STATE OF NEW JERSEY

In the Matter of Czezre Adams, City of Newark, Police Department CSC DKT. NO. 2020-1661 OAL DKT. NO. CSR 00956-20	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**

ISSUED: APRIL 7, 2021 (NFA)

The appeal of Czezre Adams, Police Officer, City of Newark, Police Department, removal effective November 13, 2019, on charges, was heard by Administrative Law Judge Nanci G. Stokes (ALJ), who rendered her initial decision on March 4, 2021. Exceptions were filed on behalf of the appointing authority.

Having considered the ALJ's initial decision modifying the removal to a six-month suspension, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on April 7, 2021, adopted the Findings of Fact as contained in the initial decision. However, it did not adopt the recommendation to modify the removal to a six-month suspension. Rather, the Commission upheld the removal.

DISCUSSION

The appellant in this matter was charged with conduct unbecoming a public employee and violation of various departmental policies. Specifically, the appointing authority alleged that the appellant posted a video recorded on May 30, 2019, to his Twitter social media account of a sexual encounter involving himself and another person, without that person's consent. It also alleged that while the appellant thereafter removed the video upon that person's request, he again discovered that on September 12, 2019, that the appellant reposted the video.

In her initial decision, the ALJ found that the appellant did post the aforementioned video without the other person's consent. Ultimately, the ALJ

found that the appellant was guilty of conduct unbecoming a public employee as well as violating all but one of the charged departmental policies.

Regarding the penalty, the ALJ recommended modifying the removal to a six-month suspension. Specifically, the ALJ stated:

> Had Adams profited from these actions or identified himself as a police officer on social media, the offense would be more egregious . . . While police officers do not relinquish all First Amendment rights, a police department's legitimate interests permit speech restriction requiring a balancing of the employee's interest with those of the employer only when the employee "speaks as a citizen upon matters of public concern." (citation omitted). Here, Adams posts do not involve "matters of public concern."

The ALJ further indicated that:

> Notably, Newark urges that I consider Adam's (sic) other disciplinary appeals in determining the appropriate penalty. Undeniably, Adams challenges the allegations, and those appeals remain pending. Yet, Newark is correct that consideration of pending disciplinary appeals is appropriate in determining the penalty here. (citation omitted).
>
> The pending cases involve conduct occurring before the events following the May 30, 2019, sexual encounter. Still, all Newark's charges relate to conduct occurring within a one-year period. While the pending charges also include conduct unbecoming, the nature of the offenses does not suggest a specific pattern of misconduct other than perhaps a disrespectful attitude. Newark rightly can insist on appropriate, respectful, and professional conduct of its officers. Further, the pending appeals note significant offenses within a short period and include a maximum suspension of ninety days. Regardless, no prior discipline occurred in the nearly five years before the pending charges or charges in this case.
>
> Despite consent to engage in sexual relations and to recording the encounter, JB did not consent to posting the images or making the sexual act public. Undeniably, the misconduct occurred off-duty. Yet, I concluded that Adams's actions concerning the May 30, 2019, images represent violations of multiple Rules, Order 15-02, and *N.J.A.C.* 4A:2-2.3(a)(6). Moreover, Adams showed a lack of respect for JB's privacy and welfare.

> Even so, this is mostly a private matter between two adults without sufficient evidence of a crime or direct involvement with Adams's position as a police officer . . . Accordingly, I **CONCLUDE** that bypassing progressive discipline is not warranted, termination is unreasonably harsh, and that Adams be suspended for the maximum period of six months instead.

While the Commission agrees with the ALJ's conclusions regarding the charges, after its *de novo* review of the record in this matter, it does not agree that the removal should be modified to a six-month suspension. Rather, it finds that the only appropriate penalty in this matter is removal from employment.

In its exceptions, the appointing authority argues that the ALJ erred in recommending a modification to the removal. In this regard, it argues that based on the egregious nature of the offenses, that removal is the only appropriate penalty. It contends that the appellant inappropriately posted the video without the other person's permission as well as subsequently threatened him. It also argues that the ALJ inappropriately applied the tenets of progressive discipline in this matter.

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

In this case, the appellant's actions are clearly sufficiently egregious to support the penalty of removal without consideration of progressive discipline. The ALJ appeared to focus more of the type of video and the appellant's rights to engage in the activities and make such a video, than she did on the main reason for the discipline, which was violating the other individual's trust and right to privacy. She also noted that the appellant's actions all occurred off-duty and without direct identification to his position. Regardless of the above, the fact is that the appellant, a Police Officer, posted the video **without the other person's consent** on more than one occasion. These actions are an egregious violation of that person's right to

privacy. The nature of the activities in the video, or the appellant's "right" to post it, in essence, are not relevant. As such, the ALJ's references to "free speech" appear misplaced. In that regard, had the other person consented to the video's posting, it is more than likely that the appellant would not have faced any charges, or at the most, very minor ones. Thus, the Commission is not finding that the appellant could not have engaged in whatever legal consensual activities he wished to while off-duty. Nor is it even finding that he could not have posted the resultant video with consent to any public location so long as it did not run afoul of his employer's policies or was otherwise illegal. However, the Commission is finding it wholly inappropriate, and even outrageous, for the appellant to have posted the video **without consent** in public multiple times. This inexplicable lack of judgement on multiple occasions was exacerbated by the appellant's additional communications with the other person which can only be seen as actual or veiled threats. These activities are, indeed, the definition of conduct unbecoming a public employee. This misconduct is even more egregious as the appellant is a Police Officer. It is recognized that a municipal Police Officer is a law enforcement employee who must enforce and promote adherence within to the law. Municipal Police Officers hold highly visible and sensitive positions within the community and that the standard for an applicant includes good character and an image of the utmost confidence and trust. It must be recognized that a municipal Police Office is a special kind of employee. His primary duty is to enforce and uphold the law. He carries a service revolver on his person and is constantly called upon to exercise tact, restraint and good judgment in his relationship with the public. He represents 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. *See Moorestown v. Armstrong*, 89 *N.J. Super*. 560, 566 (App. Div. 1965), *cert. denied*, 47 *N.J.* 80 (1966). *See also In re Phillips*, 117 *N.J.* 567 (1990). The appellant certainly violated the above standards.

