

**STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW**

Jeffery A. Bertram,

*Appellant,*

v.

Case No. 2015-SUS-12-0229

Dept. of Rehabilitation and Correction,

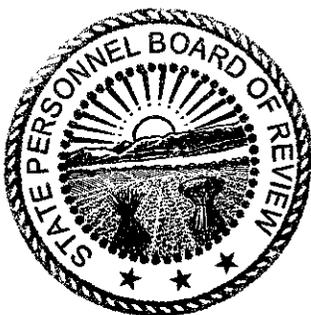
*Appellee,*

**ORDER**

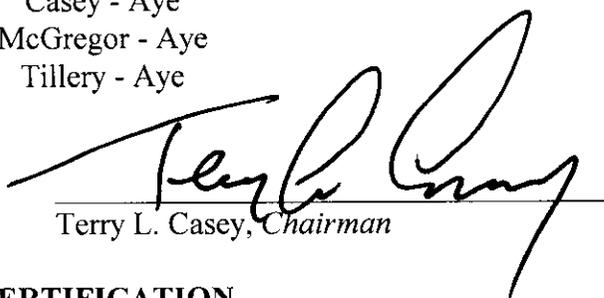
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge (ALJ) in the above-captioned appeal.

This Board has carefully and thoroughly examined the entirety of the instant record. That examination included a review of the Report and Recommendation of the ALJ, a review of any objections to that report and responses thereto that were timely and properly filed, and a review of the presentations of the parties at Oral Argument. Pursuant to that review, this Board hereby adopts the findings of the ALJ but must modify the recommendation of the ALJ for the reasons set forth in the Board Opinion attached, hereto.

Wherefore, it is hereby **ORDERED** that Appellant's **TEN-DAY SUSPENSION** be **MODIFIED** to a **FIVE-DAY SUSPENSION**, for the reasons set forth in this Board's Opinion, pursuant to R.C. 124.03 and R.C. 124.34.



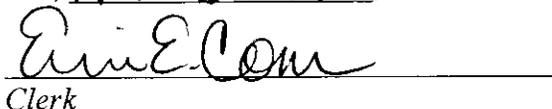
Casey - Aye  
McGregor - Aye  
Tillery - Aye

  
Terry L. Casey, *Chairman*

**CERTIFICATION**

The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitutes (the original/a true copy of the original) order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, November 14, 2016.

  
Clerk

**NOTE:** Please see the reverse side of this Order **or** the attachment to this Order for information regarding your appeal rights.

## NOTICE

Where applicable, this Order may be appealed under the provisions of Chapters 124 and 119 of Ohio Revised Code. An original written Notice of Appeal or a copy of your Notice of Appeal setting forth the Order appealed from and the grounds of appeal must be filed with this Board fifteen (15) days after the mailing of this Notice. Additionally, an original written Notice of Appeal or a copy of your Notice of Appeal must be filed with the appropriate court within fifteen (15) days after the mailing of this Notice. At the time of filing the Notice of Appeal or copy of your Notice of Appeal with this Board, the party appealing must provide a security deposit to the Board. In accordance with administrative rule 124-15-08 of the Ohio Administrative Code, the amount of deposit is based on the length of the digital recording of your hearing and the costs incurred by the Board in certifying your case to court. The length of the digital recording, the costs incurred, the corresponding amount of deposit required, and the final date that the Notice of Appeal or copy of your Notice of Appeal and the Deposit will be accepted by this Board are listed at the bottom of this Notice. If a full or partial transcript of the digital recording has been prepared prior to the filing of an appeal, the costs of a copy of that certified transcript will be accepted by this Board; transcript costs will be listed at the bottom of this Notice.

**IF YOU ELECT TO APPEAL THIS BOARD'S FINAL ORDER, THEN YOU MUST PROVIDE THE DEPOSIT LISTED BELOW AT THE TIME YOU FILE YOUR NOTICE OF APPEAL OR COPY OF YOUR NOTICE OF APPEAL WITH THIS BOARD.** Please note that the law provides that you have fifteen (15) calendar days from the mailing of the final Board Order to file your Notice of Appeal or copy of your Notice of Appeal both with this Board and with the Court of Common Pleas. The fifteenth day is the date that appears at the bottom of this Notice.

