



STATE OF NEW JERSEY

In the Matter of Wayne Pearson
 Bayside State Prison, Department of
 Corrections

FINAL ADMINISTRATIVE ACTION
 OF THE
 CIVIL SERVICE COMMISSION

CSC DKT. NO. 2021-1250
 OAL DKT. NO. CSR 02997-21

ISSUED: SEPTEMBER 29, 2021
 BW/ACM

The appeal of Wayne Pearson, Senior Correctional Police Officer, Bayside State Prison, Department of Corrections, removal effective February 24, 2021, on charges, was heard by Administrative Law Judge Catherine A. Tuohy, who rendered her initial decision on August 9, 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 reply, the Civil Service Commission (Commission), at its meeting on September 22, 2021 did not adopt the ALJ's recommendation to modify the removal to a six-month suspension. Rather, the Commission upheld the removal.

DISCUSSION

The appellant was removed on charges of conduct unbecoming a public employee, other sufficient cause and violation of the New Jersey Department of Corrections Policy Prohibiting Discrimination, Harassment or Hostile Environment in the Workplace. The appointing authority asserted that the appellant made a post on Facebook that depicted inappropriate racial content. Specifically, the appellant posted on Facebook a scene depicting an African American male on the gallows surrounded by Caucasian males and a crowd of onlookers with the written comment, "We need to bring this back." Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a

contested case.

In her initial decision, the ALJ found that on June 22, 2020, the appellant, off duty, posted on his personal Facebook page a scene depicting an African American male on the gallows surrounded by Caucasian males and a crowd of onlookers, and added the typed comment "We need to bring this back." The appellant's Facebook page was set on "Public" and he listed his occupation with South Woods State Prison as "Animal Caretaker at Magic Forest." Robert Curry, a Correctional Police Sergeant who worked at Bayside State Prison "liked" the appellant's post and a civilian member of the public saw the post and was so offended that he communicated with Curry and called him a racist for liking the post and that he had zero business guarding black inmates. The appellant removed the post after approximately two days and he acknowledged that his post and his description of his job as animal caretaker could cause the impression in the minds of the public, of inmates or staff members that he harbors racist beliefs.

The ALJ indicated that the appellant's public Facebook posting is an electronic communication that displayed and distributed racially derogatory and demeaning language and images in the workplace. She emphasized that even if it was posted while he was off duty using his personal computer in his home, the very nature of the communication publishes the image and comments for all the world to see, anywhere and everywhere. Moreover, even if he did not intend to convey racially derogatory and demeaning messages and comments, the appellant acknowledged that his lack of explanation or context as to why he made the posting could tend to convey to the viewers that he held racist beliefs. Accordingly, the ALJ concluded that the appointing authority sustained the charges. However, given that he had never been charged with or been the subject of any prior complaints regarding discrimination, the appointing authority's lack of a social media policy, and the remoteness in time of his prior major disciplinary actions, the ALJ found that a six-month suspension was appropriate.

In its exceptions, the appointing authority states that the appellant's actions in this matter were so egregious that removal is the only appropriate penalty. In this regard, it maintains that significant deference should be given to correctional officials in matters of determining an appropriate penalty for disciplinary infractions. In this case, as the inmate population is predominately African-American, if correction officers or other staff are perceived as biased against one race or another, it will compromise the safety and security for everyone involved. Of concern would be a potential demonstration or rebellion by inmates against staff, which would endanger everyone in the facility. The appointing authority emphasizes the appellant's actions occurred in the wake of George Floyd's murder by a police officer and the resulting social unrest that was occurring throughout the country at the time. Further, the appointing authority states that the facts of the appellant's case are different than other matters where the Commission modified the removals of employees that made comments on Facebook. Specifically, the

appellant posted the offensive image, not merely “liked” it, and he described his position with South Woods State Prison as “Animal Caretaker at Magic Forest.” Further, it argues that he had a prior six-month suspension for improperly securing a weapon.

In response, the appellant states that it was proper for the ALJ not to consider his prior major discipline as it did not occur within a reasonable period prior to the offense being considered. He also states that the mitigating factors in his case were addressed meticulously by the ALJ that resulted in her finding that removal was not appropriate. Specifically, the fact that he had no major discipline since March 17, 2007, that he never was charged with or been the subject of a discrimination complaint, and the appointing authority’s lack of a social media policy supported the reduction in penalty. Additionally, the appellant argues that the ALJ’s recommendation is consistent with the Commission’s prior decisions involving disciplinary actions involving social media.

Upon an independent review of the record, the Commission agrees with the Findings of Fact of the ALJ and concludes that the appointing authority has met its burden of proof in this matter. However, for the reasons set forth below, the Commission determines that the penalty of removal should be upheld.

In determining the proper penalty, the Commission’s review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant’s offense, the concept of progressive discipline, and the employee’s prior record. *George v. North Princeton Developmental Center*, 96 N.J.A.R. 2d (CSV) 463. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual’s disciplinary history. *See Henry v. Rahway State Prison*, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not a “fixed and immutable rule to be followed without question.” Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 N.J. 474 (2007).

In this case, removal is the proper penalty. In this regard, it is noted that in *In the Matter of Tammy Herrmann*, 192 N.J. 19 (2007), the State Supreme Court upheld the removal of Herrmann, a Family Service Specialist Trainee with the Department of Youth and Family Services, who, during an investigation of alleged child abuse, flicked a lighted cigarette lighter in front of a special needs child. Herrmann had been employed for approximately six months at the time of the incident and had no prior discipline but her conduct “divested her of the trust necessary for her position” and “progressive discipline [was not] appropriate in this

matter.” *Id.* at 38. Even when a Correctional Police Officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense occurring in the environment of a correctional facility may, nevertheless warrant the penalty of removal where it compromises the safety and security of the institution, or has the potential to subvert prison order and discipline. *See Henry, supra*. In this regard, the Commission emphasizes that a Senior Correctional Police Officer is a law enforcement officer who, by the very nature of his job duties, is held to a higher standard of conduct than other public employees. *See Moorestown v. Armstrong*, 89 N.J. Super. 560 (App. Div. 1965), *cert. denied*, 47 N.J.

As noted in the appointing authority’s exceptions, the appellant did not merely “like” the offensive post. Rather, on June 22, 2020, not even a month after the George Floyd murder by a police officer, the appellant posted¹ on Facebook a scene depicting an African American male on the gallows surrounded by Caucasian males and a crowd of onlookers with the written comment, “We need to bring this back.” As noted by the ALJ, given the climate that existed at the time he made his Facebook postings, it strains credulity to believe his explanation that he was advocating for the return of public executions of criminals in general, and not the lawless lynching of African Americans that previously occurred in our country’s history. He also indicated on Facebook that his occupation was “Animal Caretaker at Magic Forest.” Therefore, the Commission agrees with the appointing authority that the appellant’s actions are sufficiently egregious to warrant his removal. Moreover, the appellant’s disciplinary history, while remote in time, is significant, as it contains a six-month suspension – the highest penalty an appointing authority can impose short of removal. Accordingly, the Commission finds that the penalty imposed by the appointing authority was neither unduly harsh nor disproportionate to the offense and should be upheld.

ORDER

The Civil Service Commission finds that the action of the appointing authority in imposing the removal was justified. Therefore, the Commission dismisses the appeal of Wayne Pearson.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

¹ The fact that the appellant was the actual poster of the material is an important fact. In this regard, his affirmative action was the impetus for anything that may have followed. Essentially, such an action is inherently more egregious than an individual viewing and “liking” such material, as was the case in *In the Matter of Robert Curry* (CSC, decided June 2, 2021).