Moreover, the Commission notes that the ALJ's application of progressive discipline, even if it were appropriate in this case, was in error. As the ALJ indicated, the appellant had four previous major disciplinary actions within one year prior to the current infraction. These disciplines included a 15 working day suspension, a 30 working day suspension, a 45 working day suspension and a 90 working day suspension.[1] While the ALJ properly found that the prior disciplines could be considered, she concluded that they were for dissimilar conduct and thus, coupled with the misconduct in this matter, did not support removal from employment. She also noted that "no prior discipline occurred in the nearly five years before the pending charges or charges in this case."[2] The Commission

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[1] All of these matters are currently on appeal and pending at the Office of Administrative Law.

[2] This statement appears inaccurate. The County and Municipal Personnel System indicates that the appellant was hired in September 2015. Additionally, the earliest incident underlying the appellant's 15 working day suspension occurred in September 2018. Regardless, for the purposes of

disagrees. A Police Officer with four major disciplines in such a short time period cannot seriously expect that the fifth serious infraction that warrants major discipline would carry any penalty short of removal. The fact that the prior disciplines were not for the same type of conduct is not determinative. More important is the fact that the appellant had demonstrated a consistent pattern of misconduct that cannot be tolerated given the above standards imposed upon Police Officers. As such, even if the Commission were to agree that the appellant's current infractions were not so egregious to support removal absent the application of progressive discipline, it would find that applying that standard, removal is the only appropriate penalty.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore upholds that action and dismisses the appellant's appeal.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 7TH DAY OF APRIL, 2021

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

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and
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Attachment

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progressive discipline, the appellant would not be considered an employee with a long-term record of exemplary service.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 00956-20
AGENCY DOCKET NO: 2020-1661

IN THE MATTER OF CZERE ADAMS, CITY OF NEWARK, POLICE DEPARTMENT

Giovanna Giampa, Esq., for appellant

Courtney Durhann, Esq., Assistant Corporation Counsel, for the City of Newark

Record Closed: February 25, 2021 Decided: March 4, 2021

BEFORE **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE

On June 4, 2019, and September 12, 2019, Czere Adams posted graphic images from a consensual sexual encounter on his social media account after the other participant, JB,[1] requested that he not do so although consenting to the recording by Adams. Should Adams be removed from his position as a police officer? No. Progressive discipline requires that the punishment be proportionate to the offense in light of the circumstances.

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[1] This decision will use the complainant's initials to protect his privacy.

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PROCEDURAL HISTORY

On October 8, 2019, Newark served Adams with a Preliminary Notice of Disciplinary Action (PNDA). In its notice, Newark charged Adams with conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6) and General Order 15-02 (Order 15-02).

Order 15-02 states that to maintain "professionalism, honesty. and integrity," Newark implemented "guidelines to address the conduct and the appearance of personnel, on and off duty, while utilizing social media outlets" to ensure members "use discretion in a manner to not discredit, defame, or disrespect the department." Order 15-02 defines "speech" to include photographs or videos.

Order 15-02 also states that "members are not to engage or participate in speech containing obscene or sexually explicit language, images, acts, statements, or other forms of speech that ridicule, malign, disparage, or otherwise express bias against any race, religion, ethnicity, economic status, protected class, or social status of an individual."

Moreover, Order 15-02 requires that members not engage in "speech involving themselves . . . that would reflect behavior reasonably considered reckless or irresponsible."

Newark also charged Adams with violations of Newark's Department Rules and Regulations (Rules) requiring police officers to:

1. Not knowing write, print, copy, distribute, transport, store, or possess any writings, records, or pictures which contain obscene, immoral, offensive or defamatory matter (4:2.6),
2. Ethically conduct themselves, in both private and public, respecting welfare of and rights of all citizens (Rule 3:1.1),
3. Not commit acts of immorality, indecency, or lewdness (Rule 18:25), and
4. Avoid any other violation or offense that may not be otherwise chargeable under the Rules (Rule 18:28).

The PNDA advised that Newark sought Adam's removal.

In its specifications, Newark specified that on June 4, 2019, Adams posted a video recorded on May 30, 2019, to his Twitter social media account of a sexual encounter involving JB and Adams, without JB's consent. JB requested Adams remove the video from Twitter on June 4, 2019, and Adams did so. However, on September 12, 2019, JB discovered that Adams again posted the sex video to his Twitter account without JB's permission.

On November 13, 2019, Newark scheduled a departmental disciplinary hearing. Instead, Adams waived his opportunity for a hearing and pled not guilty. On the same date, Newark served Adams with a Final Notice of Disciplinary Action (FNDA), sustaining all charges and specifications relative to the incidents occurring on June 4, 2019, and September 12, 2019, and removed Adams from Newark's employment effective immediately.

On December 5, 2019, Adams appealed to the Commission under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6. On December 6, 2019, the Commission received the appeal and fee via facsimile, and the OAL received a copy on January 14, 2020, perfecting the appeal. On January 24, 2020, the OAL assigned the case to me for hearing.

On February 13, 2020, I held a prehearing conference under N.J.A.C. 1:1-13.1 to discuss when the parties and their witnesses would be available for the hearing, the nature of the proceeding, and the issues to be resolved, including any unique evidentiary problems. I set a discovery completion date and scheduled hearings for May 7 and 8, 2020.

On March 17, 2020, the OAL stopped in-person proceedings due to the COVD-19 pandemic and conducted hearings via Zoom. The Newark Corporation Counsel's

(NCC) office also closed because of COVID-19, which caused delays in obtaining discovery, and I adjourned the hearings with consent. Moreover, NCC advised that it did not have computers with audiovisual capabilities and had internet connectivity issues making Zoom impossible at that time. Also, NCC felt Zoom posed security issues. Although I rescheduled hearings to July and then to August 2020, NCC remained unable to participate in Zoom because of technological complications. NCC later obtained Zoom capabilities and agreed to participate given updated Zoom security protocols.

On October 19 and 26, 2020, I conducted hearings via Zoom. The parties requested transcripts and agreed to submit post-hearing submissions thirty days after receipt.

On January 12, 2021, the parties submitted post-hearing briefs. On January 29, 2021, I conducted a conference to address progressive discipline and reopened the record for supplemental submissions. On February 12, 2021, Newark presented its supplemental submission, and on February 25, 2021, Adams replied, and the record again closed.

