STATE OF NEW JERSEY

In the Matter of Keith Scott, Garden State Youth Correctional Facility, Department of Corrections CSC DKT. NO. 2022-517 OAL DKT. NO. CSR 08793-21	**DECISION OF THE CIVIL SERVICE COMMISSION**

ISSUED: JULY 19, 2023

The appeal of Keith Scott, Senior Correctional Police Officer, Garden State Youth Correctional Facility, Department of Corrections, removal, effective August 14, 2021, on charges, was heard by Administrative Law Judge Jeffrey N. Rabin (ALJ), who rendered his initial decision on June 7, 2023. Exceptions were filed on behalf of the appointing authority and a reply was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, including a thorough review of the exceptions and reply, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of July 19, 2023, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision and his recommendation to reverse the removal.

The Commission makes the following comments. As indicated above, the Commission thoroughly reviewed the exceptions filed by the appointing authority in this matter. In that regard, the Commission finds them unpersuasive as the ALJ's findings and conclusions in reversing the charges and penalty imposed was based on his thorough assessment of the record and are not arbitrary, capricious or unreasonable.

In its exceptions, the appointing authority argues that the ALJ improperly relied on certain underlying departmental hearing officer's findings. While the Commission agrees that any underlying reference or reliance on the hearing officer's findings was improper, as the hearing at the Office of Administrative Law is *de novo*, it is not clear as to what actual weight, if any, the ALJ put on that finding. Rather, it appears to have been one of myriad reasons that the ALJ offered in finding that the proffered charges were not sustained by the appointing authority. Regardless, the

Commission finds after its *de novo* review, that the evidence presented at the hearing, without regard to any portion of the underlying hearing officer's findings, does not establish that the appellant was guilty of the charges.

Moreover, a review of the specifications underlying the charges in the Preliminary Notice of Disciplinary Action (PNDA) and Final Notice of Disciplinary Action (FNDA) indicates that the appellant was charged with the following:

> On March 7, 2021, the Garden State Youth Correctional Facility (GYCF), Special Investigations Division (SID) was notified by Principal Investigator (PI) Brian Bonomo of a possible threat of harm to others. Specifically, a Confidential Informant (CI [number omitted]) stated that Senior Correctional Police Officer (Ofc.) Keith Scott (GYCF) posted a video to his "TikTok" Social Media account, threatening Custody Staff at GYCF. The CI said that staff are in fear because they know that he possesses a weapon each day at work. The CI said that this is in retaliation to staff harassing Ofc. Scott, due to his relationship with the widow of a GYCF Officer who was killed in a vehicle accident ([officer name omitted]).

Importantly, as indicated above, the specifications underlying the charges in the FNDA and PNDA are highly specific, solely charging the appellant with ***threatening*** other employees in the video he posted. Absent a finding that the video, indeed, was specifically threatening as indicated in the specification underlying the charges, such charges cannot be sustained. It is well established that the ALJ and the Commission only have jurisdiction to adjudicate disciplinary charges and specifications which were sustained at the departmental level hearing. *See Hammond v. Monmouth County Sheriff's Department*, 317 *N.J. Super.* 199 (App. Div. 1999); *Lamont Walker v. Burlington County*, Docket No. A-3485-00T3 (App. Div. October 9, 2002). In this regard, the ALJ found:

> It therefore appeared that the only source of the Video being threatening was the CI. Without testimony from someone who indeed felt threatened by the Video, whether another employee or member of the public, this court cannot rely on hearsay statements made by a confidential informant to find that the Video was an attempt by appellant to threaten a specific person.

Important to the finding above is the fact that the ALJ found the appellant's testimony regarding his reasons for posting the video credible, and those reasons did not establish any threat specific to any individual or group. The Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted

by the record." *See also, In re Taylor,* 158 *N.J.* 644 (1999) (quoting *State v. Locurto,* 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra).* The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri u. Public Employees Retirement System,* 368 *N.J. Super.* 527 (App. Div. 2004). In this matter, the exceptions filed by the appellant are not persuasive in demonstrating that the ALJ's credibility determinations, or his findings and conclusions based on those determinations, were arbitrary, capricious or unreasonable. Accordingly, the Commission agrees with the ALJ that there is no competent, credible evidence that the subject video directed any specific threats towards any individual or group.