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 22ND DAY OF SEPTEMBER, 2021

Dolores Gorczyca

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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 02997-21

AGENCY DKT. NO. N/A

2021-1250

**IN THE MATTER OF WAYNE PEARSON,
SOUTH WOODS STATE PRISON**

Arthur J. Murray, Esq., for appellant, Wayne Pearson (Alterman & Associates, LLC, attorneys)

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

Record closed: July 2, 2021

Decided: August 9, 2021

BEFORE CATHERINE A. TUOHY, ALJ:

STATEMENT OF THE CASE

Appellant, Wayne Pearson (Pearson), a Senior Correctional Police Officer (SCPO) at South Woods State Prison, appeals his removal, effective February 24, 2021, following an investigation that determined that on June 22, 2020, he had engaged in conduct unbecoming a public employee by posting on Facebook a scene depicting an African American male on the gallows surrounded by Caucasian males and a crowd of onlookers with the written comment, "We need to bring this back". Appellant was charged with N.J.A.C. 4A:2-2.3(a)6 conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)12 other sufficient cause; and violations of HRB 84-17, as amended, C (11) conduct

unbecoming an employee; C (31) - violation of the NJDOC Policy Prohibiting Discrimination, Harassment or Hostile Environment in the Workplace; and (E)1 violation of a rule, regulation, policy, procedure order or administrative decision.

PROCEDURAL HISTORY

On August 3, 2020, respondent issued a Preliminary Notice of Disciplinary Action setting forth the charges and specifications made against the appellant. (R-2.) Appellant requested a departmental hearing which was held on February 2, 2021. On February 22, 2021, respondent issued a Final Notice of Disciplinary Action (FNDA) sustaining the charges in the Preliminary Notice and removing appellant from employment, effective February 24, 2021. (R-1.) Appellant filed a direct filing removal appeal on February 24, 2021, to the Office of Administrative Law (OAL) where it was originally received on March 3, 2021, but considered defective, since it did not have an effective date of removal set forth in the FNDA. The Civil Service Commission (CSC) advised the OAL on March 24, 2021, that the effective date of removal, as per the appointing authority, was February 24, 2021. The appeal was deemed perfected on March 24, 2021, and filed as a contested case pursuant to N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52:14F-1 to 13.

By letter, dated May 27, 2021, appellant stipulated that the posts he made off-duty on his Facebook page on or about June 22, 2021, constituted a violation of N.J.A.C. 4A:2-2.3(a)6 conduct unbecoming a public employee; HRB 84-17 as amended (C) 11 conduct unbecoming a public employee; and HRB 84-17 (E) 1 violation of a rule, regulation, policy, procedure, order or administrative decision. The remaining charges in the FNDA remain contested, i.e. N.J.A.C. 4A:2-2.3(a)12 other sufficient cause and HRB 84-17 C (31) - violation of the NJDOC policy prohibiting discrimination, harassment or hostile environment in the workplace.

The hearing was held via zoom on June 3, 2021. The record remained open to allow the parties to submit post hearing submissions and the record closed on July 2, 2021.

FACTUAL DISCUSSION AND FINDINGS

Testimony

Timothy E. Gonzalez (Gonzalez) is employed by the New Jersey Department of Corrections and has been for thirteen years. He has been in the Special Investigations Division (SID) for six years. In June of 2020, he was a senior investigator assigned to the SID. His primary duties were to conduct investigations involving allegations of violations of the administrative and criminal code. These investigations typically involve interviewing employees.

Mr. Gonzalez is familiar with former Corrections Officer Pearson as he was involved in the investigation. Pearson was a SCPO at South Woods State Prison. An investigation was initiated by the chief investigator, now retired Investigator John Klein (Investigator Klein). A civilian had submitted materials that were deemed controversial and required an investigation. The materials were believed to have been social medial posts made by Pearson. Investigator Klein was the case agent and Investigator Gonzalez was assigned to assist him with the interviews and review materials prior to the interviews. Investigator Klein assembled and reviewed the materials and interviewed Pearson and former Sergeant Robert Curry and was able to identify that Pearson was the one that authored the post in question. Investigator Klein authored an investigation report. (R-4.) Investigator Gonzalez was present for the entire interviews with Sergeant Curry and Pearson and actively participated in the interviews. The investigation report accurately depicts what transpired during the course of the interviews and investigation.

Pearson's profile page on Facebook was obtained by Investigator Klein's review of the Facebook page. (R-5.) The timeline photos were supplied by a civilian, Sherwood Collins, and were referred to Investigator Klein. The profile image of Pearson's Facebook page was provided by the civilian. At the top of the document it

says "Sherwood's post" which was the name of the civilian. (R-6.) Pearson was questioned about this document in his interview. Pearson was questioned concerning his listing of his occupation as "animal caretaker at magic forest". Since Pearson was identified as an officer at South Woods State Prison and he has custody over the inmates assigned there, he was questioned as to whether there was a correlation to animal caretaker to the inmates and magic forest as being the South Woods State Prison. Pearson denied the correlation but admitted that others could perceive it that way. During the course of the SID interview, Pearson was questioned as to the post, which he admitted to posting, as well as the narrative underneath the posting which stated, "We need to bring this back". (R-6, bate stamped page 016.) The posting had a link to a Wikipedia narrative. Pearson was questioned as to what his intentions were in posting this material, especially in light of the fact that it was less than four weeks after the George Floyd incident and there were concerns whether it was racially motivated. Pearson explained that he was a history fan and was referring to the need to bring back public executions and was not promoting lynchings. However, since Pearson did not explain his intentions in his post, he admitted it was vague and could be interpreted by others to mean something else. The image came from 'historical images' and when you clicked on the image it directed you to a Wikipedia page. Another screenshot of the post showed Sergeant Robert Curry as 'liking' the image. (R-6, bate stamped 017.) Pearson's Facebook profile was public, meaning it was not exclusive to any certain groups or persons. Anyone that searched Pearson's name could have access to his Facebook content. Pearson denied he had any intentions to exhibit racial bias. Pearson was friends with other corrections officers on Facebook who could access his page as well as other members of the public.

There were documents related to Sergeant Curry's 'liking' Pearson's post and showed screenshots of messaging between Sergeant Curry and a civilian raising concerns about these officers guarding black inmates. (R-6, bate stamped pages 019-020.)

The Wikipedia link indicated that the image was a lawful public execution of Rainey Bethea and Pearson was familiar with who was depicted in the image. (R-7,

pages 021-027.) The image depicts a black man about to be hung on the gallows with thousands of predominantly white onlookers. (R-8, page 028.) Investigator Klein did an independent review and found an article that appeared on a National Public Radio (NPR) site. (R-9, page 029.)

Pearson has been a corrections officer for eighteen years at South Woods State Prison and has attended regular training with the department on the law enforcement rules and regulations and code of ethics.

Pearson was questioned whether he had any concerns for his safety given the nature of his posting and he responded that there was a person named Mohammed who posted Pearson's address and there was other negative comments targeting him as a result of making the posts.

Investigator Gonzalez stated that he attended the thirteen-week corrections academy when he first became a recruit. He did not receive any training specifically regarding social media. When he transferred into the SID, he attended the N.J. Division of Criminal Justice (DCJ) academy and received twenty-four weeks of training. Included in that training was training on the topic of social media, which he did not have in the correctional police academy. Since he has been with SID, he is not aware of any specific NJDOC training given to its' rank and file senior correctional officers on the topic of social media. There was no written policy that NJDOC put out on the topic of social media prior to this incident in June of 2020. It is Investigator Gonzalez' understanding that there is now a policy in draft form, but he has not yet been served with it or had to accept and sign for it. So, from the time Pearson started eighteen years ago and up until the date of this incident in June of 2020, there was no written policy that NJDOC put out on the topic of social media.

Senior Investigator Klein was the lead investigator and has since retired. The investigation report was entirely his typing. (R-4.) Investigator Gonzalez was the second person who attended the interviews according to the Attorney General' Guidelines. The interviews of Sergeant Curry and Pearson were not transcribed

verbatim but were summarized by Investigator Klein in his report and included what Klein believed was important. (R-4.) There are CDs of both interviews but no transcripts. Investigator Klein decided what to cut and paste out of Pearson's Facebook link and put into the investigation report. (R-4.)

