

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 19TH DAY OF JULY, 2023

Allison Chris Myers

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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 02210-2021

AGENCY DKT. NO. N/A

2021-988

**IN THE MATTER OF JOSEPH DeMARCO,
BAYSIDE STATE PRISON, NEW JERSEY
DEPARTMENT OF CORRECTIONS.**

Christopher St. John, Esq., appearing for appellant (Agre & St. John, attorneys)

Kendall J. Collins, Deputy Attorney General, appearing for respondent (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: March 6, 2023

Decided June 5, 2023

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

STATEMENT OF THE CASE

Appellant, Joseph DeMarco (appellant or DeMarco) appeals the determination of the respondent, the Department of Corrections, Bayside State Prison (collectively referred to as the "DOC") removing him from his position as a Senior Correctional Police Officer ("SCPO") on disciplinary charges arising out of his actions in connection with a June 8, 2020, protest march in Franklinville, N.J. during which a mock reenactment of George Floyd's murder was conducted. Appellant denies any prior knowledge of, or participation in, the reenactment and maintains that he was merely present during same. Appellant further contends that the penalty of removal is unduly harsh and excessive.

PROCEDURAL HISTORY

On June 16, 2020, the DOC issued appellant a Preliminary Notice of Disciplinary Action ("PNDA") arising out of the June 8, 2020, incident. (R1.) On July 16, 2020, the DOC issued a second PNDA adding charges relating to alleged violations of the Policy Prohibiting Discrimination in the Workplace. (R2.) Appellant requested a departmental hearing on the charges, which was held on November 16, 2020. Final Notices of Disciplinary Action ("FNDA"), were issued on December 16, 2020, (R3.) and (R4.) Appellant was removed from employment based on the following sustained charges:

- N.J.A.C. 4A:2-2.3(a)6 – Conduct unbecoming a public employee;
- N.J.A.C. 4A:2-2.3(a)12 – Other sufficient cause; HRB 84-17, as amended, C8 Falsification: Intentional misstatement of a material fact in connection with work employment application, attendance or in any record, report, investigation or other proceeding; C11 Conduct unbecoming an employee; C31 – Violation of the NJDOC Policy Prohibiting Discrimination; and E1 Violation of a rule, regulation, policy, procedure or administrative order or administrative decision.

The specifications detailing the incidents giving rise to the charges in the first FNDA provide in pertinent part:

On or about June 8, 2020, you...participated in a group demonstration. Video evidence establishes that on June 8, 2020 you were participating, in public view, with a group in a reenactment mocking the homicide of George Floyd, an African American male widely known as having been killed by a former police officer in public on video. You are observed positioned near a "Thin Blue Line" American Flag, which represents law enforcement, while mocking a lawful protest demonstration as it passed by your area while your group engaged in mimicking the killing of George Floyd, as another participant (notably, the same circumstances as the Floyd killing), and shouting at the passerby lawful protesters. These actions were reckless and inflammatory and show a profound disregard for consideration of public order and safety, including the safety of police officers present and on duty at the passing demonstration, conduct especially egregious by an officer sworn to protect the public. Your conduct as a law enforcement officer by publicly participating/supporting the exhibition of violent action known to cause death or serious injury in a mocking manner demonstrates that you do not understand nor do you care about your role as a law enforcement officer, and neither the NJDOC nor the

public can have confidence in your ability and judgment, especially in the performance of your duties as a Correctional Police Officer where you have control over inmates and are responsible for the safety of inmates and staff. As a sworn Correctional Police Officer, it is expected that you maintain composure and keep peace. You failed to take any action to diffuse the situation where you were in attendance. Your conduct is egregious, unbecoming a law enforcement officer, violates relevant Departmental rules and regulations, and shall not be tolerated by this Department.

Additionally, you admitted that you derive income from the sale of firewood and you failed to report secondary employment as required by NJDOC policy.

[R3.]

The specifications detailing the incidents giving rise to the charges in the second FNDA further provide:

On June 8, 2020, you violated the *Policy Prohibiting Discrimination in the Workplace* which is a zero tolerance policy, by engaging in conduct that displayed egregious and severe discrimination based on race. Video evidence establishes that on June 8, 2020, you were participating in recording, in public view, with a group, during a Black Lives Matter protest, a reenactment mocking the homicide of George Floyd, an African-American males [sic] widely known as having been killed by a former police officer. Your behavior and conduct on June 8, 2020 constitutes intolerable racist behavior that violates the Policy. Your racist actions were reckless, egregious, and inflammatory, and show a profound disregard for the *Policy Prohibiting Discrimination* and effect on the workplace of your actions on June 8, 2020. Specifically, during the course of your performance and duties as a Senior Correctional Police Officer, sworn to protect the public, you have control over inmates, and are responsible for the safety of inmates and staff, and ultimately the public at large. Your racially discriminatory and harassing actions of June 8, 2020, which occurred in public were widely reported, also undermine the public's trust in Correctional Police Officers and law enforcement. As a sworn Correctional Police Officer, it is expected that you not only enforce, but that you also abide by, the *Policy Prohibiting Discrimination*.

[R4.]

DeMarco appealed his removal and on or about February 21, 2021,¹ the matter was referred to the Office of Administrative Law as a contested case.

The matter was originally assigned to the Honorable Jeffrey R. Wilson, ALJ. Hearing dates scheduled for September 2022 were adjourned in advance due to Judge Wilson's appointment to Superior Court. Thereafter, the matter was assigned to me in September 2022. The hearing was conducted on December 14 and December 15, 2022. The record remained open to allow the parties to obtain transcripts of the proceeding and to submit written closings arguments. By Order of Extension, the time for filing this Initial Decision was extended until June 5, 2023.

FACTUAL DISCUSSION AND FINDINGS

Undisputed Facts

Having fully reviewed the record, I **FIND** the following **FACTS** to be undisputed:

On June 8, 2020, approximately two weeks after George Floyd was killed,² a demonstration/protest march took place on Delsea Drive in Franklinville, New Jersey.

Appellant's brother, James DeMarco (hereinafter referred to as "James") owns a wood yard on Delsea Drive.

Appellant lives in Franklinville, New Jersey nearby the wood yard.

On June 8, 2020, appellant, along with his brother James and others, gathered at the wood yard and watched the protest march. Appellant invited SPCO Leonard Smith to the wood yard to watch the June 8, 2020, protest.

¹ After the matter was transmitted to the OAL, it appears there was some confusion as to whether DeMarco had timely filed an appeal of the FNDA alleging violation of the Policy Prohibiting Discrimination in the Workplace and whether two removal actions had been served on him. On March 29, 2021, the Civil Service Commission issued a Corrected Decision granting DeMarco's request for hearing and referring the matter to the OAL for hearing as one removal action subsuming the sustained charges and specification in both FNDAs.

² George Floyd, was killed on May 25, 2020, by Minneapolis police officer Derek Chauvin, who knelt on Floyd's neck while he was handcuffed and being restrained.

Appellant video recorded portions of the June 8, 2020, protest march on his phone. Appellant's video from June 8, 2020, is of the protest march.

During an interview with the DOC, Special Investigations Division ("SID"), appellant voluntarily provided the DOC with a copy of the video he took on June 8, 2020.

At the time of his disciplinary removal, appellant had been a correctional police officer for approximately nineteen years.

FACTUAL DISCUSSION AND FINDINGS

Testimony

The following is a summary of the relevant and material hearing testimony.

For respondent

Timothy Gonzalez is currently a Principal Investigator for the DOC, Special Investigations Division ("SID"). In June 2020, he was assigned to investigate DeMarco's actions following a referral from the Deputy Chief of Investigations. The Chief's office was "bombarded" with complaints from the public and DOC staff reporting that a correctional officer was involved in a reenactment of George Floyd's murder. During his investigation, Gonzalez learned that the protest was in response to the unlawful use of force by the police against George Floyd. There was a counter-protest "of sorts" at the wood yard owned by the DeMarco family. The wood yard was located on Delsea Drive in Franklinville where the march took place.

Video of the June 8, 2020, incident was widely available on the internet. Gonzalez reviewed various videos, compared staff ID photos to the individuals in the videos and identified DeMarco as the officer involved.

The investigation revealed that DeMarco's brother, James and his son [appellant's nephew], were also present at the wood yard during the protest. Gonzalez identified James as

the individual who is seen and heard in the video, berating the police, and antagonizing the protesters as they marched past the wood yard.