FINDINGS OF FACT

Background

The parties do not dispute the following facts, and I **FIND** them as **FACT**:

JB is an African American man residing in Fords, New Jersey. JB's social media accounts include Facebook, Instagram, and Twitter. "Tweets" are communications or posts on a Twitter account page. Including a Twitter account name in a tweet alerts the person holding the account about the tweet. Posts can be "retweeted" or repeated by the creator or Twitter users.

JB first reached out to Adams on Adams's personal Twitter account, @CA,[2] but Adams did not respond.

Adams and JB began a conversation on the morning of May 30, 2019, on Adam's other Twitter account @KingLiteSkinDic,[3] or his "freak" page. During the interaction on @KingLiteSkinDic, Adams posted a picture of himself. JB and Adams agreed to meet up at JB's home later that day.

On May 30, 2019, JB and Adams engaged in consensual sexual relations. Adams used his phone to take pictures and videos of the encounter. The videos graphically depict sexual acts between JB and Adams.[4]

After their meeting, JB requested that Adams forward him a copy of the images via cellphone text messaging. However, Adams advised JB that the videos were too large to transmit via text, but Adams agreed to send the materials through another cellphone application, WhatsApp. JB received the videos that same day, commenting that they were "sexy." JB also texted that he wanted to see Adams again and sent a picture of Adams, noting that Adams's face was "all in it."

Later that day, JB requested that Adams not post videos of the sexual encounter on Twitter, and Adams responded, "I wasn't."

However, on June 4, 2019, JB observed photos of the sexual encounter on Adams's Twitter account @KingLiteSkinDic and took a screenshot to record the post. The post also included the phrase "chocolate ass was on a different level" and a hashtag "#LGBTQFreakTwitter." A word or phrase preceded by a hash sign (#) used on social media identifies digital content on a particular topic. However, Adams did not include JB's face, a hashtag to JB, a reference to JB's Twitter account, or JB's name.

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[2] JB and Adams have personal Twitter accounts. This decision uses @JB and @CA rather than the actual account names for privacy reasons. Adams's Twitter account under the name @KingLiteSkinDic is no longer active.

[3] The hearing transcripts incorrectly identify the account as @King Light Skin Dick.

[4] Exhibits R-10 and R-11 are videos of the sexual encounter on CDs that I reviewed.

After seeing the image, JB texted Adams via cell phone that he "didn't want [the images] on Twitter" and that he expected Adams to respect "what he asked, this wasn't cool."

Adams replied that "I been [sic] took it down," apologizing that he "completely forgot until [he] read our text which is why I took it down before you even said something." JB then asked Adams if he posted the encounter to OnlyFans, a different media venue, and texted "please delete everything from your pone [sic]." Adams responded that he did not post to OnlyFans and not to worry because "it's actually all gone." Later that evening, Adams reached out to JB and apologized again. Adams then removed the images from @KingLiteSkinDic.

OnlyFans is a website where an individual creates a site, including videos, pictures, or other content. A user or subscriber would have to sign up for access and log into the website to view its full content.

Later text messages and Twitter postings ensued regarding the sexual encounter. On August 24, 2109, JB texted Adams that he was not interested in other meetings, did not have a freak page, and did not want to be a "link" for Adams to use. Adams responded that JB intended to engage in sexual relations, that JB reached out to Adams on his freak page and was up to "get freaky." JB gave Adams until the end of the day to remove everything that he had "up" or if he would expose the truth about his fake "revenge porn" and inform Adams's job about his "antics . . . on social media."

On September 12, 2019, Twitter received JB's complaint about Adams's @KingLiteSkinDic Twitter account. That day, Twitter made the @KingLiteSkinDic Twitter account unavailable for violating Twitter's media policy. Unavailable means that neither the account owner nor other Twitter users can post or tweet on the account.

On September 13, 2019, JB filed a complaint with Newark's Office of Professional Standards regarding Adams's Twitter posting of the sexual encounter between JB and Adams without JB's consent. Specifically, JB complained that Adams posted images of the consensual sexual encounter on June 4, 2019, and on September

12, 2019, without his permission. On that date, JB spoke to Lieutenant Rivera regarding his complaint against Adams and provided Rivera with copies of the videos and screenshots captured from various cell phone text messages and Twitter conversations with Adams.

Multiple Twitter postings followed JB's complaint. On September 13, 2019, JB posted on @JB that "his privacy was being abused by a cop" and that he "never consented to taping or publicly uploading any of the videos posted by Czere Adams." JB did not include the @CA account name in the post or a hashtag identifying Adams.

On September 14, 2019, Adams posted on his @CA Twitter account that "@JB you [sic] clock is ticking. I sent you my warning."

On September 19, 2019, Adams, on his @CA Twitter account, stated that "@JB [so] you want to keep these lies up after I gave you fair warning. . . . Just because you change your settings to only those following can see your posts don't mean I don't have what I need Yes! I'M PULLING UP." Adams then posted that @JB "tried to get my city and job involved . . . Just when you thought I deleted the text and inbox threads. I DIDN'T. So, my radio gig and job seen it ALL!." Further, Adams accused @JB of "spewing false narratives and lies." Adams also posted on @CA that "JB really didn't want to go down this route but I thought the situation was dead, but clearly, it's not so . . . crack knuckles."

Following JB's report to the Newark police department, Essex County assistant prosecutor Jeff Conrad met with JB. The Essex County Prosecutor's Office investigated JB's complaint but determined that no crime occurred.

Newark based all charges against Adams on posting sexually explicit content on a social media platform open to the public without the other party's consent.

At this time, four additional discipline appeals filed by Adams are pending at the OAL for separate incidents and FNDAs issued by Newark on November 13, 2019:

1. CSV 00971-20, resulting in a fifteen-day suspension
2. CSV 00972-20, resulting in a forty-five-day suspension
3. CSV 0973-20, resulting in a ninety-day suspension
4. CSV 00974-20, resulting in a thirty-day suspension

Newark's charges for the fifteen-day suspension specify Adams's alleged conduct relative to a September 21, 2018, motor vehicle accident, including identifying himself as a police officer, the failure to maintain appropriate insurance, and providing false information during an investigation.

Newark's charges for the thirty-day suspension address Adams's alleged conduct while working at the 911/communication division on October 31, 2018, including rude behavior with a caller.

Newark's charges for the forty-five-day suspension involve Adams's alleged conduct while working at the 911/communication division on November 25, 2018, including unprofessional language with a caller and his failure to create an assistance assignment in the system.