The text exchange depicted in R-6, bates stamped pages 019-020 is between Sergeant Curry and the civilian and was provided to the investigator by Sergeant Curry. None of the typing was from Pearson. Pearson was a correctional police officer and Sergeant Curry was a correctional police sergeant in June of 2020. Sergeant Curry was a supervisory officer of Pearson who was 'liking' the post that Pearson put on Facebook.

If someone double clicked on the photo that Pearson uploaded or downloaded to his Facebook page, the Wikipedia article would come up. (R-7.) The article itself was not posted directly on Pearson's Facebook page. If you cross-reference R-6 and R-7, the Pearson Facebook page with the words "We need to bring this back" and the image that is there says "The last public execution to take place in the U.S., August 14, 1936." Investigator Klein did his own independent research as it relates to the public execution depicted on Pearson's Facebook page. (R-9.) This information would not come up if you clicked on the information on Pearson's Facebook page.

Investigator Gonzalez acknowledged that at one point in time the United States did have public executions of both men and women of different races and ethnicities other than African Americans. The words typed by Pearson "We need to bring this back" in and of themselves do not express a racist intent. It is only in conjunction with the photograph that it may be so interpreted. (R-6.) A member of the public was concerned by the content of Pearson's Facebook page and the Professional Standards Unit investigated whether Pearson's conduct undermined civilians trust in the department. Investigator Gonzalez was not aware of any previous investigations of Pearson for allegations of racial discrimination.

Pearson was familiar with the individual depicted as being hung on the gallows as Rainey Bethea. This was consistent with the NPR article and the Wikipedia link.

Brian Morris testified on behalf of the respondent. He is a lieutenant at South Woods State Prison, NJDOC. He has been the lieutenant for service training since March of 2017, and his responsibilities include coordinating the training for all transfers, promotions and new hires. He has been employed by the DOC at South Woods for twenty-four years, since June 7, 1997, and has worked his way up the ranks. He was promoted to sergeant in 2004 and lieutenant in July of 2007. He attended a one-week methods of instructions course through Gloucester County which was a crash course on how to be a teacher, conduct service training, do lesson plans and engage with your audience. NJDOC law enforcement personnel are held to a higher standard of conduct 24/7 to exercise good judgment, follow the rules, regulations, policies and procedures and not do anything that would bring discredit to themselves or to the department or cause the public to lose confidence in them.

HRB 84-17, as amended, is a table that sets forth various violations and offenses and penalties assigned to the violations based on the number of times that infraction may have been committed. (R-10.) It could also be based upon the severity of the conduct even for a first offense. All corrections officers are given a copy of HRB 84-17 as amended either on orientation as a new hire, transfer or promotion or even upon a transfer to the institution. Although they are on a disk now, previously each officer had to sign for receipt of the discipline policy. Pearson acknowledged that he received a copy. (R-11.)

Personal conduct charge C (11) is for conduct unbecoming an employee. The range of penalty prescribed is three days to removal. (R-10, page 036.) Personal conduct charge C(31) prohibits racial discrimination, harassment and retaliation. The first infraction could be an official reprimand up to a removal and a second infraction could be a thirty- day suspension up to removal. A third infraction would be removal. (R-10, page 039.) (E) General 1, is a violation of a rule, regulation, policy, procedure or administrative order with a range of penalties from a written reprimand to removal for a

first infraction; five days to removal for a second infraction; and removal for a third infraction. (R-10, page 044.)

The Law Enforcement Personnel Rules and Regulations are distributed to all correction officers and they are expected to abide by them 24/7, on and off duty, for their entire career. (R-12, pages 047 – 050.) It is pounded into their head while in the academy that they are held to a higher standard and that during their career they are placed under a microscope by the department and the general public.

Section 2 of the Rules and Regulations states, “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-12, page 048.)

Article III Professional Conduct, Section 1 states, “No officer shall discriminate against or harass any employee, inmate, parolee or member of the general public based upon that individual’s race, creed, color, natural origin, sex, affectational or sexual orientation, age, religion or handicap/disability.” (R-12, page 049.)

Pearson acknowledged receipt of the Law Enforcement Personnel Rules and Regulations on February 22, 2012. (R-13, page 051.)

The policy statement on the Code of Ethics provides a link to the full Code of Ethics which is approximately one-hundred pages and all officers are responsible to comply with the entire code. (R-14, page 052.)

Pearson acknowledged receipt of the annual Ethics Briefing on November 6, 2015. (R-15, page 056.)

Lieutenant Morris is familiar with Pearson as they worked together at South Woods State prison. The screenshot of Pearson’s Facebook profile indicates his job description is “animal caretaker at Magical Forrest”. (R-6, page 015.) From the

department's perspective, Pearson is referencing the inmates as animals and the institution is referenced as Magic Forrest. Someone viewing this would believe that Pearson or any other staff member or the department as a whole views the inmates they are responsible for as animals rather than individual human beings. R-6, page 016 is a picture and post from Wayne Pearson stating, "We need to bring this back" and it depicts an African American male on the gallows about to be hung surrounded by a group of white males. The DOC viewed this as a violation of the rules and regulations and policies and procedures of the department because there is no context supplied as to what Pearson's intent was and the public could interpret it differently as to supporting the public execution of black men. There were people who interpreted this posting as problematic and that Pearson had a bias and not be able to fulfill his duties impartially. That is why this matter was referred to the SID. R-6, page 017 is another screenshot of the same post but with Robert Curry, a sergeant at Bayside State Prison 'liking' the post. This was problematic from the DOCs point of view because two employees from different institutions may indicate it is a systemic problem of bias within the DOC. Sergeant Curry was disciplined and removed for this incident.

Screenshot communications between Robert Curry and a civilian individual, Sherwood Collins occurred as a result of Curry 'liking' Pearson's post. (R-6, pages 016-020.) The DOC was concerned how this would impact other staff members and reflect on the department being able to do its job with impartiality and without bias. The George Floyd incident took place in May of 2020, and the DOC was very concerned these posts could adversely impact relationships among staff members and staff members and the inmates within the facility. There is a diverse staff and a diverse inmate population. The inmate population is predominantly African American. So, if officers are biased it would compromise security for everyone involved. There could be demonstrations by the inmate population that would make the entire situation more dangerous for everyone.

The DOC stands by its decision to seek Pearson's removal. The work history for Pearson reflected one major discipline of a six-month suspension from March 2002. (R-19, page 068.)

As the training lieutenant in June 2020, Morris had no role in the selection of charges or penalty contained in the FNDA. (R-1.) When he started in the academy in 1997 there was no social media. When he was a corrections officer and then when he was a corrections sergeant, he received no training from the DOC on the specific topic of social media. When he was a lieutenant but before he became a training lieutenant, he received no training regarding social media. Since he became the training lieutenant, he has not received any lesson plan modules on the topic of social media, and he has not instructed any members of South Woods on the topic of social media. No adjunct instructors were brought in to instruct on the topic of social media. The DOC still has no written policy or procedures specifically on the issue of social media or social media use.

The table of offenses and penalties is only part of 84-17. (R-10.) The beginning of the policy indicates that the DOC will look at the length of service of an employee and the prior discipline of the employee in deciding discipline. Pearson had a prior C (31) infraction in April 2004, so the C (31) infraction at issue in this case would be a second offense. The C (11) and E(1) offenses at issue in this case would be first offenses. A first C (31) offense has a range of penalties from an official written reprimand up to removal and a second offense has a range of penalties from a 30 -day suspension to removal. (R-10, page 039.) The policy prohibiting discrimination in the workplace, subsection 10, administrative and/or disciplinary action states "Any employee found to have violated any portion or portions of this policy may be subject to appropriate administrative and/or disciplinary action which may include, but is not limited to: referral for training, referral for counselling, written or verbal reprimand, suspension, reassignment, demotion or termination of employment. Referral to another appropriate authority for review for possible violation of state and federal statutes may also be appropriate." (R-16, page 062.) There are more discipline options available in this policy than in the table of offenses and penalties section of 84-17. Lieutenant Morris did not know which took precedence as far as what penalty was to be imposed.