In addition to video from the internet, DeMarco provided SID with the video he recorded during the protest. DeMarco admitted to making the statement heard on his video, "you're not going to kneel on his neck, are you, oh my God."

During his SID interview, DeMarco confirmed that he saw his brother kneeling on his son's neck. He also confirmed that some of his neighbors, and SCPO Leonard Smith, were also present at the wood yard during the protest. DeMarco acknowledged that local residents knew he was a law enforcement officer and that the local police at the protest could have known he was in law enforcement.

Gonzalez reviewed the DOC's professional conduct policy with DeMarco. DeMarco acknowledged that looking back, he would do things differently but that he did not see his actions as being violative of the public trust. DeMarco acknowledged that he should have "walked away" but explained that he was in shock at the time. They also discussed training on the use of force and DeMarco denied participating in the depiction of unlawful use of force. Gonzalez posed hypothetical questions to DeMarco about demonstrations of unlawful use of force and response thereto.

Gonzalez again interviewed DeMarco on June 12, 2020. DeMarco explained that he attended the event to record history and also because he was concerned and wanted to make sure that no "shenanigans" or "nothing bad" happened.

DeMarco acknowledged that he derived income from the wood yard but did not disclose this to the DOC. He did not complete an outside activity questionnaire form in connection with work at the word yard.

SCPO Leonard Smith was also interviewed during the investigation. Smith reported that DeMarco called and invited him to watch the protest at the wood yard. He was present for the entire protest march. Once he saw James kneel on his son's neck to re-enact the murder of

George Floyd, he "did what he could" to remove himself from the situation. He tried to hide until the crowd cleared and he was able to drive away on his motorcycle. DeMarco was the only person Smith knew at the event. Although he lived only fifteen minutes away, Smith said he was not familiar with members of the Franklinville Police Department ("PD"). Smith said he had no prior knowledge the reenactment would occur.

On cross-examination, Gonzalez explained that James berated the Franklinville police through his comments including about getting some "guys out here with some balls."

Gonzalez also agreed that DeMarco was cooperative during the investigation and volunteered his video during the first SID interview. Gonzalez confirmed that SID had no evidence of DeMarco posting his video on social media.

DeMarco's only comment during the video occurred during the second time the protestors marched past the wood yard.

Gonzalez acknowledged that the reenactment was highly publicized and that there had been news articles misidentifying DeMarco as the individual who conducted the mock reenactment of the George Floyd murder. Gonzalez confirmed he was not told how to handle the case given its notoriety. He explained the DOC is always very concerned about public perception and trust and that he is thorough in all his investigations.

He did not believe that displaying the "Thin blue line" (a.k.a) the "Blue Lives Matter" flag³ meant that an individual was a law enforcement officer. He understood the flag to represent support for fallen officers. He agreed that the flag itself would not identify DeMarco as law enforcement.

Regarding SCPO Smith, Gonzalez confirmed that the DOC received information from at least two individuals that Smith was at the protest. Smith confirmed that DeMarco never talked

³ Wikipedia indicates that this flag represents a countermovement in the United States advocating that those convicted of killing law enforcement officers should be sentenced under hate crime statutes.

to him about the reenactment. On the date of the protest, Smith was out of work and under quarantine due to COVID exposure. Smith's quarantine was not the focus of the investigation. Gonzalez was not involved in the disciplinary process and was unaware of whether Smith received any discipline.

Brian LaBonne, is a regional major and has been employed by the DOC for approximately eighteen years. He works on special projects and is knowledgeable of all DOC policies. He is familiar with DeMarco as a result of the June 8, 2020, incident.

With respect to DOC's Standards of Professional Conduct, LaBonne explained that the policy holds sworn law enforcement officers to a higher standard of conduct, whether on duty or off. Officers are expected to conduct themselves at all times in a way that is professional and ethical. The DOC was disappointed to learn that one of its officers was present during the reenactment of the George Floyd incident, which took place at a lawful demonstration supervised by local police. The DOC was further disappointed to learn that one of its officers was on the scene filming. The department would have expected its employee to separate himself from the incident and attempt to deescalate the situation. James's comments directed towards law enforcement and to the chief of police were unfortunate and embarrassing. The department does not want the public to lose confidence and trust in its officers.

LaBonne explained the DOC's Code of Ethics and the State Uniform Ethics Code and that officers are required to disclose their outside employment.

LaBonne also explained the Law Enforcement Personnel Rules and Regulations ("Rules and Regulations") (R25.) The department believed that it would create an impression of lack of confidence if the public learned that one of its officers participated in an event that included yelling and shouting at the police and reenacting the George Floyd killing.

He further explained that the DOC has a strict anti-discrimination policy. DeMarco violated the public trust by being present at an incident where individuals at his location replied "to no one," in response to the crowds' chants of "Black Lives Matter." Additionally, his failure to attempt to deescalate the situation could have caused members of the public to lose trust and confidence in

the DOC's ability to carry out its duties without bias. Even though DeMarco was not one of the two individuals who engaged in the reenactment and did not yell at the protesters, DeMarco's presence signified that he was "ok with those types of behaviors." Association with those actions violated the DOC Rules and Regulations that prohibit officers from engaging in threatening or assaultive conduct, using assaultive language or engaging in a disrespectful manner. Law enforcement officers are supposed to maintain the peace. DeMarco acted to the discredit of himself and the DOC.

As to penalty, LaBonne confirmed that removal was appropriate given the overall seriousness of the incident and the national attention it garnered. The DOC would have concerns regarding DeMarco's return to duty. The other correctional officers and the DOC's inmate population, which is largely African American, might also have concerns about DeMarco's ability to perform his duties. There was a loss of confidence because of the incident.

On cross-examination, LaBonne testified he was unaware of whether the national media attention had anything to do with the department's decision to remove DeMarco.

Regarding the charge relating to failure to report outside employment, LaBonne explained that outside employment must be disclosed so it can be reviewed and considered for approval by DOC and the Ethics unit.

Leonard Smith, is a SCPO employed by the DOC. He met DeMarco through work. They became friends but he has not had any contact with DeMarco for the last couple of years.

On June 8, 2020, he received a text from DeMarco informing him that there was going to be a protest and inviting him to come hang out at his family's wood yard.

Smith was on leave/not working that day and decided to go to the protest. He watched the protestors walk up and down the street. DeMarco was the only person he knew at the wood yard. Prior to that day, Smith had not met DeMarco's brother, James.

He recalled that during the incident, James was "yelling and screaming" at the police. He did not recall James yelling at the protesters. Smith was very surprised by what was happening. He did not engage with the protesters.

As the protesters marched back down the street, DeMarco's nephew laid down on the ground and James knelt on his neck. Smith was "shocked" and "taken aback" by the situation. He walked away—behind a wood pile. He wanted to separate himself from the situation because James was mocking the recent death of George Floyd. Smith did not think that was right. He remained behind the wood pile from the time James began the reenactment until the protesters began to leave. It took approximately twenty to thirty minutes before he was able to leave because Delsea Drive was blocked during the protest.

DeMarco called him the next day and advised that he had spoken with SID. He asked Smith whether anyone had seen him at the wood yard. DeMarco called him one additional time, but Smith told him never to contact him again. He has not spoken to DeMarco since.

On cross-examination, Smith noted that he and DeMarco are no longer friends. He acknowledged this was, in part, because he believed DeMarco mentioned his name to SID.

Smith acknowledged that due to what was going on in the world, he had a general idea of the type of protest that was to occur. He was unaware that James was going to reenact George Floyd's killing.

He agreed that James's ranting and raving was not directly addressed to any individual. He also agreed that the protest was peaceful.

He explained that on the date of the protest, he was on Covid-19 protocol that required him to remain home and rest. He was not disciplined or reprimanded for violating the protocol.

Peter Thambidurai, works within the DOC's Equal Employment Division ("EED") and the Ethics Unit. He is the Equal Employment Opportunity ("EEO") and Ethics Officer. He has been with the DOC for approximately seventeen months. He was just recently appointed as the

managing attorney. He is responsible for supervising all investigators and legal specialists, reviewing investigation reports, and determining whether allegations are substantiated or not. He reviewed DeMarco's investigative file.