Newark's charges for the ninety-day suspension include Adams's alleged conduct on June 4, 2019, in not following several orders and speaking in an unprofessional, profane manner.

Respondent's Case

JB

JB asserts that Adams reached out to him from the @KingLiteSkinDic on May 30, 2019, leading to the sexual encounter.

Although only one screenshot in evidence from @KingLiteSkinDic reveals a picture of the sexual encounter between JB and Adams, JB testified observing

subsequent Twitter postings of images of the May 30, 2019, sexual encounter, or "re-Tweets." JB unsuccessfully attempted to have Adams remove the sexual content and ultimately contacted Twitter given his lack of consent to post his images. Because Adams continued to post content regarding the sexual encounter, JB pursued his complaint with the police department.

JB acknowledges that his September 13, 2019, Twitter posting that he did not consent to the taping was inaccurate. However, JB maintains that he never agreed to Adams's use of their sexual pictures or videos on social media. JB denies posting photos from May 30, 2019, on his own Twitter account.

JB testified that he felt threatened by Adams's numerous Twitter postings. Because Adams knew where he lived, he was concerned that the phrase "I am pulling up" meant Adams was coming to his home. Moreover, the term "crack knuckles" suggested physical violence.

JB also supplied evidence of an image from the May 30, 2019, sexual encounter posted on a Twitter account, @XclusivePoPo. JB stated that he learned of the account from a person who knew Adams but was not sure who told him. The posting states that "freak in the morning, noon, evening, and night. Formerly known as @KingLiteSkinDic." The post also provided a link to an "OnlyFans.com/justkash" site. JB testified he observed the OnlyFans/justkash site on the @KingLiteSkinDic account. Indeed, the September 13, 2019, Twitter notice on the @KingLiteSkinDic account stating the account was unavailable also includes the Onlyfans/justKash site link. JB explained that OnlyFans required payment to view the full content on the site. However, JB did not sign up or view the videos.

JB testified that on October 7, 2019, Adams called him from an unknown caller number and threatened to sue JB.

Later in October, JB reached out to Adams via email and on Adams's @CA Twitter account. JB requested that Adams not use or post the videos and explained

that he filed the complaint because he felt that Adams was being spiteful and not respecting his privacy. JB expressed feeling humiliated and as though Adams did not respect his privacy. At that time, Adams had blocked JB from his @CA Twitter account.

Andy Rivera

Lieutenant Rivera worked for Newark for nineteen years, achieving the rank of lieutenant in July 2020. Rivera currently works in the Office of Professional Standards, a department that reviews cases involving officer activities. On September 13, 2019, Rivera authored a report concerning JB's statement.

Rivera was unfamiliar with the OnlyFans social media site until JB explained how the site operated. An OnlyFans account is linked to another social media platform. In this case, Adams had a Twitter page with a link that would take you to an OnlyFans page. His office interviewed Adams during which Adams admitted being on social media sites Instagram, Twitter, Facebook, Snapchat, and OnlyFans.

Rivera believed that OnlyFans users make payment to view content but did not know how an individual would do so. During Adams's interview, he stated that did not receive compensation for his posts on OnlyFans. Although JB reported an OnlyFans account held by Adams, Newark did not obtain any information regarding this account. Specifically, Rivera did not review any evidence that Adams owned the account reported by JB or profited from any videos allegedly posted on OnlyFans. Rivera understood that the prosecutor's office handled that aspect of the investigation.

Newark's investigative report, completed by another investigator, identifies no other social media account names for Adams.

Rivera also testified that officers could not engage in outside employment without first advising Newark. Any profit from posting on social media, sexual content or not, would require disclosure. Adams did not complete an outside employment form.

Although the Essex County prosecutor's office determined that no crime occurred, Rivera testified that the investigation disclosed sufficient evidence to demonstrate Adams violated Newark's Rules.

Rivera testified that Adams's violated Order 15-02 and Rules regarding police officer conduct as charged when he posted sexually explicit images of another person without his consent on social media platforms linked to the officer. Newark uses General Orders to ensure that department-wide members know particular policies, including social media. Officers receive education on the topics covered by general orders and sign off on receiving and reading all General Orders.

Appellant's Case

Adams

At the time of the sexual encounter and the ensuing investigation, Adams worked as a police officer for Newark for approximately five years.

After JB reached out to Adams via Twitter, Adams reviewed JB's Twitter account, including pornographic-like photos. Adams relayed the same events leading to the May 30, 2019, sexual encounter with JB, acknowledging that he took pictures and recorded sexual acts with JB. Before May 30, 2019, Adams and JB never met and did not have mutual friends.

After the sexual encounter, Adams and JB communicated via text message, and Adams sent the sexually explicit videos and pictures to JB at his request. Adams believed JB wanted to use the materials on his own social media account because he used a fire emoji indicating that the pictures and videos were "nice-looking."

Adams testified that he observed the pictures of the May 30, 2019, encounter on JB's Twitter account and believed it was appropriate to post them himself. Adams admits that he posted sexual images on his @KingLiteSkinDic account or his self-

described "freak" page, but only after seeing the images on @JB. Adams testified that the @KingLiteSkinDic account does not include his name, personal information, or anything to suggest Adams was a Newark police officer.

JB later requested Adams remove the pictures, and Adams took the photos down, and did not post them again. Further, Adams testified that he never posted the pictures or videos on OnlyFans. Adams also denied profiting from any post on OnlyFans or ever posting videos without someone's permission.

Adams maintains that the video recording was JB's idea and that the parties placed no conditions on using the recordings when made.

Adams admits to being upset by JB's allegations but that the phrases "I am pulling up" or "crack knuckles" meant that he was going to "present evidence" because JB was acting like a victim when he was a knowing participant.

Adams testified as to the ease in which a person can create a Twitter account. Twitter only requires an email, a birthdate, and whatever name you provide. An individual can include additional personal identifiers. Yet, Twitter does not require further details and does not verify the account creator's information.

Adams denied creating the @XclusivePoPo Twitter account and asserted that the account creator impersonated him. Adams testified that the profile picture, or "avatar," on @XclusivePoPowas not him, and the image reveals no face. The account screenshots include the description "formerly known as @KingLiteSkinDic," but they show no other personal information or other connection to Adams.