The checklist of policies that Pearson signed for did not specifically reference the words social media. (R-11.) The words social media do not appear in "The Law Enforcement Personnel Rules and Regulations". (R-12.) The words social media are not contained anywhere in the policy statement of the Code of Ethics. (R-14.) The link to the complete one- hundred -page Code of Ethics does not contain the words social media in the document. Although law enforcement officers are held to a higher standard, supervisory law enforcement officers are held to an even higher standard than rank and file law enforcement officers. Curry was a sergeant and higher in rank than Pearson, but since they did not work at the same facility, Curry did not oversee Pearson on a day to day basis but did outrank him.

Lieutenant Morris learned that the Civil Service Commission amended Curry's removal to a ninety-day suspension and that he would be coming back to his job as a sergeant and supervisory officer to Pearson in the rank structure.

Although the rules do not specifically mention social media, the general rule that no officer shall act or behave in an official or private capacity in a manner that would bring discredit to the department encompasses a wide range of prohibited conduct.

Lieutenant Morris was aware that there is new training regarding social media being implemented although he has not seen any formal written policies concerning the use of social media. He estimated that Facebook has been around for approximately ten years, and he is unaware of why the DOC has not provided training to its members regarding its use.

EI-Rhonda Williams Alston (Alston) testified on behalf of the respondent. She is employed by the N.J. DOC as the Director of the Equal Employment Division (EED) and the Ethics Unit since February 2021. She has been employed by the State of New Jersey as an attorney and has held various positions for the past thirty years starting out as a deputy attorney general. As the Director of the EED, she is responsible for implementing the policy within the department and overseeing the legal and investigative aspects and rendering determinations. She supervises the EED staff and

advises the commissioner, the chief of staff and other senior employees about the policy prohibiting discrimination in the workplace. She also fields questions from employees with regards to the policy. Her office does review investigations with regards to violations of the policy prohibiting discrimination in the workplace at the DOC. There is a state-wide policy prohibiting discrimination in the workplace and requires every state agency department to have the policy and distribute it to its employees. (R-16, page 057.) The policy is a zero-tolerance policy meaning if there has been a violation of the policy, the employee is subject to discipline up to removal. Corrections officers are required to comply with all provisions of the policy both when at the workplace and when they are not at the workplace.

Ms. Alston said the policy contains specific references to Facebook or social media because it covers any 'electronic communication' where it says, "Displayed 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." The protected categories are race, creed, color, national origin, nationality, ancestry, age, sex/gender, pregnancy, marital status, civil union status, domestic partnership status, familial status, religion, affectional or sexual orientation, gender identity or expression, atypical hereditary cellular or blood trait, genetic information, liability for service in the Armed Forces of the United States and disability. (R-16, page 059.)

"It is also a violation of this policy to use derogatory or demeaning references regarding a person, race, gender, age, religion, disability, affectional or sexual orientation, ethnic background, or any other protected category set forth in Section II A above. A violation of this policy can occur even if there was no intent on the part of the individual to harass or demean another." (R-16, page 058.) If you engage in conduct that harasses or demeans another, you have violated the policy prohibiting discrimination in the workplace by the State of New Jersey and the DOC.

Using derogatory references, with regard to any of the above protected categories in any communication, is also prohibited conduct and in violation of the

policy. (R-16, page 059.) Social media and Facebook are not specifically mentioned in the policy but the EED's interpretation is that social media posts and Facebook are electronic communications which is covered by the policy. Each member receives a copy of the policy when they become a member of the department and the policy is re-distributed almost annually to each employee in the department. Pearson acknowledged receipt of the State of NJ DOC policy prohibiting discrimination, harassment, hostile environment in the workplace on December 13, 2016. (R-17, page 064.)

Ms. Alston was familiar with Wayne Pearson from reviewing the investigation reports. It was problematic from the EED's perspective that Pearson listed his occupation on his Facebook profile page as "Animal caretaker at Magic Forest" knowing that he is a corrections officer and referring to the inmates as animals as opposed to humans and the Magic Forest as the prison he worked in. (R-6, page 015.) The term animal caretaker was derogatory and contrary to the policy prohibiting discrimination in the workplace by not using demeaning or harassing terminology within the workplace. The post of the African American about to be hung on the gallows surrounded by a number of all Caucasian men on the gallows with a number of Caucasian men gathered at the bottom to watch, with the typed words "We need to bring this back" was also problematic from the EED's perspective since it was demeaning, derogatory and racist and looked like it was an affirmation of lynching which did occur in the history of our country when black men were lynched by white mobs. (R-6, page 016.) This post was violative of the policy prohibiting discrimination. The next post is of the same photo but with the 'like' sign indicating Robert Curry plus two more individuals liked the post on Facebook. Ms. Alston explained that this was equally, if not more, disturbing because not only did Curry 'like' the post, Curry is a sergeant and a supervisor who had a duty to report violations of the policy. (R-6, page 017.)

The screenshot communications between Sergeant Curry and a civilian were problematic from the EED's perspective because the information had been seen by the public, the civilian acknowledged that this was a racist posting and caused concern

about this person being a corrections officer. (R-6, pages 019-020.) Also, there is nothing in the communications indicating any remorse about the post.

The South Woods State Prison inmate population is over 50% African American. The corrections officers at South Woods State Prison are 30-35% African American. There were concerns by the EED that the staff, inmates and public would perceive the posts as racist. It brings into question whether the officer harbors racist feelings and would render proper aid to prisoners who might find themselves in a situation. Equally important would be whether he would render aid to his fellow officers who are of African American descent if they had a problem within the prison. These posts breach the public trust that a sworn officer would behave appropriately. The EED would also have concerns for the safety of Pearson himself and the safety of everyone within the prison. The EED is sensitive to the cultural climate of the country and state and that factors into its application of whether there has been prohibited conduct that violates the policy prohibiting discrimination. The EED views social media even if it is used off duty in your home as not being private because you are entering a public forum and no longer can expect that even if you had a private posting someone else would not like it and share it with someone else.

In May of 2021, Ms. Alston conducted training for supervisors and non-supervisors and specifically discussed the use of social media and the concerns raised if you are posting certain things. The EED has distributed further explanation as to what electronic communications could be in the policy. Social media is a form of electronic communication and includes Facebook, Instagram and Tik-Tok. There is no separate social media policy that has been issued. In June 2020, there was no specific reference in the policy that electronic communication included Facebook.

A separate EED investigation was done by Sharon Felton, Ms. Alston's supervising investigator. A determination letter was prepared, which Ms. Alston reviewed and then sent up the chain of command to the Commissioner who reviewed it and signed it. Once the report comes back, the parties are notified. Pearson received a letter stating that he had been found to have violated the policy prohibiting

discrimination in the workplace and that charges would be instituted. An administrative memo is also sent to South Woods State Prison, which delineates the charges and the discipline to be imposed. The Final Notice of Discipline was issued February 22, 2021. (R-1.) Ms. Alston had just started as the Director of the EED and this case was already in progress when she arrived, so she did not handle this case personally. Ms. Alston's legal specialist who was the 'acting' EED Director handled this case. She did not review anything indicating that Pearson sent his posts to anyone employed at South Woods State Prison and had no proofs indicating that Pearson affirmatively sent his posts to anyone at South Woods State Prison. This was an anonymous complaint. She had no proof that Pearson posted this from anywhere other than his personal home. She had no proofs that Pearson posted this Facebook post on a NJDOC computer or during regularly scheduled work hours. Ms. Alston believed NJDOC provided social media training through the policy prohibiting discrimination in the workplace as electronic communications include social media.