He testified concerning the DOC's Policy Prohibiting Discrimination ("Policy") in the Workplace. (R17.) The Policy applies to all state employees and is a "Zero Tolerance" Policy. It applies to the very first violation. Given the circumstances of the protest in this matter and the publicity received in the press and with other DOC staff, removal was the recommended penalty.

Thambidurai explained that racial discrimination was at the heart of this case. The reenactment of the George Floyd murder was a very sensitive matter. It involved a black man lying on the ground with a white police officer on his neck and it received national attention. So the whole case in "race centered." (T145:14-19.)

The reenactment was racially charged. Video of the incident was on social media. The DOC received numerous complaints from the public and other members of the department. It had a direct effect on the integrity of the workplace and on the safety of the officers and inmates. The Policy applies not only to the workplace but "any other place where it could have an impact on the workplace." (T147:5-7.)

Although DeMarco did not directly participate in the reenactment, he was present during it and filmed the entire protest. Video of the reenactment was placed on social media and it cast the DOC in an extremely negative light. Officers are sworn to protect the public. The individuals were perceived as "counter protestors, meaning they were not in sympathy with the Black Lives protestors." (T148:7-12.) There were derogatory comments hurled at the Black Lives protestors. There were comments that if Floyd had only complied, he would be alive and there were also responses that "all lives matter". (T148:17-24.) The reply of "to no one" in response to the chant of "Black Lives Matter" demonstrated racial animus or insensitivity.

The second FNDA concerned the alleged violation of the Policy. EED has exclusive jurisdiction to determine whether discriminatory conduct in violation of the Policy has occurred. From EED's standpoint, there would be serious concerns about reinstating DeMarco to duty

including the morale of other officers and the lack of trust of his co-workers, and of the inmates under his charge.

The DOC prison population largely consists of people of color—particularly African Americans. A good percentage of the DOC staff is also African American. Prisons are a high-risk environment and officer trust is essential.

On cross-examination, Thambidurai explained that prior to his recent appointment as managing attorney, he worked in the DOC as legal specialist. At the time he reviewed DeMarco's investigation, he had reviewed approximately fifty other investigations. He did not make the determination to substantiate the discrimination charges, but he agreed with the charges.

He did not agree that DeMarco's statement in response to the reenactment expressed surprise at his brother's conduct. He explained that he would have to consider the statement in the context of everything that was going on including that DeMarco remained at the protest throughout the incident, that he filmed "the whole thing," and made no attempt to intervene or separate himself. Thambidurai opined that in context of this matter, "mere presence" was enough to warrant discipline.

He further explained that the Policy applies in a broader context. The incident was an extension of the workplace. The incident occurred not long after the George Floyd killing. There was nationwide unrest. It was a sensitive time to reenact the racially triggered killing. The reenactment posted on social media triggered lots of calls from the public wanting to know where the DOC stood on the issue. The incident, with so much publicity, had an effect on the morale of the workplace. The Policy also applies to third-party harassment.

Thambidurai acknowledged that he believed that DeMarco had filmed the reenactment. However, the fact that he filmed only the crowd did not change his opinion because DeMarco did not attempt to intervene. Additionally, other comments directed at the protestors and the police were antagonistic.

He clarified that it was not his position that the counter protestors were racists because were not "in sympathy" with the BLM protestors. However, he concluded that DeMarco engaged in racist activity. The reenactment had to be understood in the context of racial undertones. The reenactment was racially insensitive. As a law enforcement officer sworn to uphold the public trust, DeMarco did nothing to separate himself or stop the reenactment.

As to SCPO Smith, Thambidurai did not review his investigation file.

For appellant

James DeMarco is appellant's brother. He has lived in Franklinville for approximately fifty years. He testified that he became aware of the Delsea Drive protest, on the date of the incident, through a phone call from a business owner/friend. The caller advised there was going to be a Black Lives Matter ("BLM") protest and that there were threats posted on the internet to James's family and to burn down his property.

James has sold firewood for years, but he would not call it a "business." He has no employees. Appellant helps him cut and split firewood. Appellant rarely dealt with customers but would do so if James was not around. He did not compensate appellant through a "W-2" or a "1099" but would occasionally give him gas money or take him out for dinner or get him lunch.

After learning of the protest, James called Franklinville Township to find out who had "pulled the permits" and where the protestor would be marching. He wanted to get as much information as he could because he was worried about his family. The Township was aware of the threats to his family and property and to others on Delsea Drive. The Township was going to close the municipal building and send the employees home early. He was "extremely angry" because "strangers" had determined that he and his family were racist and made threats because he had a Trump flag along with two American flags and an Italian flag on his property. (T2 11:1-18-12:-6). Additionally, he learned that the protestors did not have permits and the Township did not let people know what was going on. The Governor had restricted gatherings due to the COVID pandemic. James felt it was not appropriate to allow the BLM protest because the month before,

the Memorial Day Parade had been cancelled. He felt that Brian Zimmer, the Chief of Police, failed to act and let politics get involved. He viewed it as “cowardice.” (T2 12:8-24.)

He did not dispute the BLM protesters’ right to protest as long as it was peaceful. He called the appellant because of the threats he received and asked him to videotape the protest that was to occur in front of his property. He wanted his brother to record the event so if anything happened to his wife, kids, or property he could link the protest back to the town and “seek some type of retribution for allowing it to go on.” (T2 14:16-20.) The night after the protest, someone set fire to some of his firewood racks. Fortunately, appellant was nearby and able to put the fire out.

On the day of the protest, James was extremely angry and basically kept to himself. He did not recall if he spoke to appellant once he arrived at the wood yard.

He acknowledged that when the protestors first passed by the wood yard, he made statements directed towards the chief of police and the mayor. He didn’t have any animosity toward the patrol officers present. He suggested that the patrolmen should strike because they were forced to be there. His comments about getting some men out there “with some balls” was directed to the men behind the women protestors—not the patrolmen.

There was a “Thin Blue Line” or “Blue Lives Matter” flag at the woodyard. An acquaintance asked him if he could hang the flag on the back of a pickup truck at the wood yard to show support for the Franklinville PD.

The protesters made “hostile threats” when they first came by, but there was no violence. The protesters called him a “racist,” a “white devil,” a “cracker,” a “MF’er” and threatened to burn down his property and kill his family and “things of that nature.” (T2 23:5-12.) As the crowd marched back down Delsea Drive, he told “someone” there with them to get down on the ground. (T2 24:10-20.)

He put the person on the ground, kneeled on his neck, and yelled out, “if we don’t comply with the police, this is what they can do to us, white and black together.” “All he had to do was comply and he would’ve been alive.” (T2 25:1-10.) Race had nothing to do with his actions. Id.

It was “extreme anger” of what was taking place, threats to his family and what was allowed to take place. It was an “unfortunate incident” but he was not going to allow anyone to threaten to kill his family. (T2 26:2-6.)

After the incident, his brother was “extremely mad” at him, and “let [him] have it.” The appellant did not agree with James’s actions. The incident affected his relationship with his brother. His brother gave up his career because James asked him to video the protest for James’s/his family’s safety.

No one knew he was going to do the reenactment. He had not planned it prior to the protest. He “lost it” when he saw the person who previously threatened his family and someone said something lumping him in with a “bad police officer.” (T2 27:2-16.)

On cross-examination, James testified that on the date of the protest, the first threats made to him came from “four black individuals” in a white SUV. This occurred before appellant arrived. (T2 28:21-25.) There were also threats to him by unknown persons on the internet. He had already called the police but they said there was nothing they could do about it. He then explained that after receiving the telephone call advising him of the internet threats against him, he first called the township’s zoning office—rather than the police. (T2 31:24-33:-13.) He did not file a police report concerning the threats made. (T2 41:1-15.) He did not recall if he filed a police report when the wood yard was set on fire.

Additionally, he clarified that it was his son upon whom he knelt on during the reenactment. He did not mention his son on direct examination because he was concerned for his son’s safety.

He did not know how close appellant was to him during the incident. He had “tunnel vision” at that time and was more focused on the crowd. He did not hear appellant say anything to him.

He did not agree that he inflamed the situation by kneeling on his son’s neck in reenactment of George Floyd’s murder. He did it because someone in the crowd yelled to him, “Why—how could you white devils, you racists crackers do this to our people?” (T2 48:21-25.) He explained, “I feel the protesters inflamed the situation and made me do that.” (T2 49:5-20.)