The Commission also agrees with the ALJ's findings that the general conduct charges against the appellant were not sustained. In this regard, given that the underlying specifications indicate that the specific threatening nature of the video was a required element to the misconduct, absent such a threat, the appellant could not be found to have violated those policies. Had the job specifications been drafted in a manner to indicate that the mere posting of the video was, in fact, unbecoming conduct or a violation of general conduct policies, such charges could have been considered as to whether to be upheld. Nevertheless, while the video is undoubtedly in poor taste, and used questionable lyrics and movements, the appellant was not charged with violating any specific departmental social media policy or other similar policy for merely either the posting of the video or its contents absent establishing that the video constituted a specific threat, which has not been sustained.

Since the removal has been reversed, the appellant is entitled to be reinstated with mitigated back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10 from the first date of separation without pay until the date of reinstatement. Moreover, as the removal has been reversed, the appellant is entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay or counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra,* if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that

action and grants the appeal of Keith Scott. The Commission further orders that the appellant be granted back pay, benefits, and seniority from the first date of separation without pay until the date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned, and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for the appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

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

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

Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 08793-21

AGENCY DKT. NO. N/A

2022-517

IN THE MATTER OF KEITH SCOTT, GARDEN STATE YOUTH CORRECTIONAL FACILITY, NEW JERSEY DEPARTMENT OF CORRECTIONS.

Amie DiCola, Esq., for appellant (Fusco & Macaluso Partners, LLC, attorneys)

Andrew J. Sarrol, Deputy Attorney General, for respondent (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: August 22, 2022 Decided: June 7, 2023

BEFORE **JEFFREY N. RABIN,** ALJ:

STATEMENT OF THE CASE

Appellant, Keith Scott (Scott), has appealed the termination of his position with respondent, the Garden State Youth Correctional Facility (respondent or GSYCF), for violating N.J.A.C. 4A:2-2.3(a)6, conduct unbecoming a public employee, and N.J.A.C. 4A:2-2.3(a)12, other sufficient cause, specifically HRB 84-17:C-11 conduct unbecoming an employee and E-1, violation of a rule, regulation, policy, procedure, or administrative decision, for posting an allegedly threatening social media video (Video).

PROCEDURAL HISTORY

On August 13, 2021, appellant Scott was served with a Final Notice of Disciplinary Action (FNDA), calling for appellant's termination, effective August 14, 2021.

An appeal was filed by appellant on May 17, 2021, and the matter was transmitted to the Office of Administrative Law (OAL), where it was filed on October 21, 2021, for determination as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

Hearings were heard via Zoom due to Covid-19 protocols, on April 19 and April 25, 2022. Briefs were received by August 22, 2022, and the record closed on that date. After delays caused by the pandemic, the date for issuance of this Initial Decision was extended nunc pro tunc until January 30, 2023, and again until June 15, 2023.

FACTUAL DISCUSSION

Testimony:

For respondent:

Brian Bonomo was with respondent's Department's Special Investigations Department (SID), Professional Standards Unit (PSU), as of February 1, 2022. As Principal Investigator, Bonomo supervised other SID investigators who conducted administrative and criminal investigations involving inmates, visitors, and staff.

In 2021, a confidential informant (CI) contacted him regarding a TikTok video appellant posted, referred to as appellant's "triggerman" video (Video). The CI provided a copy of the Video and appellant's profile name, "boundtothemoon." Bonomo discussed this with his supervisors, then had no further involvement with the investigation. The CI sought to remain anonymous to preclude any retribution for reporting on a fellow employee.

Department of Corrections personnel are permitted to have social media accounts. There were screenshots of the Video on his TikTok page. In the Video, appellant appeared to

be fighting or training, simulating hitting someone. There was a hashtag, which when clicked indicated that it was about law enforcement and that appellant was a law enforcement officer (LEO).

Because the allegation included a potential threat, respondent initiated TERPO (Temporary Extreme Risk Protection Order) procedures, which would include the confiscation of appellant's work-related firearm and follow-up with officials from Ocean County, appellant's county of residence. Appellant's service weapon was taken from him but no TERPO was issued.