**METHOD OF PAYMENT:** for all entities other than State agencies, payment of the deposit must be by money order, certified check, or cashier's check. State agencies are required to use the Intra-State Transfer Voucher (ISTV) system (OBM Form 7205), which must be processed prior to the filing of an appeal. To initiate an ISTV, State agencies may call the State Personnel Board of Review Fiscal Office at 614/466-7046.

**IF YOU MAINTAIN YOU CANNOT AFFORD TO PAY THE DEPOSIT LISTED BELOW, THEN YOU MUST COMPLETE THE BOARD'S "AFFIDAVIT OF INDIGENCE" FORM. YOU CAN OBTAIN THAT FORM BY CALLING 614/466-7046. THE COMPLETED AFFIDAVIT MUST BE RECEIVED BY THIS BOARD ON OR BEFORE November 21, 2016.** You will be notified in writing of the Board's determination. If the Board determines you are indigent, you will be relieved of the responsibility to pay the deposit to the Board. However, if the Board determines you are NOT indigent, then **YOU MUST FILE YOUR NOTICE OF APPEAL OR A COPY OF YOUR NOTICE OF APPEAL AND PAY THE DEPOSIT BY THE DATE LISTED BELOW.**

**If you have any questions regarding this notice, please contact the Board at 614/466-7046.**

Case Number: 2015-SUS-12-0229

Transcript Costs: \$273.00 Administrative Costs: \$25.00

Total Deposit Required: \* \$298.00

Notice of Appeal and Deposit Must  
Be Received by SPBR on or Before: November 29, 2016

STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW

Jeffery A. Bertram,

*Appellant,*

v.

Case No. 2015-SUS-12-0229

Dept. of Rehabilitation  
and Correction,

*Appellee.*

**OPINION**

This Opinion comes as a result of the oral arguments heard on October 12, 2016, the Report and Recommendation (“R&R”) of May 17, 2016, Appellee’s objections, and Appellant’s reply thereto.

**BACKGROUND**

This case arises from Appellant’s ten-day suspension for posting a picture from his home onto his personal Facebook page of the White House superimposed with a confederate flag and caption about the south rising again. Appellant’s co-worker and Facebook friend who is African-American saw the post, became offended, and reported it to Appellee. Appellee disciplined Appellant for, *inter alia*, actions which could impair Appellant’s ability to discharge his duties, and actions which could bring discredit to Appellee.

The R&R was issued on May 17, 2016. The Administrative Law Judge (“ALJ”) applied the First Amendment *Pickering* balancing test<sup>1</sup>. The ALJ then recommended that, in this case, Appellee’s interest in avoiding minor disruption was outweighed by Appellant’s First Amendment right to speak as a private citizen on a matter of public concern. Evidence in the record tends to show that the confederate flag is a political symbol and its display is a continuing source of public debate and controversy.

**OBJECTIONS**

**Appellant** argues that Appellee has no right to object to the R&R. Appellant’s objection is **overruled**.

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<sup>1</sup> See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S.Ct. 1731 (holding that a public employee has the right to speak as a private citizen on a matter of public concern but that the exercise of this right must be balanced with the public employer’s interest in “promoting the efficiency of the public services it performs through its employees.”)

Objections are governed by rule. This Board is given “due deference” by the courts in interpreting its own rules.<sup>2</sup>

O.A.C. 124-15-02 *Objections to Reports and Recommendations* states that “Parties” may file objections and responses thereto. Parties refer to both Appellant and Appellee. For these reasons, Appellant’s objection is without merit and overruled.

Appellee objects that the ALJ erred by applying First Amendment constitutional law to reach her recommendation. Appellee argues that it did not get a chance to oppose the application of constitutional law on jurisdictional grounds at hearing. However, we note that Appellee has had ample opportunity to challenge this very matter both through the objection process and during the lengthy and comprehensive oral argument on October 12, 2016.