Joseph DeMarco was a correctional police officer for over eighteen years. He is a lifelong resident of Franklinville. He testified that he learned of the June 8, 2020, protest from his brother James. He went to watch the protest to “record it for history.” He watched the protest from his brother’s wood yard. He lives approximately one quarter mile from the wood yard. He arrived there before the protest began. He texted SCPO Smith and invited him to “hang out” and watch the protest. Smith arrived a little after he did.

He knew several people at the wood yard, including his brother, Smith, and some neighbors. He identified his brother’s voice on the video. He also recalled someone behind him at the wood yard replying “to no one” in response to the chant “Black Lives Matter.” (T2 58:5-14.) He did not know the person who said that. He did not agree with the comment. The only thing appellant said during the protest was, “Oh my God, you’re not going to kneel on his neck.” (T2 57:23-24.)

As the protestors marched by, he was recording them, “just to have everybody’s face in the video.” (T2 59:14-16.) At the time, he was unaware of the alleged threats to his brother. James did not share the threats with him and did not say why he wanted appellant there. (T2 60:1-4.)

When appellant arrived at the wood yard, James was very quiet. However, he agreed that James engaged in “verbal assaults” after the protestors first passed by. (T2 60:8-11.) He did not agree with his brother’s comments. Id. at 14-18.

He was unaware that any of the protestors had threatened James. (T2 60: 24-61:-1.) If the protest had turned physically violent, he would have stepped in to stop it—to try to calm it down.

He recalled making only “small talk” with his brother after the protestors first passed by. The protestors marched back down the street approximately thirty minutes to one hour later. As the protestors marched past the second time, he saw “out of the corner of his eye” James kneeling on his son’s back and responded, “Oh my God, you’re not going to kneel on his neck.” He was in “shock” and “embarrassed.” (T2 61:23-62:-7.)

His nephew did not appear to be in any physical distress. The reenactment lasted approximately thirty seconds to one minute. He did not intervene because he was in shock. He just kept to himself. He now regrets not stepping in. He had no prior knowledge of the reenactment. (T2 62:22-63:-5.) If he had known what his brother was going to do, he would not have been there. Id. at 11-13.

He explained that Thambidurai's testimony, referring to his actions as "racist," made him angry because it was not true. Appellant has since spoken to several officers who want him to come back to work. He opined that safety would not be impacted if he were to be reinstated. He would do his job fairly and consistently as he had done for nearly nineteen years.

If he had it to do over again, he would have walked away or tried to have said something to his brother to stop it. (T2 65:20-66:-2.) He acknowledged that the reenactment garnered national attention. He was initially misidentified as the person who directly participated in the reenactment.

During his SID interview, he was confused by the investigator's question about what he would do if something like the reenactment occurred at a DOC facility. If he witnessed a correctional officer performing the reenactment on an inmate, he would stop it. (T2 66:25-67:1-18.)

Regarding the DOC's outside activity/ secondary employment policy, he was aware of the policy and had previously disclosed other secondary employment. He did not disclose his work at the wood yard because he did not consider it a job. He split and cut wood once in a while. As compensation, he received reimbursement for gas or dinner/lunch. During questioning by the undersigned, appellant confirmed that he helped his brother at the wood yard for approximately less than one year. He would help out approximately once or twice a month—a couple of hours at a time. (T2 101:19-102:-12.)

On cross-examination, appellant confirmed that he did not seek any advice regarding the outside activity/secondary employment policy. He acknowledged that looking back, he guessed that he should have disclosed his activity at the wood yard. (T2 73:23-74:-3.)

Appellant further confirmed that when he later learned of the threats to his brother/his brother's property, he did not advise SID of same. Similarly, he did not report the threats to the police and did not encourage his brother to do so. He acknowledged however that looking back now, he realizes this would have been important to disclose. (T2 76:11-25.)

He explained that he did, however, encourage James to call the police about the arson at the wood yard. The day after the protest, he was outside of the Wawa when someone said that the wood yard was on fire. He ran to the wood yard and put out the fire with the water he had in the car. He spoke with the Fire Marshall but does not think he spoke with the police. He did not recall disclosing to the Fire Marshall or anyone else the threats made. (T2 77:11-78:-8.)

Regarding the protest march, appellant also acknowledged that he personally knew approximately four to five Franklinville police officers. During the protest, Franklinville police cars were in the middle of the road, they were approximately twenty-five feet from where he was standing. He agreed that the officers could have recognized him.

He acknowledged that he took no action to deescalate the situation but explained that correctional officers are trained that they don't have to intervene if something happens "on the street." He further explained that it is "actually frowned upon." (T2 88:3-17.) He reiterated however that looking back now, he should have walked away. (T2 89:14-17.)

He confirmed that during his SID interview he told those at the wood yard to, "just let [the protestor] march by." He acknowledged that he took no action when those at the wood yard did not listen to him. "What was I supposed to do?" . . . "They're adults, I – can't control somebody's actions – so no, I didn't." (T2 90:18-91:-19.)

Appellant also acknowledged that, despite his proximity, he did not hear any threats to his brother during the protestor's second march by. He was standing approximately ten feet away from James during the incident.

Bernard Willie, worked for the DOC for twenty-seven years. He is a retired security Major. He is familiar with the DOC's policy regarding secondary employment and has performed "one or two" investigations regarding policy violations. He agreed that the purpose of the policy is to ensure no conflicts of interest. Willie opined that officer's failing to report or to seek approval for helping with a family business would likely warrant only a written reprimand—not termination. Willie knew only that appellant was allegedly working for his brother. He opined that regardless of whether appellant was paid or not for his work, he should have notified the DOC in writing of what he was doing.

On cross-examination, Willie confirmed that his opinion as to penalty was limited to the issue of secondary employment.

Robert Barrientos, Jr., is a correctional officer. He has known appellant since 2005. They worked together for about fifteen years and became friends outside of work. He opined that appellant is a very good officer who is fair and consistent. He is a "good guy." He daily observed appellant interact with inmates and officers when appellant ran the barbershop. He never saw appellant treat inmates or officers differently based upon race, gender or creed. Nor did he see appellant treat people differently in social settings due to race, gender or creed.

Barrientos did not attend the June 8, 2020, protest march.

Christopher Cole is a correctional officer. He worked with appellant for approximately thirteen years and he thinks he is a "good guy" and a helpful officer. They are friends outside of work. He has never seen appellant treat officers, inmates, or members of the public differently based on the basis of race, gender or creed.

Cole did not attend the June 8, 2020, protest march.

Brian Darcy is a Lieutenant with twenty-two years of experience at the DOC. He supervised appellant for several years and worked with him when they were both correctional officers. He opined that appellant was a "good officer" and "one of the better officers at the institution." He never saw him treat inmates or officers differently on the basis of race, gender or creed. The inmates liked working on appellant's detail—he ran the barbershop. Darcy would have no reservations about appellant being reinstated to duty and would want appellant to work at Garden State Correctional Facility where Darcy is working.

Darcy did not attend the June 8, 2020, protest march.

Video Evidence

Having fully reviewed and considered the video evidence in the record, both at hearing and during my post-hearing review of the record, I **FIND** the following as **FACT**:

One of the video recordings taken by the appellant on June 8, 2020, is of the protestors as they first march down the street, [from right to left of the video], towards appellant's location across the street at the wood yard. (J-1, at DeMarco Video 2.)

The protest march down the right side of the street is led by a police vehicle driving in the same lane. Another police vehicle is driving in the left lane, alongside the protest marchers. Id.

As the protestors march down the street towards the wood yard, they are heard chanting, slogans including, "Silence is violence," "All lives can't matter, until Black Lives Matter," and "We can't breathe." Id.

At approximately forty seconds into the video, as the first police vehicle leading the march is no longer in view and as the protestors begin to approach the wood yard, a voice identified at hearing as James DeMarco's, is heard yelling. James's comments are not entirely distinguishable due to the sounds of the approaching protestors. Id.

At approximately forty-three seconds, James is heard yelling, including “and these pieces of shit, we gotta have them up here, right?” Id.

At approximately, one minute, thirty-seven seconds, someone yells comments including, “Racism in this town is done.” “No more racism,” and “Fuck racism.” Id.

At approximately one minute, forty-seven seconds, as the protestors begin to pass the wood yard, James is heard yelling, “Fucking Brian Zimmer, allowed this shit. Our administration allowed this shit.” Id.

