public that an officer may be engaged in conduct violative of the public trust as an officer.

[(R-15.)]

As specified in Article III, Section 3:

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

[Id.]

Every new hire is given a copy of the Rules and Regulations and officers receive annual training.

Correction officers are required to comply with the Standards of Professional Conduct, on or off duty. (R-9.)

The highest level of professional, ethical conduct shall be required of all applicable personnel, especially Department of Corrections employees, with regard to all matters related to Department or State concerns. All persons to whom this policy applies are reminded that decorum and conduct becoming a public employee and staff member of the Department of Corrections are expected when both on and off duty, thus extending the workplace environment to other locations.

Labonne reviewed Burkholder's Facebook post, and determined that its content violated the Rules of Conduct (R-17) and the Standards of Professional Conduct (R-9.) It also posed safety concerns, raising questions whether Burkholder would aid African American inmates or fellow officers during disturbances within the prison population. Making such a post, reflected poor judgment by Burkholder.

NJDOC's policies and procedures are updated on a regular basis. Labonne acknowledged that NJDOC does not have any specific policy for social media. Correction officers do not receive any training specifically in the use of social media.

HRB 84-17 delineates policy pertaining to the types of offenses and their corresponding range of penalties. (R-16.) For a C-11 violation of conduct unbecoming an employee the penalties for a first infraction range from a three day suspension to removal. (R-16 at 9.) The penalties for a first infraction for a C-31 violation for racial and/or sexual harassment, discrimination and/or retaliation range from a five-day suspension to removal. (Id. at 12.) The penalties for violating a rule, regulation, policy, procedure, order or administrative decision under E-1 range from an official written reprimand to removal. (Id. at 16.) In determining what penalty to impose, an officer's length of service and past disciplinary history are considered.

Labonne's familiarity with Burkholder was only in his supervisory capacity. Burkholder holds the lowest rank in the NJDOC. Labonne had no role in the charges against Burkholder sustained in the FNDA. (R-1.)

Labonne interpreted the Rules and Regulations and Standards of Professional Conduct to apply to an officer's use of social media. He is aware that a specific social media policy is being formulated and but there is no current policy.

Burkholder is fifty-four years old. He is a divorced father of two daughters and resides alone. He is a high school graduate with no post-graduate or military training. He attended the police academy from February 15, 1997 to March 15, 1997, and became a corrections officer recruit upon graduation for his first year. He held the rank of SCPO from 1998 until his removal in December 2020. The title change to SCPO from a recruit is not considered a promotion. Burkholder has twenty-three years, five months in the pension system.

Prior to June 20, 2020, Burkholder never received major discipline but had three minor disciplinary infractions for time and attendance violations. He was never a target in a SID investigation for racial harassment, hostile work complaint, or any other complaint.

Burkholder conceded violating N.J.A.C. 4A:2-2.3(a)6, HRB 84-17:C-11, and HRB 84-17:E-1. In making this one post to his Facebook account, Burkholder acknowledged that he used poor judgement and accepts that major discipline is warranted. However, he does not agree that removal is the appropriate penalty.

When he posted this comment on his personal Facebook page, Burkholder was emotional from watching violence in the streets on social media platforms and television. He believed that only the people he accepted as "Facebook friends" could view his posts. Burkholder's Facebook friends included NJDOC employees. Fahber, who is a friend of his ex-wife, became his friend on Facebook under a different identity. She made the post public. When Burkholder became aware of the comments being

made, he edited the post and removed all references about race. In hindsight, he realized that it was not a good post and his comments were inappropriate.

Burkholder also admitted to posting his picture in uniform. He claimed the picture was posted during the COVID 19 pandemic as a sign of support for first responders. He knew of no prohibition against posting his picture in uniform, but he removed it from his Facebook page.

On cross-examination, Burkholder was asked whether a reasonable person could infer from Burkholder's post that he was inciting violence. Burkholder stated that inciting violence was never his intent. He thought his post advocated standing up for yourself and fighting back if necessary. He realized he used poor judgement. When asked whether his judgment could be trusted in the future, he responded affirmatively. Burkholder did not feel that this post reflected his true nature. It was an improper response to what he saw on social media and television.

In order to assess credibility, the witness' interest in the outcome, motive or bias should be considered. Furthermore, a trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Having considered the testimonial and documentary evidence presented by the respondent, I accept the testimony offered by Tobolski, Lee, and Labonne to be very credible and persuasive. Their testimony was free of any animosity towards Burkholder and they exhibited no ulterior motive aside from laying out the facts of the investigation, safeguarding the integrity of the NJDOC, and explaining its rules, regulations, and policies.

Having considered the testimonial evidence presented by the appellant, and being mindful that his livelihood and career are at stake, I deem Burkholder's testimony to be candid and consistent with his prior interviews. I note that his admission of violating three of the charges and acceptance of discipline were made without offering

excuses or attempting to minimize his conduct. However, his awkward attempt to explain what he intended by the post was not believable. It is simply incredible that Burkholder intended this post as an expression that all people in distress should fight back and not be victims.