Ruben Baca was a Senior Investigator who investigated the within matter. Baca narrated the Video. Baca wrote a report summarizing his investigation. He figured out the lyrics to the Video by playing it slowly and listening to the lyrics. Baca concluded that "extendo clip" referred to an extended magazine, which could be attached to a weapon to provide additional ammunition and require less frequent reloading. "Put down below" meant killing someone. Appellant pointed to himself as the "triggerman" and employed a throat-cutting motion.

Baca interviewed appellant twice. Appellant said he had lip synced the lyrics and used hand and body gestures to "emote" the lyrics. Appellant referred to the song as a "sea shanty." Appellant stated he was not trying to threaten anyone. Baca interviewed Officer Fleming, because he believed that the Video was meant as a threat to Fleming. Fleming told Baca he did not feel threatened and had no issues with any fellow employees. Baca reviewed other videos on the "boundtothemoon" TikTok account. A screenshot showed appellant performing training or fighting, perhaps in a gym setting. The Video contained the hashtags "#fitforduty" and "#bluelinestrong" and had other law enforcement terminology, and therefore members of the public could view appellant's TikTok videos and identify him as a LEO.

Ronald Paldino was the Administrative Major at GSYCF since January 2015, writing and reviewing GSYCF policies and procedures. Sections of GSYCF's General Post Order applied to appellant's posting of the Video. Section E. Personal Conduct On and Off Duty states that conduct becoming a public employee was expected both on and off duty, with a

requirement to conduct yourself with professionalism and dignity. Code of Ethics Section III: Policy says an employee should avoid conduct that creates a justifiable impression among the public that such trust is being violated. Section II. General Standards of Conduct stated that no State officer or employee should knowingly act in any 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 violative of his trust as a State officer or employee or special State officer or employee.

Appellant's posting of his Video violated these provisions because it depicted him lip syncing to a song about killing somebody. Hand gestures indicated killing someone, cutting someone's throat and cocking a gun. Appellant's TikTok account was accessible for public view. Hashtags found in appellant's TikTok account could indicate that he was a LEO.

Personnel Rules and Regulations also addressed such behaviors. Article I, Section 2 – No officer shall knowingly act in any way that might reasonably be expected to create an impression of suspicion among the public that an officer may be engaged in conduct violative of the public trust as an officer. Article III, Section 3 – No officer shall act or behave, either in an official or private capacity, to the officer's discredit, or to the discredit of the Department. Article III, Section 5 – An officer shall: (a) Be civil, orderly, maintain decorum, control temper, be patient and use discretion in the performance of duty. Article III, Section 5 also applied when a LEO was off duty. Human Resources Bulletin 84-17 set out penalties: first infraction of offense C(11), Conduct unbecoming an employee, would be a three-day suspension up to removal. A second infraction would be removal. A first infraction of offense E(1), Violation of a rule, regulation, policy, procedure, order or administrative decision, would be an official written reprimand up to removal. A second infraction would be a five-day suspension up to removal. A third infraction would be removal.

Appellant had served two prior suspensions, received a written reprimand, and received a commendation. For an incident on August 16, 2009, appellant received a suspension for offenses B8, C17, D7, E1, and E2. For an incident on January 27, 2012, appellant received a sixty-day suspension, and served only thirty days based on a settlement agreement; that incident included C(11), Conduct unbecoming an employee. As appellant had a prior C(11)

charge, if the current C(11) charge was sustained, the only available penalty would be removal.

For appellant:

Appellant **Keith Scott** had been a corrections officer for over fifteen years. He handled general assignments for GSYCF, akin to being a foot patrolman. As he was in the Special Operations Group (SOG), he was issued a firearm.

He posted the Video on January 16, 2021, because he found it entertaining. He had found a bunch of sea shanties on TikTok, with others lip-synching to them. He made the Video on his cell phone, using the TikTok app. His hand gestures fit the lyrics of the song. Regarding the attached hashtags, "#talkshitgethit" was a condensed version of the first line of the song, and "#wolveswinwars" was a phrase from a military morale patch. The hashtags were not directed at anyone in particular. He was never told to remove the Video but did so on his own.