James continues to be heard yelling comments for the remainder of the video, including: “Fucking assholes.” “It’s a shame the everyday patrolmen have to stay here and do what the fucking administration says and Brian Zimmerman. . .” “You know you guys don’t want to be fucking here doing this shit, you all should’ve protested the chief.” “You shouldn’t have let it happen. You all should’ve went on strike.” “You would have had Franklinville Township residents behind you. We would have backed every one of you.” “We’ve got the best police force in the country and you fucking assholes are doing this in our little town.” “Brian Zimmerman and the administration should be ashamed of themselves for letting this happen and our poor veterans can’t even walk.” “Fucking assholes.” “Get some fucking men out here with some balls.” “You piece of shit.” “You hide behind little girls.” Id.

Approximately four additional police vehicles are seen in the video, riding behind the marchers, including two police vehicles that stop and remain at the wood yard. Id.

The video ends after two minutes, forty-nine seconds. Id.

The other video recording taken by the appellant on June 8, 2020, is of the protestors as they march down the street [from left to right of the video] for the second time towards appellant’s location at the wood yard--on the same side of the street. (J1 at DeMarco Video 1.)

The protest march is led by a police vehicle. Approximately four additional police vehicles are seen riding in the far-right lane/shoulder of the road, alongside the woodyard. Id.

As the protestors march down the street, they chant, "We're not stopping." In response, a voice from the wood yard and sounding like James's replies including, "Good, keep walking," "Start running," and "Good, keep running," and in response to the protestors' chant, "Black Lives Matter," replies "so do white lives, so do police lives." Id.

At approximately twenty-six seconds into the video, appellant says, "No, you're not going to kneel on his neck. Oh my God." Appellant continues to video the protestors as they march towards the wood yard. Id.

As the protestors near the wood yard, James is heard yelling comments including: "Look at that, you don't comply, that is what happens." "See that, he ain't complying, he ain't complying." "If he would have complied, it wouldn't have happened." "It's his own fault—that is why he's dead." "He's dead because he didn't comply." "Look at this, baby." "Wooh." "That's right bitch, take my picture." "It's his fault he's dead—not the cops." "He had drugs on him." "He was in prison five times." This is what happens. Comply with the cops." Id.

Appellant continues to video the protest march. Id.

Neither James nor his mock reenactment of George Floyd's murder is seen in this video. Id.

Another person, off camera, says, "He passed bad checks." At approximately one minute fourteen seconds, that same person is heard saying, "Black lives matter—to no one." Id.

James continues to yell at the protestors as they pass the wood yard. "Look at this, Look at that." "Next time he should have complied." "He should have listened to the cops." Id.

The video ends after one minute, twenty-eight seconds. Id.

Another video of the June 8, 2020, protest march is taken from a vantage point behind where the appellant is standing at the wood yard. (R8, at MAH 0072.)

Appellant is seen standing next to/up against a pole. He is wearing sunglasses and a black sleeveless t-shirt. He is holding his phone up and recording the protest march. As with the prior video, [J-1 at DeMarco Video 1] comments from the wood yard including but not limited to, "Good, keep walking" and "Start running" are heard in response to the protestors' chants. Id.

At approximately fifty seconds into this video, as the protestors march towards the wood yard, an individual identified at hearing as James's son, is seen rushing to the front of the wood yard driveway and lying face down on the ground. He is positioned in front of and slightly to the left of appellant. Id.

Appellant appears to briefly turn his head in the direction of his nephew lying on the ground and then returns in the direction of the protest march and continues to video. Id.

At approximately one minute, James is seen kneeling on his son's back/neck as the protestors march closer to the wood yard. James is wearing jeans, a long sleeve t-shirt, and a backwards baseball cap. Id.

James is heard and seen yelling comments at the protestors, including directing their attention to his mock reenactment of Floyd's murder and yelling about Floyd not complying. Id. (See also J-1 at DeMarco Video 1, for the comments made.)

As James continues to kneel on his son and yell comments at the protestors; appellant continues to video the protest march. Id.

At approximately one minute, forty-five seconds, another individual at the wood yard is heard saying, "to no one" in response to the chant "Black lives matter." Thereafter, that same individual replies, "Black Lives Matter—to no one." At approximately two minutes fourteen seconds, that same individual is heard saying, "God Bless the Po-lice." and "Dumbass protestors," and is thereafter heard laughing. Id.

Another voice is heard saying, "all lives matter" and "police lives matter."

Appellant is seen in this video for approximately one minute, fifty seconds. Id. The video ends at two minutes, forty-two seconds. Id.

No comment made by appellant is heard on this video. Id.

Additional short videos of the events of June 8, 2020, are taken from the vantage point of the protestors as they march by the wood yard. (R8, at MAH 0073, see also R8 at MAH 0074.) The protestors can be heard chanting slogans including, "George Floyd," and "Black Lives Matter." (R8, at MAH 0073).

James is seen in the center of the wood yard driveway kneeling on top of his son's back/neck and yelling comments at the protestors. Id.

Appellant is seen at the entrance of the wood yard driveway. He is videoing the protest march and standing nearby James as James conducts his mock reenactment of George Floyd's murder and yells comments at the protestors. Id.

Signs and flags including but limited to, an American flag, a "Trump" banner, a sign listing firewood for sale, a sign reading, "All Lives Matter" and a "Blue Lives Matter" (a.k.a.) "Thin blue line" flag are displayed in the wood yard. Id.

At approximately six seconds into this video, as the protestors march past the wood yard driveway, a voice presumed to be that of a protestor is heard yelling, "You piece of shit."⁴ Thereafter, the protestors are heard chanting, "No justice, No Peace." The video ends after twenty seconds. Id.

During his June 10, 2020, SID interview, appellant advised that the wood lot belonged to his brother. He agreed that firewood sales were a family business. He acknowledged that it was

⁴ This presumption is made based on the vantage point of the video and the direction/proximity from which the sound of the voice is coming.

something from which he earned a profit but explained that the profit was very little. (R9.) Appellant also acknowledged that he did not report his secondary employment to the DOC. Id.

CREDIBILITY

In evaluating evidence, it is necessary for me as the finder of fact to assess the credibility of the witnesses. This requires an overall assessment of the witness' story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F. 2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950).

A trier of fact may reject testimony as "inherently incredible" when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). "The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

As to respondent's witnesses, I accept their testimony as credible and without improper motivation or bias. More specifically, I accept the testimony of Timothy Gonzalez's concerning the DOC's investigation and his actions regarding same to be reasonable and reliable. I also accept the testimony of Brian LaBonne concerning the DOC's rules, regulations, and policies as reasonable and reliable. I also accept the testimony of Leonard Smith concerning his actions in connection with the June 8, 2020, protest march as straightforward. While Smith acknowledged that he is no longer friends with appellant, and that he may have an interest in avoiding disciplinary action, his testimony concerning the events of June 8, 2020, was consistent with other evidence in the record including that of appellant's. Finally, I accept the testimony of Peter Thambidurai, concerning his actions in reviewing the DOC's investigation of appellant for purposes of

determining a possible violation of the DOC's Policy prohibiting discrimination in the workplace, as credible and reliable.⁵

As to appellant's witnesses, I accept the following:

While I accept as credible the testimony of James DeMarco that he was very angry on the date of the June 8, 2020, protest march, overall, I do not accept his testimony as credible, reasonable, or reliable. As an initial matter, his testimony concerning threats allegedly made to him and/or his family, including threats to kill his family and threats made to him at the protest march appear overly exaggerated and do not ring true considering his testimony that after initially learning of threats posted on the internet, his first call was to the zoning department rather than to the police, and his further testimony that he did not file a police report concerning the alleged threats. Further, his testimony that he shared information regarding the threats with his brother is directly contradicted by appellant's testimony. James's testimony about threats made to him during the protest march is also inconsistent with appellant's testimony that he did not hear any threats.

Additionally, James's testimony that his actions and/or comments had nothing to do with race is contradicted by his testimony that he "lost it" after someone in the crowd called him a racist and/or lumped in him with the "bad police officer" and his further testimony that he felt the protestors inflamed the situation and "made [him] do that" by asking how could you "white devils" and "racist crackers" do this to our people. Moreover, this testimony is contradicted by James's actions and comments seen and heard in the ample video evidence in the record.