The Policy Prohibiting Discrimination in the Workplace was approved and issued by Marcus O. Hicks, Esq., Commissioner on November 5, 2019, with an effective date of December 16, 1999, and a revised date of October 8, 2019. (R-16.) This was the policy in effect for prohibiting discrimination in the workplace in June of 2020, when this incident took place. It is Ms. Alston's understanding that another revision has since come out that provides additional clarification on the definition of electronic communication and what it includes. Pearson would not have received the new policy since he was removed in February of 2021. She has never attended NJDOC training that pre-dated her employment with the DOC in February 2021. The policy prohibits discrimination in the workplace and is a DOC and statewide policy. This was a zero-tolerance policy, and it states: "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." (R-16, page 58.) If someone violated the policy, it does not necessarily mean that they must be terminated. Subsection X sets forth administrative and/or disciplinary action and sets forth all of the possibilities what the DOC might do to an

employee who violated the policy. (R-16, page 062.) Pearson has been an employee with the State of New Jersey for eighteen plus years and has not been the subject or target of any complaints regarding racial discrimination, racial harassment, racial hostile work environment or racial retaliation by any employee or civilian of South Woods State Prison in those eighteen years plus of service.

Ms. Alston was more concerned with the actions of Sergeant Curry because he was a supervisory officer and Pearson was not. Sergeant Curry had a duty to report Pearson for a violation of the policy. She is aware that the Civil Service Commission reversed Sergeant Curry's removal and converted it to a ninety-day suspension.

A review of the conversation between Sergeant Curry and the civilian Sherwood Collins does not indicate that any remorse was shown by Sergeant Curry in any of the typing. None of the typing was that of Pearson. (R-6, pages 019-0120.)

Wayne Pearson testified on his own behalf. Pearson is fifty-five-years-old and resides in Vineland. He has never been married, has no children and lives alone. He graduated from Vineland High School in 1983. He has not had any post high school education. He has not served in the military. His work history included working a couple of years doing asphalt work. Then he worked at Dry Goods Department store on the loading dock. He worked for Butch's Gun World in Vineland for approximately eleven years and then worked at Duran Glass for approximately five years before joining the DOC. This was his first job in law enforcement. He took a civil service test and started with the State of New Jersey DOC in October of 2001, when he was thirty-six-years old. He attended the police academy between October of 2001 and January of 2002. His initial title was Correctional Officer Recruit and after one year became a Senior Corrections Officer. The legislature changed the job title to Senior Correctional Police Officer. His job duties involve the safety and security of the facility, and he has worked in other areas such as transporting prisoners and worked in the medical area.

The Civil Service Job Description for a Senior Correctional Police Officer represents a non-exhaustive list of what he does on a daily basis. (R-18.)

The last day he worked for the NJDOC was in June of 2020, when he was removed from his employment due to the Facebook post. Initially he was suspended with pay and then on July 9, 2020, without pay. (R-3.) At the time, he had eighteen and a half years on the job. He has been suspended without pay from July 9, 2020, to the present.

Under Civil Service rules, a major discipline is considered a suspension of six or more days. Prior to being served with the PNDA in this case, Pearson was previously served with major discipline once before on March 11, 2002, when he received a suspension of one-hundred and eighty days. This was within two months of him finishing the academy when he was still a police recruit. His truck had been stolen and inside of his truck he had his personal handgun in a zipped case. The girl who stole his truck crashed and when the State Police were doing the inventory, they found his gun and it was immediately returned to him. He had a permit to own the gun but not to carry the weapon because as a recruit you cannot carry a weapon off duty. The DOC's policy is that you have to be a senior corrections officer, which is after one year, to carry a weapon off duty and he was not yet a senior corrections officer. Had he been a senior corrections officer he would have been permitted to have the gun in his car. He has received other minor discipline. On July 31, 2002, he was late for work and received a written reprimand. On April 1, 2004, he received a five-day suspension for offensive writing. Pearson said he wrote a poem with profanity in it and it was found in a desk drawer. On January 17, 2007, he received a one-day suspension for a missing forty caliber round while he was working in the center. It was for one missing bullet that had fallen out of the magazine but was eventually found in the bottom of the magazine pouch. On March 17, 2007, he received a one-day suspension for a missing pair of handcuffs while he was working the center that went home with someone but were returned. (R-19.) After the March 17, 2007, discipline Pearson has no other discipline until the incident at issue in this case.

Pearson also received a letter of commendation on November 15, 2008, for assistance in the seizure of CDS from an inmate who was getting drugs from visits and they found it in the inmate's cell.

Within the DOC there is an internal affairs unit referred to as the SID, the Special Investigations Division. If you are the target of a complaint, you would receive a target letter from the SID. Prior to this instant case, he has never received a target letter advising that he was the target of a complaint of racial harassment, racial discrimination, racial hostile work environment or racial retaliation from either an inmate, co-employee, visitor or vendor or anyone who would have been at South Woods for any reason. He also has not been the target of any complaints regarding any of the other protected categories.

Pearson admitted he is guilty of violating N.J.A.C. 4A:2.3(a)(6) conduct unbecoming a public employee. He did not admit to being guilty of violating N.J.A.C. 4A:2.3(a)(12), other sufficient cause, because that could cover a lot of different things. He did admit to violating HRB 84-17 as amended, C (11), conduct unbecoming an employee. Pearson stated he was not guilty of HRB 84-17 as amended C (31), violation of NJDOC policy prohibiting discrimination, harassment or hostile work environment in the workplace. Pearson admitted that he was guilty of a violation of HRB 84-17 E 1 violation of a rule, regulation, policy, procedure, order or administrative decision. (R-1.)

Pearson admitted that he posted all of the pages contained in R-5 pages 012-014. The photograph depicted in the R-6 Facebook post was posted by Pearson who physically typed in the words "We need to bring this back." He posted this on his personal Facebook page. He made this post off-duty but the privacy setting on his Facebook page was set on 'Public'. He did not know at the time that there were privacy settings available on Facebook. He has never received any training with the NJDOC on social media. There were no written policies on the use of social media.

Pearson admitted that no matter what his Facebook settings were on at the time, he should never have made the posting in terms of either the photographs or the words. Looking back, it was a stupid thing to do because he did not take into consideration other peoples' feelings and how his post could be interpreted. By making the post he was referencing his belief that public executions needed to be reinstated. A couple of days later, he learned his post was being taken as racially motivated or racially biased when a couple of his friends said it did not look right, it should not be there and then he took it down. It was posted for approximately two days before he took it down.

Pearson listed his occupation on his Facebook page as "Animal Caretaker at Magical Forrest" which was posted for two days. He took it down for the same reasons he took down the other post. He had not previously listed his occupation on Facebook and did not replace it with another listed occupation. (R-6.) Pearson listed "Animal Caretaker at Magic Forest" as his occupation because six to nine months before, he had a couple of incidents with animals at work including being bit by a mouse and having a bat land on him. The term 'Magic Forest' comes from a '1960's band that had a song called Magic Forest and that is where he got the idea. The name of the band was called "Fat Mattress". He was thinking about the incidents where he got bit and the bat and put the two together and posted it. He understands now, that without explanation as it relates to his job listing as an animal caretaker when he was a senior correctional police officer would make one think he is referring to the inmates as animals. This realization came to his mind at the same time he made the post, "We need to bring this back"" was not appropriate. It did not cross his mind before he actually made the post.

Pearson said he will be able to do his job as a senior correctional police officer and not be perceived as racist if he gets his job back because doing one stupid thing does not make you a racist. He has been at South Woods for over eighteen years and has gotten along with everyone and has never had any racial complaints against him. He was out in the workforce about eighteen years before starting with the DOC and never had any claims against him for racial discrimination, harassment, hostile work environment or racial retaliation.

Pearson does not agree with the DOC's position that his making the post and listing his job title undermines his ability and judgement as a law enforcement officer because in the many years he has been with the DOC he has never had any issues with the inmates, the civilian staff or anyone. He also does not agree that he would have any difficulty responding to help either African American inmates or an African American co-worker based upon his post and job description. Through the years working at the DOC, he has helped fellow police officers and inmates in responding to codes and has never discriminated against anybody as far as helping them.

Pearson agrees he deserves major discipline in this matter. He does not believe he deserves to be terminated because he has no history of discriminatory conduct and has always been a fair officer. He knows what he posted was wrong and he should not have posted it. It was a stupid thing to do and he wished he did not do it but wants to apologize to all who were offended. If he is allowed to go back to work, he is willing to undergo additional training and is willing to undergo a fitness for duty evaluation if so ordered, before returning to work.