There was no social media policy or social media training. He did not think the Video was offensive, compared to the music played today on the radio. He was not the person who wrote or created the song. Sea shanties were trending on TikTok, meaning they were popular. The Video refers to "blue line strong," a LEO phrase indicating he was proud of being a LEO and proud of staying in shape. The throat cutting motion of his was to match the lyrics of the song. He had done two other lip-syncing videos, both Disney-related. Other LEOs at work made videos without receiving discipline, one from a jujitsu class and one from a hunter.

Credibility:

In evaluating evidence, it is necessary to assess the credibility of the witnesses. Credibility is the value that a finder of the facts gives to a witness's testimony. It 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 fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, at pages 521–22; See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may also 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).

Further, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), cert. denied, 10 N.J. 316 (1952). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

Brian Bonomo was a knowledgeable, forthright witness, although he could not recall certain dates and details. He attempted to discuss the Confidential Informant's comments, but was prohibited. He was a credible witness.

Ruben Baca was a calm witness who answered in a clear, direct manner. He was a knowledgeable witness, who I found to be credible.

Ronald Paldino was a straightforward witness who appeared very familiar with the rules. He was knowledgeable about LEO conduct. He was a reliable witness.

Appellant **Keith Scott** testified in a calm and clear manner. He was knowledgeable and seemingly honest and straightforward. He remained calm and resolute on cross-examination,

and I found his testimony credible. Nothing presented at the hearing proved that he had provided any misrepresentations or fraudulent statements during the internal department investigations of the within matter.

Therefore, after reviewing the testimony, the Video and the other evidence presented, and the summary briefs of the parties, I **FIND**, by a preponderance of credible evidence, the following **FACTS**:

Appellant posted a video on January 16, 2021, of him lip-syncing to a song similar to an Irish sea shanty, using his profile name, "boundtothemoon"; in the Video, appellant appeared to be fighting or training, simulating hitting someone; there was a hashtag, which when clicked indicated that it was about law enforcement and that appellant was a law enforcement officer (LEO); the song lyrics in the Video included references to guns and killing; appellant made hand gestures in the Video such as cocking a gun and slashing his throat; the Video did not contain threats towards any specific person; a screenshot showed appellant training or fighting, perhaps in a gym setting; the Video contained the hashtags "#fitforduty" and "#bluelinestrong" and had other law enforcement terminology, so that members of the public could view appellant's TikTok videos and identify him as a LEO.

A CI brought the Video to respondent's attention; the CI sought to remain anonymous to preclude any retribution for reporting on a fellow employee.

Department of Corrections personnel are permitted to have social media accounts; there was no social media policy and no social media training.

Officer Fleming was interviewed during the investigation, because it was thought the Video was a threat towards him; Fleming stated that he did not feel threatened and had no issues with any fellow employees.

Officers were prohibited from acting in a way that might reasonably create an impression to the public that an officer may be engaged in conduct violative of the public trust

as an officer, or that discredited an officer or the Department; officers were to maintain decorum; these rules applied when an officer was on or off-duty.

For an incident on August 16, 2009, appellant received a suspension for offenses B8, C17, D7, E1, and E2; for an incident on January 27, 2012, appellant received a sixty-day suspension, which included C(11), Conduct unbecoming an employee.

LEGAL ARGUMENT AND CONCLUSION

The issue is whether the respondent, GSYCF, had proven by a preponderance of the credible evidence that it acted properly in terminating appellant's employment as a Senior Correctional Police Officer for conduct unbecoming a public employee, other sufficient cause, and violation of a rule, regulation, policy, procedure, or administrative decision, for posting an allegedly threatening social media video.

An appellant's rights and duties are governed by the Civil Service Act and accompanying regulations. A civil service employee who committed 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. 4A:2-2.

In a civil service disciplinary case, the employer bears the burden of providing sufficient, competent and credible evidence of facts essential to the charge. N.J.A.C. 4A:2-1.4. Thus, respondent had both the burden of persuasion and the burden of production and was required to demonstrate by a preponderance of the competent, relevant and credible evidence that appellant committed the charged infractions listed in the Final Notice of Disciplinary Action. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). See generally Coleman v. E. Jersey State Prison, OAL Dkt. No. CSV 01571-03, Initial Decision (February 25, 2004); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550, 560 (1982); In re Darcy, 114 N.J.Super. 454, 458 (App.Div. 1971).