Further, James's testimony and suggestion that his mock reenactment of George Floyd's murder was unplanned and/or that no one knew about it in advance, does not hang together particularly considering the video evidence that shows his son rushing to the front of the wood yard and lying face down on the ground for approximately ten seconds as the protestors begin to approach to the wood yard. While the reenactment may not have required much advanced

⁵ As much of Thambidurai's testimony focuses on the legal conclusions he rendered, that portion of his testimony does not warrant or require a credibility determination and is addressed as part of my legal analysis.

planning, the video evidence demonstrates that there was some prior planning/notice at least between the direct participants, if not also to others.

Finally, James' testimony that he did not consider his selling of firewood to be a "business" and his explanation that he did not have employees and only provided appellant with occasional reimbursement for gas or bought him food was not reasonable and did not ring true. In sum, James's testimony was both internally inconsistent and inconsistent with the other competent evidence in the record but rather appears to be primarily motivated by an interest in attempting to justify his actions and/or help his brother in his appeal of his disciplinary removal.

As to appellant's testimony, I accept that he now regrets not taking any action to stop his brother from engaging in the mock reenactment or from taking any action to distance his himself from the reenactment and/or the comments of his brother and others at the wood yard. However, appellant's testimony that he was in shock of his brother's actions is inconsistent with the other evidence in the record. A review of the video evidence reveals that appellant's statement, "No, you're not going to kneel on his neck. Oh my God," was said in a casual, conversational tone without any audible indication of shock or surprise. Further, appellant's admission that he observed his brother's actions and heard his comments but then almost immediately returned his attention to videoing the protest march, is further inconsistent with any genuine experience or expression of shock, surprise, or disapproval. Similarly, for these reasons, appellant's testimony that he had no prior knowledge of his brother's intended action is not fully reasonable or reliable. Finally, appellant's testimony that he did not report his activity at the wood yard because he did not consider it to be employment and that he received only occasional reimbursement or food for his work at the wood yard does not ring true and is inconsistent with his prior statement made during his recorded SID interview. Based on the foregoing, I do not accept appellant's testimony as credible or reliable.

As to Bernard Wille, I accept his testimony as credible. His opinions that appellant should have reported his activity at the wood yard regardless of whether it was done for compensation and regarding the appropriate penalty for such a violation were straightforward and reasonable. However, I recognize that Willie's opinions were limited to the policy on outside activity and secondary employment and that he had no direct knowledge or information regarding appellant's

action in connection with the events of June 8, 2020, and offered no opinion as to the penalty in connection with those charges.

I accept the testimony of Christopher Cole concerning appellant's character as a friend and a correctional police officer to be reasonable and credible. However, I recognize that Cole had no direct knowledge or information concerning appellant's action in connection with the events of June 8, 2020, or the resulting disciplinary charges.

I also accept the testimony of Lieutenant Brian Darcy, concerning appellant's character and his work as a correctional police officer, to be reasonable and credible. However, I recognize that he too had no direct knowledge or information concerning appellant's action in connection with the events of June 8, 2020, or the resulting disciplinary charges.

ADDITIONAL FINDINGS OF FACT

Having had the opportunity to listen to the testimony of the witnesses, and to observe their demeanor, and to assess their credibility, as well as having fully considered the other evidence in the record, I additionally **FIND as FACT:**

During the June 8, 2020, protest march, James repeatedly yelled angry, derogatory, and inflammatory comments directed towards the protest marchers, the Franklinville chief of police, the patrol officers, and to the mayor and the administration of Franklinville.

During the mock reenactment of George Floyd's murder, appellant was located near James. Appellant estimated that he was approximately ten feet away from his brother.

Despite witnessing James's actions and hearing his comments, and despite hearing the comments of other individuals at the wood yard, including the replies of "to no one" and "Black Live Matter-- to no one," appellant continued to video the protest march.

Appellant video recorded the march as the protestors first marched past the wood yard and approximately thirty minutes to one hour later, he again recorded the protestors as they marched past the wood yard a second time.

Appellant took no action to attempt to stop his brother's mock reenactment or comments or the comments of the others at the wood yard, to deescalate the situation, or to remove himself from the situation.

On the date of the protest march, appellant was not aware of the threats allegedly made to his brother and/or his brother's family.

Appellant's location at the front of wood yard and his action in continuing to video the protest march during the mock reenactment of George Floyd's murder, was captured and seen in various videos taken by others.

Video of James's mock reenactment of George Floyd's murder was available on the internet.

Following the events of June 8, 2020, the DOC received numerous complaints from the public and from DOC staff concerning a correctional police officer believed to be involved in the mock reenactment.

Appellant's neighbors and several of the local police, whom appellant knew personally, were aware that he was a correctional police officer.

Appellant was aware of and familiar with the DOC's policy concerning outside activity and secondary employment. (R23.) Appellant previously reported other secondary employment to the DOC.

Appellant split wood at his brother's wood yard. He did so for approximately less than one year. He would do so approximately one to two times per month, working several hours each time.

Appellant did not report to the DOC his activity at the wood yard.

LEGAL DISCUSSION

The issues to be resolved are whether the appellant committed the violations alleged and, if so, what is the appropriate penalty to impose.

Appellants' rights and duties are governed by the Civil Service Act and accompanying regulations. N.J.S.A. 11A:1-1 to 12-6. A public employee protected by the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to their employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). The appointing authority must show by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982).

Conduct Unbecoming

Among the charges filed against appellant is conduct unbecoming a public employee. "Conduct unbecoming a public employee" pursuant to N.J.A.C. 4A:2-2.3(a)(6) is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. at 140. The determination of what constitutes conduct unbecoming is primarily a question of law and is made on a case-by-case basis. Karins, 152 N.J. at 553. It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. at 429).

As a correctional police officer, appellant is a law enforcement officer. By the nature of their duties, law enforcement officials are held to a higher standard of conduct than other public employees. See Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966); see also 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.” Armstrong, 89 N.J. Super. at 566. As such, they must “exercise tact, restraint and good judgment in [their] relationship with the public.” Ibid.

Here, appellant argues that he did not engage in any improper conduct or speech but rather that he was merely present at the June 8, 2020, protest march where the reenactment took place.⁶ He further contends that the actions of his brother are being improperly attributed to him. Although appellant did not make any statements directed to the protestors or to their Franklinville police escorts, and did not directly participate in the mock reenactment of the murder of George Floyd, he remained at the wood yard and continued to video the protest march while his brother conducted the mock reenactment and yelled comments at the protestors, and while others in the wood yard replied, “to no one” and “Black Lives Matter, to no one,” in response to the protestors’ chants. Appellant’s failure to attempt to take action to stop or deescalate the offensive, inflammatory, derogatory, and racially insensitive, actions and comments of his brother or the offensive, derogatory, and discriminatory comments of others at the wood yard, or at a minimum, his failure to separate himself from these actions and comments, offend the publicly accepted standards of decency and good behavior.

Due to the egregious and offensive nature of James’s actions, just two weeks after Floyd was killed, the mock reenactment garnered much attention with the public, the media, and within DOC. And while some of those complaints mistakenly identified appellant as one of the individuals directly involved in the reenactment, appellant’s continued presence at the wood yard and his failure to act, gave an impression of condoning, and/or lent tacit, if not actual support, for James’s actions. Further, even if I were to accept that appellant was previously unaware of his brother’s intended actions, he acknowledged that he witnessed his brother and his nephew positioning themselves into place and said, as the protestors were nearing by wood yard, “No,

⁶ Appellant makes no argument that he engaged in any constitutionally protected speech or expressive conduct.

you're not going to kneel on his neck. Oh my God," thus, it is clear that at least by this point, appellant was fully aware of his brother's actions but remained at the scene and continued to video the protest. Appellant's continued presence at the scene and his continued act of recording the march was inappropriate and brought discredit to himself and to the DOC. Appellant's actions and failure to act are of the type that have the tendency to destroy, and did in fact, negatively impact the public respect and confidence in the DOC's delivery of services. This loss of public respect and confidence was demonstrated by the numerous complaints received from the public and DOC staff concerning the events of June 8, 2020.

While James and the others at the wood yard, have a constitutional right to express their beliefs and opinions, as a law enforcement officer appellant is held to a higher standard of conduct. In addition to being offensive, inflammatory, and racially insensitive, James's reenactment of George Floyd's murder and the discriminatory comments of others at the wood yard, had the very real potential of creating a dangerous situation for the protestors, the Franklinville police officers assigned to the protest, and for others who gathered to watch and/or participate in the June 8, 2020, protest march. Appellant's actions of remaining at the scene and his failure to act, including failing to attempt to stop or deescalate the situation or at a minimum, failing to remove himself from the situation, demonstrate an extreme lack in the good judgment and tact required of law enforcement, fall far short of the high standards required of a correctional police officer, represent a fundamental misunderstanding of appellant's job duties and responsibilities as a correctional police officer, and are violative of the public trust.