Before his interview with internal affairs on October 8, 2019, Adams deleted the @KingLiteSkinDic Twitter account that Adams cannot reactivate.

Additional Findings

When witnesses present conflicting testimonies, the fact-finder must weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact-finder assigns to a witness's testimony incorporating an overall assessment in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1999).

A fact-finder "is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions ...[that] excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521-22 (1950). Credible testimony must not only proceed from the mouth of credible witnesses but must be credible in itself. Id.at 522. Indeed, rejecting a witness's testimony, in whole or in part, rests with the trier and finder of facts and must simply be reasonable. Renan Realty Corp. v. Community Affairs Dept., 182 N.J. Super 415, 421 (App. Div. 1981).

In judging the witnesses's credibility, I **FIND** that the testimony of JB is credible and persuasive concerning the multiple social media posts of the sexual encounter on Adams's @KingLiteSkinDic Twitter account without his consent and prior request not to do so. JB advised Adams that he did not want his image on Twitter on the night of the sexual encounter, and Adams stated, "I wasn't." Yet, on June 4, 2019, Adams admittedly posted an image of the May 30, 2019, sexual encounter. JB and Adams expressed enjoying the sexual encounter. After observing that Adams posted images on social media after requesting that he did not post the pictures, JB reasonably felt upset towards Adams. Although JB does not supply a screenshot of the image posted on September 12, 2019, he complained to Twitter that day. After the complaint, Twitter made Adams's @KingLiteSkinDic account unavailable because it violated Twitter's media policy. The next day, JB formally complained to Newark that Adams posted

sexual images of him on social media without his consent. Indeed, I **FIND** that JB's actions are consistent with observing the images after June 4, 2019.

I also **FIND** no credible evidence exists that JB posted any images from the May 30, 2019, meeting on social media or that Adams had a reasonable belief that he could post the pictures after JB explicitly requested that Adams not post the sexual content. Further, I **FIND** that the picture posted graphically depicts a sexual act and that Adams used his phone to record the encounter.

Adams's Twitter post on September 19, 2019, states that: "Just when you thought I deleted the text and inbox threads. I DIDN'T. So, my radio gig and job seen it ALL!" Thus, I do not **FIND** Adams's testimony credible that he did not post or use the images from the sexual encounter after June 4, 2019. I similarly **FIND** Adams's attempt to distinguish the lack of permission to publish "videos" rather than a "photo" disingenuous, as he did not obtain consent to use any image from the May 30, 2019, encounter.

Moreover, Adams testified that the @KingLiteSkinDic has no personal information connecting the account to Czere Adams. Yet, on May 30, 2019, Adams posted a picture of his face during the initial Twitter conversation with JB on the @KingLiteSkinDic account. Therefore, I **FIND** that a preponderance of the evidence supports that there is a link between the @KingLiteSkinDic account and Adams and that he posted images he obtained of the May 30, 2019, sexual encounter on June 4, 2019, and on September 12, 2019, without JB's consent.

However, I also **FIND** that a preponderance of the evidence does **NOT** exist that the @KingLiteSkinDic account references or depicts Adams's employment as a police officer.

While the @XclusivePoPo account refers to the @KingLiteSkinDic account and supplies a link to the same OnlyFans site on @KingLiteSkinDic, Adams denies creating the account. The picture associated with @XclusivePoPo does not reveal Adams's face

or otherwise identify Adams. Newark presents no ownership information, financial records, or other sufficient means of connecting Adams to the account. Notably, Newark did not access the OnlyFans site. Similarly, JB never went to the OnlyFans site and could not identify who told him of the @XclusivePoPo account. Indeed, no evidence contradicts Adams's testimony as to the ease of creating an imposter Twitter account using his information or that he earned no income associated with an OnlyFans site. Therefore, I **FIND** that a preponderance of the evidence does **NOT** exist that the Twitter account @XclusivePoPo belongs to Adams or that he earned money by posting images or videos from the May 30, 2019, sexual encounter.

DISCUSSION AND CONCLUSIONS OF LAW

Discipline

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline, including removal, disciplinary demotion, and suspension or fine no greater than six months. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. Indeed, "[t]here is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998).

In appeals concerning major disciplinary action, the appointing authority bears the burden of proof. N.J.A.C. 4A:2-1.4(a). The burden of proof is by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), and the hearing as to both guilt and the penalty is de novo, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980); W. New York v. Bock, 38 N.J. 500 (1962). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). One can describe preponderance as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses but with greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

"Conduct unbecoming a public employee" is an elastic phrase encompassing conduct that adversely affects the morale or efficiency of a governmental unit, or that tends to destroy public respect for governmental employees and confidence in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998). The complained-of conduct and its attending circumstances need only "'be such as to offend publicly accepted standards of decency.'" Ibid. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)).

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)). Suspension or removal may be justified where the misconduct occurred while the employee was off duty. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

Police officers and correction officers are held to a higher standard of conduct than other citizens due to their community roles. In re Phillips, 117 N.J. 567 (1990). Indeed, adherence to this high standard of conduct is an obligation that a law enforcement officer voluntarily assumes when entering public service. Emmons, 63 N.J. Super. at 141-42. In Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966), the court explained a stricter standard of conduct applies to police officers because of the nature of the position:

> [A] police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. He carries a service revolver on his person and is constantly called upon to exercise tact, restraint, and good judgment in his relationship with the public. He represents 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 . . . .
>
> [Ibid.]

Given my findings of fact, I **CONCLUDE** that a preponderance of the credible evidence exists that Adams violated Newark's Rules 3:1.1, 4:2.6, 18:25, and Order 15-02 by recording and later posting sexually explicit content on his social media account without JB's consent on more than one occasion. Even if the sexually explicit image did not ridicule, malign, disparage, or express bias towards JB, I **CONCLUDE** that action reflected irresponsible behavior on social media in violation of Order 15-02. Further, I **CONCLUDE** that a preponderance of the credible evidence exists that Adams violated N.J.A.C. 4A:2-2.3(a)(6) because Adams's conduct is incompatible with the high degree of integrity and respect expected of all police officers. However, because Newark charged Adams with violations of Rules 3:1.1, 4:2.6, and 18:25 that I upheld, I **CONCLUDE** that Adams did not violate 18:28 for actions or conduct not covered by other rules or regulations.