Therefore, this Board finds that any unfair surprise, if any, has been cured through post-hearing filings and oral argument. To this extent, Appellee’s objection is overruled.

Under the doctrine of *incorporation*, the federal bill of rights does apply to state employers in most cases.<sup>3</sup> It is well settled then that public employees do not leave their First Amendment constitutional rights at the door of their government employer.<sup>4</sup>

Moreover, Appellee’s argument, if followed, would produce the result that this Board would be subject to reversal by the courts for offending constitutional rights, while being without the power to observe these same rights in the first place.

Therefore, this Board overrules Appellant’s objection to application of constitutional law to Appellee’s actions.

#### MERIT DISCUSSION

We begin this discussion by noting that we have re-viewed the specific and distinct facts of this case in relation to the *Pickering* balancing test. In doing so, we find that Appellee’s structure and function are in many ways similar to paramilitary organizations such as a police departments.

This is because Appellee uses a rank chain of command structure, employs uniform dress, takes custody and control of persons, and trains in the use of force, similar to law enforcement

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<sup>2</sup> *HCMC, Inc. v. Ohio Dept. of Job & Family Servs.*, 179 Ohio App.3d 707, 2008-Ohio-6223, ¶ 24 (10th Dist.) (citing *Salem v. Koncelik*, 164 Ohio App.3d 597, 2005-Ohio-5537 at ¶ 16, citing *Hamilton Cty. Bd. of Mental Retardation & Dev. Disabilities v. Professionals Guild of Ohio* (1989), 46 Ohio St.3d 147.)

<sup>3</sup> *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 744, 130 S.Ct. 3020, 3022-3

The [Supreme] Court eventually held that almost all of the Bill of Rights’ guarantees met the requirements for protection under the Due Process Clause. The Court also held that Bill of Rights protections must “all ... be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.” citing *Malloy v. Hogan*, 378 U.S. 1, 10, 84 S.Ct. 1489.

<sup>4</sup> *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983)

organizations. The Supreme Court has ruled that the *liberty* interest enjoyed by police officers pursuant to the Fourteenth Amendment is less expansive than that enjoyed by employees in other public professions.<sup>5</sup>

We note that reasonable minds can differ over their conclusions in application of *Pickering* which all agree is a heavily fact intensive analysis. Moreover, the Board has had the benefit of significant additional development of the record that was not available to the ALJ when she issued her R and R in this matter.

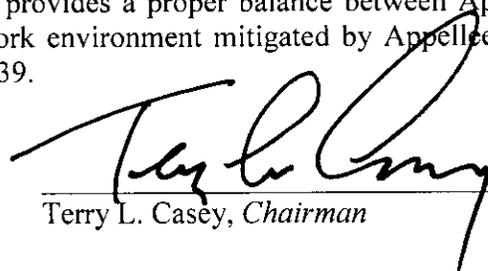
With that as the case, we reach a different conclusion than the ALJ; because we determine that more deference needs to be accorded to Appellee's heightened need for discipline as a quasi-law enforcement organization. Therefore, in this context only, we find that the level of disruption within the institution caused by Appellee's disseminated post was sufficient to warrant curtailment of his speech in this instance.

We note that the Facebook post disrupted the relationship between Appellee and another senior staff co-worker. The Warden, herself, offered probative testimony that appears to reflect the disharmony between senior staff that resulted from Appellant's actions. Indeed, Appellee was forced to expend time and costly administrative leave to figure out what impact Appellant's inherently and potentially disruptive speech would have on the workplace.

However, we, like the ALJ, find fault with Appellee for using overly ambiguous and rather broad work rules that chill protected speech in some instances. We understand that Appellee's work rules apply to thousands of employees under many and varied circumstances. Nonetheless, the rules at issue in this specific appeal, while giving general notice that anything one does that affects the employer negatively becomes a violation, do not appear to sufficiently apprise employees that private speech on matters of public concern is generally permissible as protected speech..