Pearson admitted to making a mistake in judgment in posting the image of the individual about to be hung and when he added the comment, "We need to bring this back" he was referring strictly to capital punishment itself. However, the image he posted was that of an African American man surrounded by a group of white men with hundreds of white people looking up at the particular man about to be hung. Pearson indicated in his SID interview he was a history buff and obtained the image from a historical website. Being a history buff, he is aware of the history of black people being lynched in this country. Knowing that history and knowing what was going on in the country with the Black Lives Matter movement and the George Floyd protests after he was murdered, Pearson said he was not trying to send a greater message. Although he did not know there were Facebook privacy settings, he did not investigate whether he could make anything private and just created a Facebook profile and posted what he posted. As a result of that post, both a civilian and another law enforcement officer interacted with that post. He did not know how many other correction officers saw his

post, but he is friends with quite a few on Facebook. He does not know if anyone shared the post after seeing it on his page, but he is not sure. One member of the public, the civilian, was so offended by the post that he communicated with Sergeant Curry and called him a racist for 'liking' the post and said he had zero business guarding black inmates. The civilian said he could not imagine the torture they could have been taken through. After Pearson posted the image, another member of the public posted Pearson's address on Facebook and suggested that maybe people should "roll up" on him, which he took to mean threatening his life or threatening him with bodily harm. Despite this, Pearson did not think it would be a problem for him returning to work because he has always been fair with everyone. He did not think his description of his position as "Animal Caretaker at Magic Forest" could put his or his fellow officers in a precarious position in a correction setting such as South Woods State Prison.

Pearson acknowledged that as a sworn law enforcement officer and a correctional police officer he is held to the highest standards of conduct and acknowledged receipt of the policies that were reviewed during the hearing. He also acknowledged that he was to comply with all of the policies and procedures both off and on duty. Pearson acknowledged that by posting on Facebook, even if he was off the clock, he was broadcasting his position to anybody that had access to his Facebook page.

Pearson's reference to animal caretaker at magic forest was not a reference to the inmates at South Woods but to the mouse and bat and he should have clarified that if that was truly his intent, and admits that it was stupid not to, but he was not thinking. "Caretaker" refers to someone who has authority over another and would fit the definition of an inmate rather than a mouse that bit him and a bat. He saw the music video for the song and started thinking a mouse and a bat and they live in a forest and he put it all together. Pearson was asked whether he believes it was more reasonable to interpret animal caretaker in the magic forest as Pearson as the caretaker of the animals/inmates at South Woods State Prison as the Magic Forest than to marry the concept of a mouse and a bat with a rock and roll video. Pearson believes anyone can

Pearson's public Facebook posting is an electronic communication that displayed and distributed racially derogatory and demeaning language and images in the workplace. Even if it was posted while he was off duty using his personal computer, and in his home, the very nature of the communication publishes the image and comments for all the world to see, anywhere and everywhere. Even if Pearson did not intend to convey a racially derogatory and demeaning message and comment, he acknowledged that his lack of explanation or context as to why he made the posting could tend to lead others to believe he held racist beliefs. The policy itself states that a violation of the policy can occur even if there was no intent to harass or demean another. The policy also states that it is a zero-tolerance policy, and the State reserves the right to take either disciplinary action, if appropriate, or other corrective action, to address any unacceptable conduct that violates the policy, regardless of whether the conduct satisfies the legal definition of discrimination or harassment. (R-16, page 058.)

Therefore, I **CONCLUDE** that the respondent has met its burden of proof in establishing a violation of HRB 84-17 C-31- violation of the NJDOC Policy Prohibiting Discrimination, Harassment or Hostile Environment in the Workplace. NJDOC Policy Number ADM.005.001, by a preponderance of the credible evidence.

PENALTY

The remaining issue is penalty. The Civil Service Commission's review of a penalty is de novo. N.J.S.A. 11A:2-19 and N.J.A.C. 4A:2-2.9(d) specifically grant the Commission authority to increase or decrease the penalty imposed by the appointing authority. General principles of progressive discipline involving penalties of increasing severity are used where appropriate. Town of W. New York v. Bock, 38 N.J. 500, 523 (1962). Typically, the Board considers numerous factors, including the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463.

Officer Pearson's work history included a chronology of discipline he has received on previous occasions. (R- 19.) Pearson received one major discipline of a six-month suspension on March 11, 2002. (R-19, page 068.) He has received other minor discipline as follows: on July 31, 2002, he was late for work and received a written reprimand; on April 1, 2004, he received a five-day suspension for offensive writing; on January 17, 2007, he received a one-day suspension for a missing forty-caliber round; and on March 17, 2007, he received a one-day suspension for a missing pair of handcuffs. (R-19.) After the March 17, 2007, discipline, Pearson has had no other discipline until the incident at issue in this case, more than thirteen years later. The major discipline of the six-month suspension Pearson received was remote in time and occurred when he was still a rookie. Pearson has been a corrections officer for eighteen and a half years and has received no discipline at all for the past thirteen and a half years. He also has received a Letter of Commendation.

Pearson has never been charged with or been the subject of any prior complaints regarding discrimination, harassment or hostile work environment by any inmates, staff or the public.

Although Pearson's conduct in this case warrants major discipline, the DOC's lack of a formal written policy on the acceptable use of social media by its corrections officer is problematic and should be considered as a mitigating factor in this case. If the DOC intends to seek the ultimate penalty of removing an officer from their position after many years of service, there has to be a policy explaining what type of social media use is appropriate and what type of social media use is prohibited and there must be training provided to the rank and file corrections officers on the subject. The number of recent cases involving corrections officers disciplined for social media postings indicate the need for a written policy describing the parameters for acceptable and unacceptable social media use as well as the need for training in this regard.

I **CONCLUDE** that Pearson's misconduct does not warrant removal. Considering principles of progressive discipline, I **CONCLUDE** that the imposition of discipline of a one-hundred-eighty day suspension without pay, the maximum amount permitted to be

interpret things any way they want to. He acknowledged that his post and description of his job could cause the impression in the minds of the public or of inmates or staff members that he harbors racist beliefs, but it does not mean it is true. Pearson understands his posting and comments could undermine the public perception of the DOC. The Wikipedia link informed Pearson what was depicted in his posting. (R-7.) He read the Wikipedia description before posting the image and knew what the image depicted.

Discussion

Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963). 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).

Given the climate that existed at the time Pearson made his Facebook postings, it is difficult to believe his explanation that the image he displayed was of the last public execution in the U.S. and that with his typed comment "We need to bring this back" he was actually advocating for the return of public executions of criminals in general, and not the lawless lynching of African Americans that previously had occurred in our country's history.

Pearson listed his occupation on his public Facebook page as "Animal Caretaker at Magic Forest". (R-5, page 015.) He denied he was referencing the inmates he guards as animals or South Woods State Prison as the "Magic Forest". He offered the explanation that he was bit by a mouse and a bat landed on him while at work and there was an old song by Fat Mattress called Magic Forest and he put the two together and that is how he came up with that description for his occupation. I deem Pearson's

explanation not credible and his description of his occupation to be offensive and derogatory to the inmates at South Woods State Prison, their families, the DOC, his fellow correctional officers and the public in general.

Although Pearson's position is that he did not mean to offend anyone by his Facebook postings, his intentions are irrelevant and he has conceded that he is guilty of conduct unbecoming a public employee as well as a violation of a rule, regulation, policy, procedure, order or administrative decision.

Based upon due consideration of the testimonial and documentary evidence presented at this hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following as **FACTS**:

Wayne Pearson was a SCPO for eighteen and a half years prior to his removal on February 24, 2021.

On June 22, 2020, Pearson, off duty, posted on his personal Facebook page a scene depicting an African American male on the gallows surrounded by Caucasian males and a crowd of onlookers. Pearson had added the typed comment "We need to bring this back". (R-5 and R-6.) Pearson provided no other explanation for his post on his Facebook page.

He made this post off-duty but the privacy setting on his Facebook page was set on 'Public'.