Penalty

The next question is the appropriate level of discipline. A progressive discipline system has evolved in New Jersey to provide employees with job security and protect them from arbitrary employment decisions. Progressive discipline is an appropriate analysis for determining the reasonableness of the penalty. See Bock, 38 N.J. at 523–24 (1962). Thus, an employee's prior disciplinary record is "inherently relevant" to the appropriate penalty for a subsequent offense. In re Carter, 191 N.J. 474, 483 (2007). The question upon appellate review is whether such punishment is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness. Id. at 484. (quoting In re Polk, 90 N.J. 550, 578, (1982) (internal quotes omitted)). Indeed, bypassing progressive discipline occurs only when the misconduct is severe, when it renders the employee unsuitable for continuation in the position, or when the application of progressive discipline would be contrary to the public interest—such as when the position involves public safety and the misconduct causes a risk of harm to persons or property. In re Herrmann, 192 N.J. 19, 33 (2007).

While a "past record" cannot "be utilized to prove a present charge, which is not one of habitual misconduct," an employee's "past record,"

> may encompass an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously called to the attention of and admitted by the employee.
> [Bock, 38 N.J. at 523–24]

Although "a single instance [of misconduct] may not be sufficient, numerous occurrences over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty." Id. at 522.

Generally, the focus is on the seriousness of the current charge and the appellant's prior disciplinary history. Yet, the purpose of the civil service laws are "to promote efficient public service, not to benefit errant employees" . . . [and one must also consider] the welfare of the people as a whole, and not exclusively the welfare of the civil servant. State Operated School District v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998).

Had Adams profited from these actions or identified himself as a police officer on social media, the offense would be more egregious. See e.g., City of San Diego v Roe, 543 U.S. 77 (2004)(holding that selling of videos by a police officer dressed in a police uniform while masturbating warranted his termination). Indeed, the United States Supreme Court highlighted that a governmental employer could restrict speech in ways that the general public cannot be limited. Id. at 80. While police officers do not relinquish all First Amendment rights, a police department's legitimate interests permit speech restriction requiring a balancing of the employee's interest with those of the employer only when the employee "speaks as a citizen upon matters of public concern." Id. at 80–82. (quoting Connick v. Myers, 461 U.S. 138, 147 (1983)). Here, Adams posts do not involve "matters of public concern."

Newark asserts that this case is analogous to State v. Chow, 2019 N.J. Super. Unpub. LEXIS 983. Yet, the criminal case addressed whether an individual posting naked images of an ex-girlfriend was eligible for PTI. "Revenge porn" is defined "as

nonconsensual pornography: the distribution of sexually graphic images of individuals without their consent." Id. Here, however, the prosecutor's office did not that find a crime occurred. Moreover, Chow addressed the trial judge's failure to properly consider the prosecutor's recommendation denying PTI, not an issue here. Therefore, other than explaining the term "revenge porn," the case does not assist Newark's position.

Notably, Newark urges that I consider Adam's other disciplinary appeals in determining the appropriate penalty. Undeniably, Adams challenges the allegations, and those appeals remain pending. Yet, Newark is correct that consideration of pending disciplinary appeals is appropriate in determining the penalty here. See In re Johnson, Final Decision, CSV 2084-99 (March 9, 2000), http://njlaw.rutgers.edu/collections/oal/, aff'd Docket No. A-4382-99T3 (App. Div. July 3, 2001)(concluding that the ALJ erred in not considering two disciplinary actions that were under appeal to the [Merit Service] Board (now the Civil Service Commission) to establish a course of progressive discipline).

The pending cases involve conduct occurring before the events following the May 30, 2019, sexual encounter. Still, all Newark's charges relate to conduct occurring within a one-year period. While the pending charges also include conduct unbecoming, the nature of the offenses does not suggest a specific pattern of misconduct other than perhaps a disrespectful attitude. Newark rightly can insist on appropriate, respectful, and professional conduct of its officers. Further, the pending appeals note significant offenses within a short period and include a maximum suspension of ninety days. Regardless, no prior discipline occurred in the nearly five years before the pending charges or charges in this case.

Despite consent to engage in sexual relations and to recording the encounter, JB did not consent to posting the images or making the sexual act public. Undeniably, the misconduct occurred off-duty. Yet, I concluded that Adams's actions concerning the May 30, 2019, images represent violations of multiple Rules, Order 15-02, and N.J.A.C. 4A:2-2.3(a)(6). Moreover, Adams showed a lack of respect for JB's privacy and welfare.

Even so, this is mostly a private matter between two adults without sufficient evidence of a crime or direct involvement with Adams's position as a police officer. Adams posted a picture of himself in civilian clothes on @KingLiteSkinDic, but there is no reference to his employment as a police officer or Newark. Also, Newark issued no charge for failing to report work or income outside of Adams's job. Indeed, Newark presented no evidence of outside income earned by Adams or sufficient evidence to demonstrate that Adams created or owned the Twitter account @XclusivePoPo. Accordingly, I **CONCLUDE** that bypassing progressive discipline is not warranted, termination is unreasonably harsh, and that Adams be suspended for the maximum period of six months instead.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that Adams be **SUSPENDED** for 180 days.[5]

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 is authorized by law to make a final decision in this case. 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 under N.J.S.A. 40A:14-204.

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[5] A separate Order addresses Adams's pay status.

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.

March 4, 2021

DATE

NANCI G. STOKES, ALJ

Date Received at Agency: March 4, 2021

Date Mailed to Parties: March4, 2021

ljb

APPENDIX

WITNESSES

For Petitioner:

Czere Adams

For Respondent:

JB

Lt. Andy Rivera

DOCUMENTS

Joint:

J-1 Preliminary Notice of Disciplinary Action dated October 8,

J-2 Final Notice of Disciplinary Action dated November 13, 2019

J-3 Charges

J-4 Administrative Submission

J-5 JB's first contact with Czere Adams via direct message on Twitter

J-6 JB's request for a copy of the video and not to post the videos to social media

Petitioner:

None.

Respondent:

R-1 Screenshot of Czezre Adams's first posting of the video to his Twitter page and JB telling him to remove it

R-2 JB letting Czezre Adams know that he did not want to continue a sexual relationship

R-3 JB reporting Czezre Adams's page to Twitter.