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 additional **FACTS**:

Burkholder's Facebook account is private, meaning that only his Facebook friends are able to view or read his content. This setting does not prevent Burkholder's Facebook friends from making his posts public. In those instances, the public may view or read Burkholder's posts and comments. The public may also view and read Burkholder's posts, when they are shared through public Facebook pages.

When interviewed, Burkholder conceded that the public could interpret his post to mean that he would only assist white people who were being assaulted by African Americans, but that was not his intention. Burkholder's implausible excuse did not negate the racist and violent implications of his post. He failed to consider the consequences of his actions when he made a Facebook post in reaction to the events he was viewing on social media and television outlets. Such action showed Burkholder's lack of judgment and understanding of the sensitive nature of his position and his responsibility to uphold the public trust. Burkholder's act of posting a racially offensive and inflammatory comment knowing it could be read by his Facebook friends, who were NJDOC employees, and viewed by members of the public, including inmates at South Woods, was sufficiently egregious to serve as the basis for the respondent to pursue disciplinary charges against the appellant.

Burkholder's Facebook comment entered his work place and offended at least one NJDOC employee. It's potential implications were more far reaching. Burkholder's Facebook post was available to other NJDOC employees and through public sharing available to the public and South Woods inmates, whose well being depended upon Burkholder's judgment and actions. His social media post impacted his workplace by

creating a perception that Burkholding holds racially derogatory views and may be incapable of impartially fulfilling his duties.

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).

Here, as determined in the FNDA, there were five sustained charges against Burkholder, warranting his removal as a SCPO, effective December 2020. (R-1.) Due to Burkholder's stipulation prior to the OAL hearing to violating three of the sustained charges, only the charges involving N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, and HRB 84-17:C31, violation of the Policy Prohibiting Discrimination in the Workplace remain to be addressed:

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

Appellant was 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 by his action that 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**.

HRB 84-17.

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-16.)

C(31) Prohibiting Discrimination In The Workplace

Based on the expectation that correction 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-15 at DOC122.) 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, including:

Using derogatory references with regard to any of the above protected categories in any communication;

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.

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, 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).

This policy also applies to third party harassment. Third party harassment is unwelcome behavior involving any of

the protected categories referred to in section II, A above that is not directed at an individual but exists in the workplace and interferes with an individual's ability to do his or her job. Third party harassment based upon any of the aforementioned prohibited categories is prohibited by this policy.

Appellant maintains that respondent did not meet its burden of proof to sustain this charge. The crux of appellant's argument is that his conduct in posting a comment on Facebook while off duty and using his personal computer does not fit within the specific parameters of the Policy Prohibiting Discrimination in the Workplace. (R-15.) In support of his position, appellant submits that Deans was made aware of the post outside of work. She used her own time and her own computer to find the post, and brought it to SID. The Policy specifically used the word "workplace" and it did not extend the definitions of the "workplace" into the home. The Policy did not reference the words "social media" anywhere in its text. Moreover, as a SCPO, Burkholder never received any training on the uses of social media and its impact on the workplace.

Appellant's argument failed to consider the Law Enforcement Personnel Rules and Regulations that govern Burkholder's behavior at all times. Article III, Section 3, provides as follows:

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

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 correction officers 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 a SCPO, appellant had a duty to recognize and understand that he was entrusted to work with and protect all inmates in a fair and unbiased manner. His

actions raised concerns that he could not fairly discharge his duties to those with whom he worked and to the inmate population without bias. Therefore, appellant's argument that an officer could make a derogatory and racist comment on a social media platform outside of the workplace and that it would not impact the public trust or confidence in that officer or the department is without merit.

Therefore, I **CONCLUDE** that appellant engaged in discriminatory behavior in violation of HR 84-17:C(31), which prohibits discrimination, harassment or hostile environments in the work place by his racially biased Facebook post. I **CONCLUDE** that respondent has met its burden of proof on this issue. 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 other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12) and of personal conduct prohibiting racial discrimination in violation of HRB 84-17:C(31). I further **CONCLUDE** in accordance with appellant's stipulation of guilt the charges of conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6) and HRB 84-17:C(11), and the general charge in E(1) for violation of a rule, regulation, policy, procedure, order or administrative decision are also **SUSTAINED**. Accordingly, the charges brought against appellant in the FNDA, dated December 11, 2020, are **SUSTAINED**. (R-1.)

PENALTY

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

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

Herein, respondent seeks to remove appellant Burkholder from his employment as a SCPO because of the egregiousness of his actions, bypassing progressive discipline. Appellant requests that an appropriate analysis using progressive discipline should be invoked. Burkholder conceded that his action in making this post is deserving of major suspension, training, and even a fitness for duty examination upon reinstatement. He requests consideration of the mitigating factors to show that the ultimate penalty of removal is not warranted under the totality of the circumstances.

Relative to the existence of mitigating factors, Burkholder’s disciplinary record over twenty-three years is unremarkable, consisting of three prior minor disciplines for time and attendance. This is Burkholder’s first allegation of discriminatory conduct towards members

of protected classes, who worked for the NJDOC or who were incarcerated within its facilities.