Pearson, a SCPO at South Woods State Prison, listed his occupation on his public Facebook page as "Animal Caretaker at Magic Forest". (R-5, page 015.)

Sergeant Robert Curry, a sergeant at Bayside State Prison, posted that he 'liked' Pearson's post. A member of the public, a civilian, saw the post and was so offended

that he communicated with Sergeant Curry and called him a racist for 'liking' the post and said he had zero business guarding black inmates.

Pearson removed the post after approximately two days.

Officer Person acknowledged that his post and his description of his job as animal caretaker could cause the impression in the minds of the public or of inmates or staff members that he harbors racist beliefs. Pearson understands his posting and comments could undermine the public perception of the DOC.

Wayne Pearson has never received any training with the NJDOC regarding the use of social media.

The NJDOC had no written policies specifically on the use of social media.

HRB 84-17 as amended is a table that sets forth various violations and offenses and penalties assigned to the violations based on the number of times that infraction may have been committed. (R-10.) Pearson acknowledged that he received a copy of this discipline policy. (R-11.)

Personal conduct charge C (11) is for conduct unbecoming an employee. The range of penalty prescribed is three days to removal. (R-10, page 036.)

Personal conduct charge C (31) prohibits racial discrimination, harassment and retaliation. The first infraction could be an official reprimand up to a removal and a second infraction could be a thirty-day suspension up to removal. A third infraction would be removal. (R-10, page 039.)

(E) General 1 is a violation of a rule, regulation, policy, procedure or administrative order with a range of penalties ranging from a written reprimand to removal for a first infraction; five days to removal for a second infraction; and removal for a third infraction. (R-10, page 044.)

The Law Enforcement Personnel Rules and Regulations are distributed to all correction officers and they are expected to abide by them 24/7, on and off duty, for their entire career. (R-12, pages 047 – 050.)

Article 1, Section 2 of the Rules and Regulations states: "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-12, page 048.)

Article III, Professional Conduct, Section 1 states: "No officer shall discriminate against or harass any employee, inmate, parolee or member of the general public based upon that individual's race, creed, color, natural origin, sex, affectational or sexual orientation, age, religion or handicap/disability." (R-12, page 049.)

Article III, Professional Conduct, Section 3 states: "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. (R-12, page 050.)

Article III, Professional Conduct, Section 5 states that an officer shall:

a. Be civil, orderly, maintain decorum, control temper, be patient and use discretion in the performance of duty;

b. Cultivate and maintain the good opinion of the public, by prompt obedience to all commands, by steady and impartial conduct in the discharge of duty, and by a respectful bearing to all persons. (R-12, page 050.)

Pearson acknowledged receipt of the Law Enforcement Personnel Rules and Regulations on February 22, 2012. (R-13, page 051.)

The policy statement on the Code of Ethics provides a link to the full Code of Ethics which is approximately one-hundred pages and all officers are responsible to comply with the entire code. (R-14, page 052.) Pearson acknowledged receipt of the annual Ethics Briefing on November 6, 2015. (R-15, page 056.)

NJDOC Policy Number ADM.005.001 titled "Prohibiting Discrimination in the Workplace" sets forth the policy for the NJDOC prohibiting discrimination in the workplace. The protected categories are race, creed, color, national origin, nationality, ancestry, age, sex/gender, pregnancy, marital status, civil union status, domestic partnership status, familial status, religion, affectional or sexual orientation, gender identity or expression, atypical hereditary cellular or blood trait, genetic information, liability for service in the Armed Forces of the United States and disability. (R-16, page 059.)

This is a zero-tolerance policy which 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 the policy, regardless of whether the conduct satisfies the legal definition of discrimination or harassment. (R-16, page 058.)

"It is also a violation of this policy to use derogatory or demeaning references regarding a person, race, gender, age, religion, disability, affectional or sexual orientation, ethnic background, or any other protected category set forth in Section II A above. A violation of this policy can occur even if there was no intent on the part of the individual to harass or demean another." (R-16, page 058.)

Examples of behaviors that constitute a violation of this Policy include "Using derogatory references with regard to any of the protected categories in any communication" and "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." (R-16, page 059.)

Pearson has never been charged with or been the subject of any prior complaints regarding discrimination, harassment or hostile work environment by any inmates, staff or the public.

The work history for Pearson indicates one major discipline of a six-month suspension on March 11, 2002. (R-19, page 068.) He has received other minor discipline as follows: On July 31, 2002, he was late for work and received a written reprimand; on April 1, 2004, he received a five day suspension for offensive writing; on January 17, 2007, he received a one day suspension for a missing forty-caliber round; and on March 17, 2007, he received a one day suspension for a missing pair of handcuffs. (R-19.)

After the March 17, 2007, discipline Pearson has had no other discipline until the incident at issue in this case.

On November 15, 2008, Pearson received a Letter of Commendation for assisting in the seizure of CDS. (R-19.)

Pearson stipulated and conceded that the posts he made off-duty on his Facebook page on or about June 22, 2021, constituted a violation of N.J.A.C. 4A:2-2.3(a)6 conduct unbecoming a public employee; HRB 84-17 as amended (C) 11 conduct unbecoming a public employee; and HRB 84-17 (E) 1 violation of a rule, regulation, policy, procedure, order or administrative decision.

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 bears the burden of establishing the truth of the allegations by a 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).

Appellants status as a corrections officer, subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1980). 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 (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).

Appellant stipulated and conceded that the posts he made off-duty on his Facebook page on or about June 22, 2021, constituted a violation of N.J.A.C. 4A:2-2.3(a)6 conduct unbecoming a public employee; HRB 84-17 as amended (C) 11 conduct unbecoming a public employee; and HRB 84-17 E 1 violation of a rule, regulation, policy, procedure, order or administrative decision.

“Conduct unbecoming a public employee” is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic 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, supra, 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)).

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. The Law Enforcement Personnel Rules and Regulations are distributed to all correction officers and they are expected to abide by them 24/7, on and off duty, for their entire career. (R-12, pages 047-050.) They are held to a higher standard and that during their career they are placed under a microscope by the department and the general public. Section 2 of the Rules and Regulations states “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-12, page 048.)

Article III Professional Conduct, Section 1 states “No officer shall discriminate against or harass any employee, inmate, parolee or member of the general public based upon that individual’s race, creed, color, natural origin, sex, affectational or sexual orientation, age, religion or handicap/disability.” (R-12, page 049.)

Article III, Professional Conduct, Section 3 states: “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. (R-12, page 050.)

The screenshot of Pearson's Facebook profile indicates his job description is "Animal Caretaker at Magical Forrest". (R-6, page 015.) Pearson is referencing the inmates as animals and the institution South Woods State Prison as the Magic Forrest. Someone viewing this would believe that Pearson or any other staff member or the department as a whole views the inmates they are responsible for as animals rather than individual human beings. Pearson's Facebook posting of an image depicting an African American male on the gallows about to be hung, surrounded by a group of white males with the typed words stating "We need to bring this back" (R-6, page 016) is a violation of the rules and regulations and policies and procedures of the department because there is no context supplied as to what Pearson's intent was and the public could interpret it differently as to supporting the public lynching of black men. It also called into question whether Pearson was biased and unable to fulfill his duties as a SCPO impartially.

As set forth in the findings of facts and as discussed above, appellant's conduct in this case violates the implicit standard of good behavior one would expect from a corrections officer. Therefore, I **CONCLUDE** that the respondent has met its burden of proof in establishing a violation of other sufficient cause by a preponderance of the credible evidence.

Appellant has also been charged with a violation of HRB 84-17 (C-31), racial discrimination and harassment in the workplace. NJDOC Policy Number ADM.005.001 titled "Prohibiting Discrimination in the Workplace" sets forth the NJDOC policy prohibiting discrimination in the workplace. The protected categories are race, creed, color, national origin, nationality, ancestry, age, sex/gender, pregnancy, marital status, civil union status, domestic partnership status, familial status, religion, affectional or sexual orientation, gender identity or expression, atypical hereditary cellular or blood trait, genetic information, liability for service in the Armed Forces of the United States and disability. (R-16, page 059.) The policy applies to both conduct that occurs in the workplace and conduct that occurs at any location that 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-

16, page 058.) "It is also a violation of this policy to use derogatory or demeaning references regarding a person, race, gender, age, religion, disability, affectional or sexual orientation, ethnic background, or any other protected category set forth in Section II A above. A violation of this policy can occur even if there was no intent on the part of the individual to harass or demean another." (R-16, page 058.)