The Court in In re Polk, 90 N.J. 550, 560 (1982) held:

> This jurisdiction has long recognized that the usual burden of proof for establishing claims before state agencies in contested administrative adjudications is a fair preponderance of the evidence. In Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), we observed that: "In proceedings before an administrative agency, . . . it is only necessary to establish the truth of the charges by a preponderance of the believable evidence and not to prove guilt beyond a reasonable doubt." See In re Suspension or Revoc. License of Kerlin, 151 N.J. Super. 179, 184 n.2 (App. Div. 1977) ("Where disciplinary proceedings with respect to a profession or occupation are vested in an administrative agency in the first instance, the charges must be established by a fair preponderance of the believable evidence").

A preponderance of the evidence has been defined as that which "generates belief that the tendered hypothesis is in all human likelihood the fact." Martinez v. Jersey City Police Dept., OAL Dkt. No. CSV 07553-02, Initial Decision (October 27, 2003) (quoting Loew v. Union Beach, 56 N.J.Super. 93, 104 (App.Div. 1959)). "Fair preponderance of the evidence" means the greater weight of credible evidence in the case; it does not necessarily mean the evidence of the greater number of witnesses but means that evidence which carries the greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975) citing Model Jury Charge, Criminal, 3:180. See also, Zive v. Stanley Roberts, Inc., 182 N.J. 436, 457 (2005)(applying the standard to a wrongful termination).

The burden of proof cannot be accomplished only by introducing hearsay evidence. N.J.A.C. 1:1-15.1(b). In the Matter of Nathaniel Parker, Juvenile Justice Commission, 2009 N.J. AGEN LEXIS 250, *14-15, OAL Dkt. No. CSV 02994-08 (April 15, 2009), the Court held, in relevant part,

> While hearsay evidence is admissible in administrative hearings, N.J.A.C. 1:1-15.5, in order to prove its case, the appointing authority must produce a residuum of competent evidence to prove any ultimate fact. Weston v. State, 60 N.J. 36

> (1972). Although credible hearsay evidence may serve to buttress the foundation of credible competent evidence such as to provide a more satisfactory degree of proof of guilt, hearsay that is not otherwise admissible under the Rules of Evidence (thus competent) cannot by itself support an ultimate finding of fact.

Appellant was charged with violating General Post Order for Garden 16 State Level III E, Effective 2007, Revised 2017: "You are reminded that decorum and conduct becoming a public employee and staff member of the Department of Corrections are not merely expected when you are on duty but also when you engage in activities outside of the workplace, particularly under circumstances that extend the workplace environment to other locations. . . Similarly, when you identify yourself in personal writings or in other ways as an employee of the Department of Corrections, your conduct reflects not only upon you but also upon the Department of Corrections as a whole. It therefore becomes essential that your conduct at all times conveys professionalism and dignity. Your personal conduct should be aimed at bringing honor and respect to you, your co-workers, the Department of Corrections, and the State of New Jersey. To act otherwise may be cause for discipline. With these realities in mind, it is expected that you guide your personal conduct accordingly." (R-10, pg. 5.)

State of New Jersey Department of Corrections Code of Ethics, Effective 2004, Revised 2009: "It 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 . . . and shall conform their conduct to the standards set forth in the Uniform Ethics Code." (R-12, pg. 2.) State of New Jersey Uniform Ethics Code, 2010: "No State officer or employee or special State officer or employee should knowingly act in any way that might reasonably be expected to create an impression of suspicion among the public having knowledge of his acts that he may be engaged in conduct violative of his trust as a State officer or employee or special State officer or employee." (R-13, pg. 5.) Law Enforcement Personnel Rules and Regulations, Article I Section 2, 1994: "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-11 pg. 8.)

Respondent was correct to state that appellant's status as a corrections officer subjected him to a higher standard of conduct than other public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). Corrections officers, as members of law enforcement, represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline was 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).

It was significant that in the departmental hearing, the hearing officer failed to find that there was actually a threat made in the Video, although noting the Video's seemingly violent language and disturbing gestures, and finding that Appellant exercised poor judgement. Officer Fleming did not feel as if the Video made threats towards him, and appellant testified that he intended no threats at all by posting the Video.