Accordingly, for the reasons set forth herein, I **CONCLUDE** that respondent has demonstrated by the preponderance of the credible and competent evidence that appellant's actions constitute conduct unbecoming in violation of N.J.A.C. 4A:2-2.3(a)(6) and that this charge is **SUSTAINED**.

Other Sufficient Cause

Appellant is also charged with Other Sufficient Cause in violation of N.J.A.C. 4A:2-2.3(a)(12), specifically, with violating the following provisions of HRB⁷-17, as amended:

C8 Falsification: Intentional misstatement of a material fact in connection with work, employment application, attendance or in any record, report, investigation or other proceeding

Here, the record demonstrates that appellant was familiar with the DOC policy concerning outside activity and secondary employment and that he previously reported other secondary employment. Additionally, in his recorded SID interview, appellant acknowledged that firewood sales were a family business and that he earned a profit from same, albeit very little. Appellant further acknowledged during his SID interview that he did not report this secondary employment. For these reasons, I **CONCLUDE** that respondent has demonstrated by the preponderance of the credible and competent evidence that appellant's actions constitute, other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12), specifically C8, falsification under HRB-17, as amended, and that this charge is **SUSTAINED**.

C11 Conduct unbecoming an employee

Having previously concluded herein that appellant's actions and failure to act in connection with the events of June 8, 2020, constitute conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), I similarly **CONCLUDE** that appellant's actions and failure to act, constitute other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12), specifically conduct unbecoming under C11 of HRB 84-17 as amended, and that this charge is **SUSTAINED**.

C31 – Violation of the NJDOC Policy Prohibiting Discrimination in the Workplace

The policy provides that its purpose is to establish and set forth policy for the New Jersey Department of Corrections prohibiting discrimination in the workplace. (See R17 at Purpose (I).) The policy further provides that the State of New Jersey will not tolerate harassment or discrimination by anyone in the workplace including supervisors, co-workers, or persons doing

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business with the State. This policy applies to “both conduct in the workplace, and conduct that occurs at any location which can reasonably be 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 conducted and discussed.” (R17 at Applicability (II, B).)

Here, despite the opinions offered by Peter Thambidurai of the DOC’s Equal Employment Division, respondent provides no factual or legal support for its conclusion that the events at the wood yard on June 8, 2020, constitute a reasonable extension of the DOC’s workplace. The wood yard is owned by appellant’s brother James. There was no testimony nor suggestion that James had any connection with the DOC, that the wood yard was a field location of the DOC, or that State business was conducted at the wood yard. While appellant was employed by the DOC at the time of the June 8, 2020, protest march and further while it is undisputed that appellant invited SPCO Leonard Smith to the wood yard to watch the public protest march that was to occur on Delsea Drive where the wood yard is located, respondent has not argued nor demonstrated that the events constituted an “offsite business-related social function” or were in any other way related to the DOC workplace. Although appellant, as a law enforcement officer is held to higher standard and is expected at all times, whether on duty or not, to conduct himself in an appropriate manner and to avoid acting or behaving to his discredit and to that of the DOC, not every situation or event in which an officer is involved constitutes a workplace event.

For these reasons, I **CONCLUDE** that respondent failed to demonstrate by the preponderance of the credible and competent evidence that appellant’s action constitutes, other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12), specifically C31, violation of the DOC Policy prohibiting discrimination in the workplace under HRB-17, as amended, and that this charge is **NOT SUSTAINED**.

E1 Violation of a rule, regulation, policy, procedure or administrative order or administrative decision.

Article III, Section 3, of the DOC’s Law Enforcement Personnel Rules and Regulations provides, “[n]o 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.” (R25.)

Additionally, the DOC's Standards of Professional Conduct provides, "[n]o State officer or employee shall knowingly act in a way that might reasonably be expected to create an impression or suspicion among the public having knowledge of his/her acts that he/she may be engaged in conduct which violates his/her trust as State officer or employee." (R19, at I. Policy, Guidelines for Professional Conduct, #7.) (See also, Uniform Ethics Code, (R21, at II. General Standards of Conduct, #4, and See DOC's Code of Ethics Policy, adopting the Uniform Ethics Code, R20, at III. Policy, Guidelines for Professional Conduct, #7, noting, "[i]t is essential that the conduct of public officials and employees shall hold the respect and confidence of the people. Public officials must, therefore, avoid conduct that is in violation of their public trust or that creates a justifiable impression among the public that such trust is being violated.")

Further, the DOC's policy on outside activity and secondary employment provides:

All NJDOC employees, whether or not engaged in outside activity or employment, must complete the New Jersey State Ethics Commission Outside Activity Questionnaire Form for Approval for Outside Activity or Employment ...[E]mployees are required to update [the Form] whenever there is a change in the employee's outside activity or employment. (R23 at III. Policy.) The policy defines, "outside activity or employment" as "any position, whether compensated or not, whether in government or private industry, held by an employee of the NJDOC, which is supplemental to the employee's position with the NJDOC.

I previously concluded that appellant's actions and failure to act in connection with the events of June 8, 2020, constitute conduct unbecoming under C11 of HRB 84-17 as amended. For these reasons, I similarly **CONCLUDE**, that appellant's actions and failure to act in connection with the events of June 8, 2020, also violate the DOC's Law Enforcement Personnel Rules and Regulations, its Standards of Professional Conduct, and its Code of Ethics. Additionally, the evidence, including the testimony of appellant's witness, Bernard Willie, amply demonstrates that appellant's failure to report his activity at the wood yard, whether or not it was considered employment and whether or not he received compensation, is in violation of the DOC's policy on outside activity and secondary employment.

For these reasons, I **CONCLUDE** that appellant's actions, constitute other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12), specifically E1 violation of a rule, regulation, policy,

procedure or administrative order or administrative decision, of HRB 84-17 as amended, and that this charge is **SUSTAINED**.

PENALTY

Having concluded that the charges of conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12), consisting of: C8 falsification- intentional misstatement of a material fact in connection with work employment application, attendance or in any record, report, investigation or other proceeding; C11 conduct unbecoming; and E1 violation of a rule, regulation, policy, or procedure, in violation of HRB-17 as amended, have been sustained, I must now determine the appropriate penalty to impose.

The Civil Service Commission's review of the penalty to be imposed 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.

Once a determination is made that an employee has violated a statute, regulation, or rule concerning his employment, the concept of progressive discipline must be considered. W. New York v. Bock, 38 N.J. 500 (1962). Typically, numerous factors, including the nature of the offense, and the employee's prior record, are considered. George v. N. Princeton Developmental Ctr., 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. Thus, progressive discipline is not a "fixed and immutable rule to be followed without question. Instead, we have recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." Carter v. Bordentown, 191 N.J. 474, 484 (2007).

Appellant's disciplinary history includes six written reprimands issued between 2005 and 2015 for issues related to attendance/reporting late to duty and three suspensions issued in 2008

and 2009 for: a first infraction relating to failure to produce a protective vest while on duty, a second infraction for reporting late to duty, and for a third infraction for not reporting to duty/failure to follow proper call out procedure.⁸ (R31.)

Both respondent and appellant cite to cases involving corrections officers and their involvement in racially offensive, discriminatory, and/or insensitive social media posts for their respective positions concerning the appropriateness of the penalty to be imposed.