Examples of behaviors that constitute a violation of the Policy include "Using derogatory references with regard to any of the protected categories in any communication" and "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." (R-16, page 059.)

The 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 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. (R-16, page 058.)

Appellant argues that this policy is not applicable to his conduct in this case, since he made the posts while he was off duty, on his personal computer, in his home and not while on duty, not in the workplace, or in any of the extensions of the workplace as defined in the policy. This argument is not persuasive when considering the fact that sworn law enforcement personnel are prohibited from knowingly acting 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. The rules and regulations state that 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. Pearson acknowledged that as a sworn law enforcement officer and a correctional police officer he is held to the highest standards of conduct and acknowledged receipt of the policies that were reviewed during the hearing. He also acknowledged that he was to comply with all of the policies and procedures both off and on duty. Pearson acknowledged that by posting on Facebook, even if he was off the clock, he was broadcasting his position to anybody that had access to his Facebook page.

“Although we recognize that a tribunal may not consider an employee’s past record to prove a present charge, West New York v. Brock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense.” In re Phillips, 117 N.J. 567, 581 (1990). Ultimately, however, “it is the appraisal of the seriousness of the offense which lies at the heart of the matter.” Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994). The question to be resolved is whether the discipline imposed in this case is appropriate.

Appellant has been found to have violated N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause; and violations of HRB 84-17, as amended, C(11) conduct unbecoming an employee; C(31)-violation of the NJDOC Policy Prohibiting Discrimination in the Workplace; and E(1) Violation of a rule, regulation, policy, procedure, order or administrative decision.

Respondent seeks appellant’s removal from his position as a SCPO. Respondent argues that Pearson’s conduct is so egregious, it prohibits him from being able to perform his duties in a fair and impartial manner and jeopardizes the safety of the inmates and his fellow officers.

Appellant agrees he deserves major discipline in this matter. However, he does not believe he deserves to be terminated because he has no history of discriminatory conduct and has always been a fair officer. He has a prior disciplinary history for major discipline when he was a rookie and various minor discipline, but they are remote, and he has had no discipline in the last thirteen years. In the many years he has been with the DOC, he has never had any issues with the inmates, the civilian staff or anyone. He also does not agree that he would have any difficulty responding to help either African American inmates or an African American co-worker despite his Facebook posting and comment and job description. Through the years working at the DOC, he has helped fellow police officers and inmates in responding to codes and has never discriminated against anybody as far as helping them. Pearson knows what he posted was wrong and he should not have posted it. It was a mistake in judgement and a

stupid thing to do. Pearson wanted to apologize to all who were offended. Pearson is willing to undergo additional training and is willing to undergo a fitness for duty evaluation if so ordered, before returning to work.

In deciding the penalty portion of this case, I am guided by the recent final decisions of the Civil Service Commission in In the Matter of Robert Curry, Bayside State Prison CSC Dkt. No. 2021-326, OAL Dkt. No. CSR 10174-2020, issued June 8, 2021, and In the Matter of Douglas Burkholder South Woods State Prison, Department of Corrections, CSC Dkt. No. 2021-879, OAL Dkt. No. CSR 00716-2021 issued July 2, 2021.

In the Curry matter, the Commission reduced Sergeant Curry's penalty from one of removal to a ninety-day suspension, based on Sergeant Curry's prior disciplinary history in his nineteen-year career of a previous five-day suspension and a few written reprimands. Sergeant Curry was removed for "liking" Pearson's Facebook posting. The EED Director, Ms. Alston has testified in this case that she found Sergeant Curry's conduct more concerning than that of Pearson, because Sergeant Curry was a superior officer and had a duty to report Pearson's conduct and he did not. It is difficult to reconcile the fact that respondent is seeking to remove Pearson, a subordinate officer, for posting a racially offensive post that a superior officer "liked", when the Commission has modified respondent's penalty of removal to a ninety working day suspension for Sergeant Curry.

In Burkholder, another recent case involving a racist Facebook posting by a corrections officer at South Woods State Prison, the Commission adopted the initial decision of the ALJ and found that the six-month penalty imposed, together with requiring a fitness for duty exam and diversity training was the appropriate penalty in light of the policy of progressive discipline, the officer's twenty-four-year career, and the lack of significant disciplinary history. A further mitigating factor found in that case was that the DOC had no specific written policy regarding social media use.

imposed as a suspension pursuant to N.J.A.C. 11A:2-20 is appropriate for the sustained charges of N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(12) other sufficient cause; and violations of HRB 84-17, as amended, C(11) conduct unbecoming an employee; C(31)-violation of the NJDOC policy prohibiting discrimination in the workplace; and E(1) violation of a rule, regulation, policy, procedure, order or administrative decision. Furthermore, I **CONCLUDE** that as a prerequisite to reinstatement, Pearson be required to participate in mandatory diversity and tolerance training, as well as undergo a Fitness for Duty psychological examination.

Therefore, I **CONCLUDE** that the original penalty of removal be **MODIFIED** to a one-hundred-eighty-day suspension without pay.

ORDER

It is **ORDERED** that the charges and specifications made against the appellant and set forth in the Final Notice of Disciplinary Action dated February 22, 2021, are **SUSTAINED**.

It is also **ORDERED** that the penalty of removal against appellant be **MODIFIED** to a one-hundred-eighty-day suspension without pay.

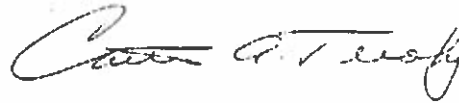
It is further **ORDERED** that appellant Wayne Pearson be returned to his employment as a SCPO with respondent following his completion of mandatory diversity and tolerance training and his successful completion of a Fitness for Duty psychological evaluation.

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.



August 9, 2021
DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency:

August 9, 2021

Date Mailed to Parties:

August 9, 2021

CAT/tat

APPENDIX

LIST OF WITNESSES

For appellant:

Wayne Pearson

For respondent:

Timothy Gonzalez

Ryan Morris

El-Rhonda Alston

LIST OF EXHIBITS

For appellant:

None

For respondent:

- R-1 FNDA, dated February 22, 2021
- R-2 PNDA, dated August 3, 2020
- R-3 PNDA, dated July 9, 2020
- R-4 NJDOC SID Investigation Report, dated July 8, 2020 (four pages)
- R-5 Wayne Pearson's Facebook profile (three pages)
- R-6 Sherwood Collins screenshots (six pages)
- R-7 Wikipedia link on Rainey Bethea (seven pages)
- R-8 Photograph of public hanging of Rainey Bethea
- R-9 NPR Article: Last Public Execution in America
- R-10 HRB 84-17 as amended, Table of Offenses and Penalties (sixteen pages)

- R-11 South Woods State Prison checklist - Wayne Pearson
- R-12 NJDOC Law Enforcement Personnel Rules and Regulations, Articles I-III
(four pages)
- R-13 Receipt Form for Rules and Regulations signed by Wayne Pearson,
February 22, 2021
- R-14 NJDOC Code of Ethics (four pages)
- R-15 Annual Ethics Briefing Receipt Form signed by Wayne Pearson
November 6, 2015
- R-16 NJDOC Policy Prohibiting Discrimination in the Workplace (seven pages)
- R-17 Receipt form for Policy Prohibiting Discrimination in the Workplace signed
by Wayne Pearson on December 13, 2016
- R-18 NJ CSC Job Specification for Senior Correctional Police Officer (three
pages)
- R-19 Wayne Pearson Work History
- R-20 CD: Data Files – Documentary Evidence
- R-21 DVD Interviews of Wayne Pearson and Robert Curry