Appellant used TikTok, a popular social media app, where anybody can create a short video. There was no reason not to believe appellant when he said he created the Video for entertainment purposes. He did not write the song featured in the Video but did what millions of other people had done: lip-synced along with an existing song. Many videos become popular, with other users creating similar content and posting their own videos, until it created a trend. Here, appellant latched on to a trend of lip-syncing along with a sea shanty, a classic form of Irish-based song. There was no doubt that making TikTok videos became an even more popular pastime during the long lockdown of the recent Covid-19 pandemic.

Perhaps at first glance appellant's hand gestures in the Video might appear to be advocating violence, but in actuality he was miming gestures that followed along with the lyrics, which hand gestures had been used in other versions of that song. While the FNDA charged a specific threat stemming from the Video, based on investigator concerns of violence because appellant possessed a firearm as part of his job, such a threat did not exist in the Video. The Video lyrics were not unlike rap and hip-hop lyrics being performed today, filled with

"gangster"-like posing and overt machismo. Towards that end, appellant's case was deemed so non-threatening that he was permitted to continue working for almost three months during the investigation instead of being immediately suspended. Although appellant's firearm was confiscated, the Ocean County Prosecutor's Office ultimately opted not to pursue any Temporary Extreme Risk Protective Order (TERPO).

It therefore appeared that the only source of the Video being threatening was the CI. Without testimony from someone who indeed felt threatened by the Video, whether another employee or member of the public, this court cannot rely on hearsay statements made by a confidential informant to find that the Video was an attempt by appellant to threaten a specific person.

Accordingly, the charges brought by respondent have to do with whether appellant's Video violated rules and regulations for officers and whether, by posting the Video, appellant committed conduct unbecoming an officer.

"Conduct unbecoming a public employee" is one of the grounds for discipline of public employees. N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" encompasses conduct that would adversely affect the morale or efficiency of a governmental unit or that had 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 NJ. Super. 136, 140 (App. Div. 1960). It was sufficient that the complained-of-conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, at 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)). Conduct unbecoming is a fact sensitive determination rather than one based on a legal formula. In the Matter of Craig Venson, City of Plainfield, OAL Dkt. No. CSV 07545-07, Initial Decision (June 9, 2009), aff'd, Civil Service Commission (August 6, 2009).

While GSYCF provided employees with general guidelines for employee behavior, it had no social media policy and offered no training to employees on how to use social media with respect to their positions. Therefore, the mere posting of a video in and of itself was not a violation of any rule or regulation. One must then consider the content of the Video to see if it actually discredited appellant or the department and might create a negative impression among the general public.

Respondent offered no evidence that the public had been offended by the Video or that it contained elements which would undoubtedly offend the public. Despite numerous "likes" of the Video and twenty followers of appellant's TikTok account, no witnesses were brought in from the general public to testify that the Video somehow upset their moral compass or created a negative view of appellant or GSYCF or the Department of Corrections. Witnesses for respondent were fellow law enforcement personnel, who concluded that in their opinion, contents of the Video violated internal guidelines. Respondent offered no definition or evidence to address the requirement for "professionalism." Appellant was correct to state that public perception was ever-changing and that what was "acceptable" depended on societal norms. These norms change over time; there was a time when popular music did not include odes to guns and criminals and drugs and sex, but today's music does make such references. This is the same problem with respondent arguing a "reasonable person" standard in evaluating the Video, because the reasonableness standard is as fluid as that of societal norms. Social media and the internet have expanded the awareness of the general public and pushed the boundaries of what people used to believe was "the norm."

The caselaw regarding "conduct unbecoming" focused on whether the behavior adversely affected the morale or efficiency of a governmental unit or had a tendency to destroy public respect in the delivery of governmental services, or whether it offended publicly accepted standards of decency.

With regards to offending publicly accepted standards of decency, the same above-referenced discussion of societal norms applies. Standards of decency continue to change,

and also differ from state to state. Again, respondent failed to prove that standards of decency in New Jersey would be offended, and provided no evidence that the general public had been or would be offended by the Video. To reiterate, there was a time when popular music was largely of the "boy-meets-girl" ilk, but today's music and music videos, as well as films and television, have much racier content than from decades ago. Violence is prevalent in today's movies and television, and nothing presented by respondent evidenced that the Video was more offensive than much of today's popular films, television and music videos.