R-4 Czezre Adams's tweets to JB following the complaint to Newark

R-5 New Twitter page showing Czere Adams and JB having sex

R-6 JB's tweets about the abuse of his privacy

R-7 JB's October 2019 messages to Czere Adams after observing the images on the new Twitter page

R-8 Message from Assistant Prosecutor Jeff Conrad

R-9 General Order 15-02 Social Media

R-10 CD/DVD of sexual intercourse

R-11 CD/DVD of materials from JB's phone

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
SALARY PAYMENT
OAL DKT. NO. CSR 00956-20

IN THE MATTER OF CZERE ADAMS,
CITY OF NEWARK, POLICE DEPARTMENT

Giovanna Giampa, Esq., for appellant

Courtney Durhann, Esq., Assistant Corporation Counsel, for the City of Newark

BEFORE **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE

On November 13, 2019, Newark suspended Czere Adams (Adams) without pay. Adams perfected his appeal on January 14, 2020. HaS 180 days expired since his suspension without pay? No. Under N.J.A.C. 4A:2-2.13(h), specific periods between the date the police officer is suspended without pay and the initial decision date do not count towards the 180-day period.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

I **FIND** the following procedural history as **FACT**:

On October 8, 2019, Newark served Adams with a Preliminary Notice of Disciplinary Action (PNDA). In its notice, Newark charged Adams with conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), and General Order 15-02 (Order 15-02). Newark also charged Adams with violations of Newark's Department Rules and Regulations (Rules).

On November 13, 2019, Newark scheduled a departmental disciplinary hearing. Instead, Adams waived his opportunity for a hearing and pled not guilty. On the same date, Newark served Adams with a Final Notice of Disciplinary Action (FNDA), sustaining all charges and specifications relative to the incidents occurring on June 4, 2019, and September 12, 2019, and removed Adams from Newark's employment effective immediately.

On December 5, 2019, Adams appealed to the Commission under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6. On December 6, 2019, the Commission received the appeal and filing fee via facsimile, and the OAL received a copy on January 14, 2020, perfecting the appeal. On January 24, 2020, the OAL assigned the case to me for hearing.

On February 13, 2020, I held a prehearing conference under N.J.A.C. 1:1-13.1 to discuss when the parties and their witnesses would be available for the hearing, the nature of the proceeding, and the issues to be resolved, including any unique evidentiary problems. I set a discovery completion date and scheduled hearings for May 7 and 8, 2020.

On March 9, 2020, under Executive Order 103, the Governor of the State of New Jersey first declared a State of Emergency caused by COVID-19. The State of Emergency continues to date. The Governor extended the State of Emergency through subsequent Executive Orders that remain in effect. Executive Order 127 extends the time for issuing initial decisions and final agency decisions. Any decision due from

March 9, 2020, until the emergency ends, plus thirty days, has an automatic ninety-day extension. Although Executive Order 127 addresses civil service matters, the provision maintains that an employee file a civil service appeal within twenty days of receiving the FNDA.

On March 17, 2020, the OAL stopped in-person proceedings due to the COVD-19 pandemic and conducted hearings via Zoom. The Newark County Counsel's office also closed because of COVID-19, which caused delays in obtaining discovery, and I adjourned the hearings with consent. Moreover, County Counsel advised that it did not have computers with audiovisual capabilities and had internet connectivity issues making Zoom impossible at that time. Also, County Counsel felt Zoom posed security issues. Although I rescheduled hearings to July and then to August 2020, County Counsel remained unable to participate in Zoom because of technological complications. County Counsel later obtained Zoom capabilities and agreed to participate, given updated Zoom security protocols.

On October 19 and 26, 2020, I conducted hearings via Zoom. The parties requested transcripts and agreed to submit post-hearing submissions thirty days after receipt.

On January 12, 2021, the parties submitted post-hearing briefs.

On January 29, 2021, I conducted a conference to address progressive discipline and reopened the record for supplemental submissions.

On February 12, 2021, Newark presented its supplemental submission, and on February 25, 2021, Adams replied, and the record again closed.

On March 4, 2021, I issued an initial decision sustaining the charges but reducing the penalty to a six-month suspension.

DISCUSSION AND CONCLUSIONS OF LAW

Initially, an administrative law judge may address the issue of the 180-day period. In In re Ford, CSV 7692-12 and CSR 15066-12 (consolidated), Initial Decision (May 22, 2013), http://njlaw.rutgers.edu/collections/oal/, modified, Civil Service Comm'n (July 31, 2013), the Office of Administrative Law issued an interlocutory order "advis[ing] that [the law enforcement officer] would be entitled to commence [receiving] his salary" on a particular date after tolling days that did not count toward the 180-day period.[6] See also N.J.A.C 4A:2-2.13(i)3 (when the administrative law judge's initial decision recommends reversal of the removal, or that the officer or firefighter receive discipline other than removal, the appellant shall receive his or her base salary on the date provided in the administrative law judge's initial decision).

When a police officer is suspended without pay, and the police department seeks to terminate his or her employment for the conduct that was the basis of the suspension, a final determination shall be rendered 180 days from the date the police officer was suspended without pay. N.J.S.A. 40A:14-201(a). If a final determination is not rendered within those 180 days, the police officer shall begin to receive his or her base salary again, beginning on the 181st day, and shall continue to receive his or her base salary until a final determination is rendered. Ibid.

This decision recommends that the disciplinary charges against Adams be sustained, but that the penalty be reduced from termination to 180 days. N.J.A.C. 4A:2-2.13(i) provides that:

> If the administrative law judge's initial decision recommends reversal of the removal, or that the officer or firefighter receive discipline other than removal, the appellant shall receive his or her base salary on the date provided in the administrative law judge's initial decision, provided, however, that if the appellant is already receiving his or her base salary at the time of the administrative law judge's initial decision, the appellant shall continue to receive such base salary.

[6] The final decision in Ford is not available on the Rutgers website or Lexis but is available from the Office of Administrative Law's electronic database.

Not all calendar days, however, count toward determining when an officer is returned to pay status. See N.J.S.A. 40A:14-201(b). More specifically, the calendar days that accrue between the date the police officer is terminated by the police department and the date the police officer files his or her appeal with the Office of Administrative Law do not count, N.J.S.A. 40A:14-201(b)(1); the calendar days that accrue because the police officer requests and is granted a postponement or delay of the hearing do not count, N.J.S.A. 40A:14-201(b)(2); and the calendar days that accrue because the police officer causes a postponement or delay of the hearing do not count, N.J.S.A. 40A:14-201(b)(3). Even the calendar days that accrue because the police officer and the police department agree to a postponement or delay of the hearing do not count. N.J.S.A. 40A:14-201(b)(4).