Respondent argued that appellant acted in an unbecoming and discriminatory manner by communicating to his Facebook friends, who included DOC employees, a racially biased post. Because this post was shared with the public and Burkholder was easily identifiable as being a SCPO, respondent submitted that Burkholder's conduct brought discredit to the NJDOC. Accordingly, respondent contended that Burkholder's actions were so egregious that progressive discipline need not be applied.

Respondent further argued that under the zero tolerance for discriminatory conduct, removal is the appropriate discipline. While there is a zero tolerance policy, removal is not the only recognized discipline to address unacceptable discriminatory conduct. (R-15 at DOC122.) An employee who violates the policy is subject to appropriate discipline that may include: "referral for training, referral for counseling, written or verbal reprimand, suspension, reassignment, demotion or termination of employment." (R-15 at DOC126.)

Under the totality of the circumstances, herein, I **FIND** that progressive discipline should be followed.

As noted in HRB 84-17, the range of sanctions for Burkholder's violation of the three HRB-17 charges for conduct unbecoming, racial discrimination, and general rules violations, range from minor discipline up to and including removal. In determining the appropriate penalty, the mitigating and aggravating factors that may be considered are length of service, total employment, and other legitimate circumstances.

Burkholder's twenty-three years of service with no major discipline are mitigating factors against removal. Such factors may not have been enough against an aggravating factor of a racially biased and incendiary Facebook post, given Burkholder's sensitive position in the public trust as a SCPO. However, under the circumstances herein, there are other "legitimate circumstances" that mitigate against the ultimate penalty of removal. The Policy Prohibiting Discrimination in the Workplace made no reference to social media use

and as a SCPO, Burkholder received no social media training. I determined that Burkholder violated this Policy because "communication" includes social media and while the Policy did not specifically extend into the home, Burkholder was held to a higher standard of professional conduct twenty-four hours a day, on and off duty. (R-15 and R-17.) While making no excuse for the conduct, the record showed Burkholder committed one act, while at home on a personal computer. Therefore, Burkholder's lack of social media training is a legitimate mitigating circumstance that weighs against removal in this instance.

Herein, Burkholder accepted responsibility and submits to major discipline. These factors bode well in making him a receptive candidate for diversity and tolerance training if he was to be reinstated. Weighing all aggravating and mitigating factors and the proofs presented, including Burkholder's lack of any major disciplinary history over a twenty-three year career, and the totality of the nature and circumstances of Burkholder's behavior resulting in the five sustained charges herein, major discipline, but not removal is warranted. I **CONCLUDE** that Burkholder's misconduct does not warrant removal. Considering progressive discipline, I **CONCLUDE** that the imposition of discipline of a 180-day suspension without pay, the maximum amount permitted to be imposed as a suspension pursuant to N.J.A.C. 11A:2-20, is appropriate for the sustained 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); HRB 84-17:C(11), conduct unbecoming an employee; C(31) 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. Finally, I **CONCLUDE** that as a prerequisite to reinstatement Burkholder undergo mandatory diversity and tolerance training and a Fitness for Duty psychological examination.

I **CONCLUDE** the original removal penalty shall be **MODIFIED** to a 180-day suspension without pay.

ORDER

Accordingly, it is **ORDERED** that the charges entered in the Final Notice of Disciplinary Action, dated December 11, 2020, of the respondent, South Woods State Prison against appellant, Douglas A. Burkholder, are hereby **SUSTAINED**.

It is further **ORDERED** that the disciplinary penalty of removal of Douglas A. Burkholder is **MODIFIED** to a 180-day suspension without pay. It is **ORDERED** that appellant, Douglas A. Burkholder, be returned to his employment as a Senior Correctional Police Officer with respondent, South Woods State Prison, subject to the provisions of this initial decision.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

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

Kathleen M. CalemMO

May 25, 2021
DATE

KATHLEEN M. CALEMMO, ALJ

Date Received at Agency:

May 25, 2021

Date Mailed to Parties:

May 25, 2021

APPENDIX

LIST OF WITNESSES

For appellant:

Douglas A. Burkholder

For respondent:

Ronald Tobolski, Senior Investigator

Chiqueena Lee, Legal Specialist

Major Brian LaBonne

LIST OF EXHIBITS

For appellant:

None

For respondent:

- R-1 PNDA, July 20, 2020 and FNDA, December 11, 2020
- R-2 Investigation Report
- R-3 Burkholder's Facebook post
- R-4 Facebook profile page and chats
- R-5 Not in evidence
- R-6 New hire checklist
- R-7 Work History
- R-8 Training Report
- R-9 Standards of Professional Conduct
- R-10 Not in evidence

- R-11 Not in evidence
- R-12 Not in evidence
- R-13 Policy Receipt – Workplace Discrimination
- R-14 Receipt – Law Enforcement personnel Rules and Regulations
- R-15 DOC Policy Prohibiting Discrimination in the Workplace
- R-16 Human Resources Bulletin 84-17, as amended
- R-17 Law Enforcement personnel Rules and Regulations
- R-18 DVD – Burkholder's interview