Respondent failed to offer proof that the Video necessarily affected the morale or efficiency of appellant's unit, GSYCF or DOC. Aside from the CI, no employees other than those investigating and handling the within matter for respondent, testified as to being offended. No evidence was submitted showing that the Video affected the morale of other officers in appellant's unit or led to a reduction in work efficiency.

Whether the Video had a tendency to destroy public respect in the delivery of governmental services was another subjective issue which respondent failed to prove. It was possible that members of the public might see the Video and conclude that appellant or other LEOs were violent men out to perpetrate violence. However, it was also possible that a member of the public might see the Video and follow the hashtag links and conclude that appellant was exactly the type of man who should be a law enforcement officer: he practiced his work skills through physical training; he made a point of staying physically fit, and took pride in his fitness; he showed a predilection for the standards applicable to our military; and he showed that he was not the type of person who might be scared away from a violent encounter with a criminal perpetrator or violent inmate.

Nothing in the Video indicated that appellant sought to commit acts of violence. Nothing indicated that the Video was a specific threat to any member of his department or to the general public. Respondent offered no evidence to support its claim that the Video promoted vigilante justice or violations of the law. If he had written the lyrics he lip-synced to, one might be able to argue that appellant was glorifying violence and killing and weapons. Instead, it appeared that he was pumping himself up by having fun with a rowdy song similar to a sea shanty. While appellant might have used better judgment about whether to post a video that

some people might find to lack decorum or dignity, the fact was that the Video could also have been interpreted as simply aggressively macho entertainment. Had respondent had a social media policy or trained employees more specifically on permitted behaviors in the social media realm, appellant might have decided not to post the Video.

As far as respondent proving their case by a preponderance of the credible evidence, I must also agree with appellant that respondent fell short of complying with the residuum rule. The residuum rule states that "[n]otwithstanding the admissibility of hearsay evidence [in an administrative proceeding], some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(b); see also Weston, 60 N.J. at 51. Here, appellant was denied access to his accuser. The conclusion that the Video presented a threat was based on statements and information provided by an unknown, unidentified CI. Respondent failed to provide any corroborating proofs.

For the above-stated reasons, I **CONCLUDE** that respondent failed to prove by a preponderance of the credible evidence that the removal of appellant from his position as a Senior Correctional Police Officer with GSYCF was warranted.

ORDER

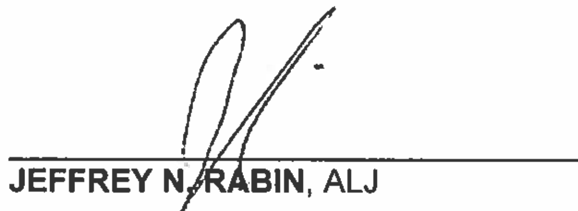
I **ORDER** that the disciplinary action of the respondent, Garden State Youth Correction Facility, in removing appellant Scott from his position as a Senior Correctional Police Officer, is **REVERSED**, and that the within appeal is hereby **GRANTED**.

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** pursuant to N.J.A.C. 1:1-18.6., by which law it is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject

this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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



June 7, 2023
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: June 7, 2023

Date Mailed to Parties: June 7, 2023

JNR/dw

APPENDIX

WITNESSES

For respondent:

Brian Bonomo

Ruben Baca

Ronald Paldino

For appellant:

Keith Scott, appellant

EXHIBITS

For appellant:

None

For respondent:

R-1 PNDA dated May 14, 2021

R-2 FNDA, dated August 13, 2021

R-3 (Redacted) TERPO Report from Baca

R-4 (Redacted) DOC Special Investigations Report from Baca

R-6 Email from Bonomo to Baca, dated March 8, 2021

R-7 Screenshot of Video

R-8 Appellant TikTok page

R-9 Appellant TikTok page

R-10 GSYCF Level III procedures

R-11 Law Enforcement Personnel Rules and Regulations

R-12 DOC Code of Ethics Checklist

R-13 State of New Jersey Code of Ethics

R-14 DOC New Hire Checklist

R-15 Orientation receipt

R-16 Rules and regulations receipt

R-17 Appellant work history

R-19 DOC Human Resources Bulletin 84-17

R-20 DVD/The Video

R-21 DVD/Appellant Interview March 9, 2021

R-22 DVD/Appellant Interview April 19, 2021