Yet, other circumstances cause calendar days not to count in the pay status determination. Specifically, the calendar days that accrue because the administrative law judge or the Civil Service Commission causes a postponement or delay of the hearing for good cause do not count. N.J.S.A. 40A:14-201(b)(5).

Like the enabling statute, the implementing regulation states that a final determination shall be rendered within 180 days, see N.J.A.C. 4A:2-2.13(g); that if a final determination is not rendered within 180 days, the police officer shall begin to receive his or her base salary again, see N.J.A.C. 4A:2-2.13(h); and that certain days are excluded from the 180-day period, see ibid.

The regulation also defines the term "date of removal." Under N.J.A.C. 4A:2-2.13(a)(4), the terms "removal," "removal date," and "removal effective date" mean the first date on which the police officer is "separated from employment without pay." Given this definition of the term "date of removal," the exclusionary period under subsection (h)(3) is the period between the date when the police officer is separated from employment without pay and the date on which he or she appeals a Final Notice of Disciplinary Action with the Office of Administrative Law and the Civil Service Commission.

As such, this definition and interpretation renders the exclusionary periods under subsections (h)(1) and (h)(2) relating to the departmental hearing proceedings superfluous.

Indeed, the Commissioner agrees that the 180 days commences on the date the appellant was "removed," or when appellant was suspended without pay. In re Wolff, 2010 N.J. AGEN LEXIS 693 (February 24, 2010). In Wolff, the Commissioner accepted the initial decision and recommendation to modify the removal penalty to a six-month suspension. However, the administrative law judge did not determine when Wolff should receive his base salary. The Commissioner deducted the period between appellant's removal and the date he filed his appeal with the Commission and the OAL and a period caused by appellant's adjournment of the original hearing date to the actual hearing date.

Moreover, the filing date for purposes of N.J.S.A. 40A:14-201 is when the OAL receives all required information along with confirmation of fee payment to the Civil Service Commission, or in this case, January 14, 2020. N.J.A.C. 1:4B-3.2 (d). Moreover, if an appeal is not simultaneously served upon the OAL and Commission, the calendar days that accrue pending appeal to both agencies do not count calculating when the officer is entitled to receive his base pay pending final determination. N.J.A.C. 1:4B-3.2 (a)1. Although Adams timely filed an appeal with the Commission at an earlier date, the "gap in time" between the timely filing with the Commission and the filing of an appeal with the OAL does not count toward the 180-day period. N.J.A.C 4A:2-2.13(h)(5).

Thus, I **CONCLUDE** that the period between November 13, 2019, (when Newark suspended Adams without pay) and January 14, 2020, (when Adams perfected his appeal of the Final Notice of Disciplinary Action with the OAL) is excluded from the 180 days under N.J.A.C. 4A:2-2.13(h)(3).

N.J.A.C. 4A:2-2.13(h)(6), (7), and (8) mirror the excluded periods for delays under N.J.S.A. 40A:14-201(b)(2), (3), and (4).

Adams agreed to the initial postponement requested by Newark. Therefore, I **CONCLUDE** that the period from May 7, 2020, (the first scheduled hearing) until July 20, 2020, (the next hearing date) is excluded from the 180 days under N.J.A.C. 4A:2-2.13(h)(6). Also, the parties agreed to obtain transcripts and submit post-hearing submissions thirty days after receipt of the transcripts. Therefore, I **CONCLUDE** that the period from October 27, 2020, (the date following completion of the hearings) until January 12, 2021, (when I received post-hearing submissions) is excluded from the 180 days under N.J.A.C. 4A:2-2.13(h)(6).

Significantly, N.J.A.C. 4A:2-2.13(h)(9) reiterates N.J.S.A. 40A:14-201(b)(5), providing that "the period of time during which the administrative law judge or the Civil Service Commission, for good cause, postpones or delays a hearing." I re-opened the record for the parties to address progressive discipline necessary for the penalty determination. W. New York v. Bock, 38 N.J. 500, 523−24 (1962). Therefore, I **CONCLUDE** that the period from January 29, 2021 (when I re-opened the record) until February 26, 2021 (when the record closed) is excluded from the 180 days under N.J.A.C. 4A:2-2.13(h)(9).

An additional delay of the hearing involved the OAL's closure due to COVID-19 and Newark's unfortunate technological difficulties during this unprecedented time, making it unable to proceed via Zoom. The Governor's Executive Orders address a State of Emergency and acknowledge that good cause exists for extending deadlines for OAL initial decisions and Civil Service Commission final decisions. The Governor's Executive Orders broadly acknowledge that delays because of COVID-19 may be considered as "good cause." Given these unusual circumstances, I also **CONCLUDE** good cause exists for the delay of the rescheduled hearings from July 20, 2020, until the first hearing date of October 19, 2020, and I exclude this period from the 180 days under N.J.A.C. 4A:2-2.13(h)(9).

Indeed, I **CONCLUDE** that Adams accrued 134 days from January 14, 2020 (when Adams perfected the filing of his appeal with the OAL) to May 7, 2020 (the first scheduled hearing), from January 12, 2021, until January 29, 2021 (when I re-opened

the record), and from February 25, 2021 (when the record closed) until March 4, 2021 (the date of the initial decision).

As such, I **CONCLUDE** that Adams is not yet entitled to receive his base salary under N.J.S.A. 40A:14-201 and N.J.A.C. 4A:2-2.13. However, time will continue to accrue during the Commissioner's review until the Final Decision under N.J.A.C. 4A:2-2.13(f).

Should the Commissioner conclude the penalty is properly modified from a removal to a six-month suspension, Adams may be entitled to mitigated back pay, benefits, and seniority for the period following his six-month suspension, May 13, 2020, to his reinstatement, under N.J.A.C. 4A:2-2.10. See In re Wolff, 2010 N.J. AGEN LEXIS 693 (February 24, 2010).

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that Adams not be returned to pay status.

This order may be reviewed by the **CIVIL SERVICE COMMISSION** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

March 4, 2021

DATE

NANCI G. STOKES, ALJ

Date Received at Agency: March 4, 2021

Date Mailed to Parties: March4, 2021

ljb