Respondents cite to In re Chirichello, 2023 N.J. Super. UNPUB. LEXIS 101 (App. Div. 2023) in which the Appellant Division upheld the termination of a corrections officer who posted a series of inappropriate social media posts “with racially insensitive and violent undertones.” In so doing, the Appellate Division, noted that an officer’s “posts could adversely affect the . . . safety of the facility and undermine the public respect in the services provided.” Id. at *10–11. Respondent also cites to In re Pearson, 2021 N.J. CSC LEXIS 420, OAL Dkt. No. CSR 02997-21, Initial Decision (Aug. 9, 2021), penalty modified, Comm’n (Sept. 29, 2021), there, a corrections officer was removed from employment for his off-duty posting on social media, of an image of a black man standing on a gallows surrounded by white men and a crowd of on lookers, along with the officer’s comment of, “[w]e need to bring this back.” Pearson’s penalty of removal was recently affirmed by the Appellate Division. 2023 N.J. Super. UNPUB. LEXIS 701 (App. Div. May 9, 2023).⁹

Appellant cites to In re Curry, 2021 N.J. CSC LEXIS 214, OAL Dkt. No. CSR 10174-21, Initial Decision (April 26, 2021), penalty modified, Comm’n (June 2, 2021), a case involving a correction officer’s social media “like” of fellow corrections officer, Wayne Pearson’s post of the black man on a gallows and comment, “[w]e need to bring this back.” See, In re Pearson, 2023 N.J. Super. UNPUB. LEXIS 701. The Commission accepted the ALJ’s findings of fact and law but did not adopt the recommendation to uphold the officer’s removal. Instead, the Commission reduced the penalty to a ninety-day suspension. Curry’s nineteen-year record of service with only

⁸ The record does not reflect the length of the three suspensions.

⁹ Appellant also cited to In re Pearson, but only to the Initial Decision which recommended a modified penalty of a six-month suspension, rather than to the Final Decision which upheld the removal. The Appellate Division decision affirming the removal was issued after the parties filed their closing arguments.

minor discipline, plus commendations he received for providing life-saving aid to a fellow officer and an inmate, both of whom were African-American, mitigated in favor of a suspension.

Appellant also cites to In re Burkholder, 2021 N.J. AGEN LEXIS 215, OAL Dkt. No. CSR 00716-21, Initial Decision (May 25, 2021), adopted, Comm'n (July 2, 2021), there, a corrections officer received a six-month suspension for posting a racist comment on Facebook about being "sick of seeing black people beating up mostly white men, women and children" and advocating that it was time to "start hitting back." There, Burkholder's twenty-three years of service with no major discipline, his lack of social media training, and that he committed "one act, while at home on a personal computer," were mitigating factors in the decision to impose a 180-day suspension.

The cases cited by both parties are distinguishable from the facts and circumstances here and are therefore not fully applicable or instructive. Here, for the reasons previously set forth, the evidence amply demonstrates that the sustained charges particularly the charges of conduct unbecoming and charges related to the DOC's rules and regulations and standard of conduct are sufficiently serious. Further, appellant's actions and as importantly, if not more so, his failure to act in light of the egregious, inflammatory, and offensive nature of his brother's comments and his mock reenactment of George Floyd's murder, as well as the offensive and discriminatory nature of the comments of the other at the wood yard, including "Black Lives Matter—to no one," demonstrate an extreme lack of the good judgment and tact required of a law enforcement officer, fall far short of the high standards required of a correctional police officer, represent a fundamental misunderstanding of appellant's job duties and responsibilities as a correctional police officer, and are violative of the public trust. Appellant's argument that his actions represent a "momentary lapse" in judgment is unpersuasive as he had several opportunities to take action or to remove himself from the situation but chose not to do so. Appellant's failure to take appropriate action and/or to remove himself from the offensive, inflammatory, and racially insensitive reenactment and the discriminatory comments including "Black Lives Matter—to no one" also violate the trust and confidence of appellant's fellow correctional police officers and that of DOC's inmate population. Thus, I **CONCLUDE** that returning appellant to his position as a senior correctional police officer would be contrary to the respondent's interest in maintaining safety, discipline, order, and morale within the DOC and in maintaining the public's trust and confidence.

Finally, the other sufficient cause charges of violating the DOC's policy on outside activity and secondary employment and the related charge of falsification have also been sustained. While these charges alone would not justify a penalty of removal, they demonstrate a lack of candor and when combined with the seriousness of the charges relating to conduct unbecoming and the other charges relating to the events of June 8, 2020, , they warrant the penalty imposed. For these reasons, and for the reasons previously expressed herein, given the serious nature of the sustained charges and the high standard of conduct to which law enforcement officers are held, removal is warranted despite appellant's lack of significant disciplinary history.

Accordingly, based on the above, I **CONCLUDE** that the penalty of removal is appropriate and should be upheld.

ORDER

I hereby **ORDER** that the charges of conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12), specifically violations of HRB-17 as amended, consisting of: C8 falsification-intentional misstatement of a material fact in connection with work employment application, attendance or in any record, report, investigation or other proceeding; C11 conduct unbecoming; and E1 violation of a rule, regulation, policy, or procedure, or administrative order or administrative decision are **SUSTAINED**. I further **ORDER** that respondent's determination removing appellant from his position of employment is **AFFIRMED**.

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

This recommended decision may be adopted, modified, or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 5, 2023
DATE


SUSAN L. OLGIATI, ALJ

Date Received at Agency: June 5, 2023

Date Mailed to Parties: June 5, 2023

APPENDIX

Witnesses

For respondent

Timothy Gonzalez

Brian LaBonne

Leonard Smith

Peter Thambidurai

For appellant

James DeMarco

Joseph DeMarco

Bernard Willie

Christopher Cole

Brian Darcy

Exhibits

Joint

J1 June 8, 2020, protest video recorded by Joseph DeMarco

For respondent¹⁰:

R1 Preliminary Notice of Disciplinary Action, June 16, 2020

R2 Preliminary Notice of Disciplinary Action dated July 16, 2020

¹⁰ The parties stipulated to the admissibility of respondent's exhibits.

- R3 Final Notice of Disciplinary Action dated December 16, 2020
- R4 Final Notice of Disciplinary Action dated December 16, 2020
- R5 NJDOC SID Administrative Investigation Report dated June 15, 2020
- R6 NJDOC SID Administrative Investigation Supplemental Report dated June 26, 2020

- R7 Photographic Evidence from June 8, 2020 Incident
- R8 State of NJ Division of Criminal Justice DVD: Protest Video Exhibits from June 8, 2020 Incident
- R9 DVD-R: NJDOC SID Interview of SCPO DeMarco dated June 10, 2020
- R10 DVD-R: NJDOC SID Interview of SCPO DeMarco on June 12, 2020 (1 of 2)
- R11 DVD-R: NJDOC SID Interview of SCPO Demarco on June 12, 2020 (2 of 2)
- R12 DVD-R: NJDOC SID Interview of SCPO Leonard Smith
- R13 NJDOC Weingarten Administrative Rights Receipt Forms (3) dated June 10, 2020 and June 12, 2020 signed by DeMarco, and dated June 23, 2020 and signed by Leonard Smith
- R14 Color-Coded Baton Chart Depicting "Striking Areas"
- R15 Google Search Results re: Joseph Demarco NJ Correctional Officer with links to articles
- R16 Bayside State Prison Daily Schedule for June 8, 2020
- R17 NJDOC Policy Number ADM.005.001 Prohibiting Discrimination in the Workplace
- R18 NJDOC Policy Receipt Form for Policy Prohibiting Discrimination in the Workplace signed by SCPO DeMarco
- R19 NJDOC Policy Number ADM.010.001 Standards of Professional Conduct
- R20 NJDOC Policy Number ADM.010.000 Code of Ethics
- R21 State Ethics Commission Uniform Ethics Code General Standards of Conduct" and Annual Ethics Briefing Receipt Form signed by DeMarco and Supervisor
- R22 State Ethics Commission Mandatory Annual Ethics Briefing 2019
- R23 NJDOC Policy Number ADM.013.001 Outside Activity and Secondary Employment
- R24 Memo from NJDOC Ethics Liaison Officer Approving Secondary Employment, dated May 25, 2004; related Questionnaire and Waiver Form completed and signed by DeMarco
- R25 NJDOC Law Enforcement Personnel Rules and Regulations (relevant sections)

- R26 NJDOC Training Academy Bureau of Training Receipt of Training Material signed by DeMarco on 12/5/2001 and NJDOC Rules and Regulations Receipt Acknowledgment Form signed by DeMarco on March 13, 2002
- R27 NJDOC Office of Training Sign-Out Attendance Form dated March 2, 2020
- R28 State of New Jersey Individual Training Summary Report for DeMarco
- R29 Department of Corrections Regional Personnel Services, Region 1 New Hire/Transfer Checklist signed by DeMarco
- R30 NJDOC Human Resources Bulletin 84-17 As Amended Disciplinary Action Policy (relevant sections)
- R31 NJDOC Work History of Infractions for DeMarco

For appellant

None