Given that Appellee's rules are overly broad in this case, it is unfair to impose the harshest possible penalty on a 28 year career employee with no prior discipline. If Appellee's work rules were more narrowly tailored and they incorporated "rights balancing", then perhaps Appellant would have made a more-informed - and better - decision and would have refrained from posting text and graphics that had such a deleterious impact on his correctional institution.

Accordingly, this Board MODIFIES Appellant's suspension to a FIVE-DAY SUSPENSION for violation of the R.C. 124.34 disciplinable offense of Failure of Good Behavior. We believe this modification provides a proper balance between Appellant's actual level of culpability for disrupting the work environment mitigated by Appellee's own need to review and amend Rule No. 37 and Rule 39.

  
Terry L. Casey, *Chairman*

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<sup>5</sup> *Kelley v. Johnson*, 425 U.S. 238, 248-9, 96 S.Ct. 1440 (1976)

**STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW**

Jeffery A. Bertram

Case No. 2015-SUS-12-0229

*Appellant*

v.

May 17, 2016

Department of Rehabilitation & Correction  
Northeast Reintegration Center

*Appellee*

Marcie M. Scholl  
*Administrative Law Judge*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

This cause came on for record hearing on March 9, 2016. Appellant Jeffrey Bertram ("Bertram") appeared *pro se*. Appellee, Department of Rehabilitation and Correction ("ODRC"), Northeast Ohio Reintegration Center ("NERC") was represented by Assistant Attorneys General Rory P. Callahan and Ryan D. Walters. Warden Sherry Clouser ("Warden") was Appellee's designee.

The subject matter jurisdiction of the Board was established pursuant to sections 124.03 and 124.34 of the Ohio Revised Code.

This cause arises from a timely appeal of Appellant Bertram's ten (10) day suspension from his position of Correction Warden Assistant 2, effective December 7, 2015. The pertinent Ohio Revised Code 124.34 Order was hand delivered to him on December 3, 2015.

The Ohio Revised Code 124.34 order states, in pertinent part:

You violated the following SOEC: Rule 37- Any act or failure to act that could compromise or impair the ability of an employee to effectively carry out his/her duties; 39- Any act that would bring discredit to the employer; 50- Any violation of ORC 124.34...

On July 2, 2015, you posted a photo on your Facebook page of the White House with the confederate flag superimposed over it and the statement "Now that's more like it! And the South shall rise again!" When informed some people, including your co-workers, were offended by your post, you posted a cartoon with the caption

“Announcing I’m offended” is basically telling the world you can’t control your own emotions, so everyone should do it for you.”

You indicated on your Facebook profile you work for the Ohio Department of Rehabilitation and Correction and Northeast Pre-Release Center as the Warden’s Administrative Assistant and the State of Ohio as Public Information Officer and Volunteer Coordinator.

These posts and related comments could compromise or impair your ability to carry out your duties and bring discredit to ODRC and NERC and represent a failure of good behavior.

Appellant Bertram filed a timely appeal of his suspension.

### **STATEMENT OF THE CASE**

Appellee’s first witness was Appellant Jeffery Bertram, as if on cross examination. Appellant Bertram testified he serves as a Volunteer Coordinator for Appellee and, as such, he conducts background checks on applicants and presents them to the Warden for her approval. He works with colleges and universities on hiring interns and exposes the interns to various aspects of the institution. Appellant Bertram stated he interacts with approximately twenty (20) churches, as that is where most of the volunteers come from. Approximately thirty-five (35) percent of his duties consist of assisting the Warden and Deputy Warden by serving as a liaison with the staff, reviewing policies and making recommendations as to changes. He also submits reports for random drug testing and receives reports regarding use of force and violent incidents. Appellant Bertram testified he is a member of the executive staff, which is comprised of twelve (12) employees. He stated there are approximately 155 employees at NERC. He also testified he is the Public Information Officer, and as such, processes requests for public information and handles public relations for the newsletter and the media.

Appellant Bertram testified he is aware of the Standards of Employee Conduct and identified Appellee’s Exhibit C as the Standards and Appellee’s Exhibit B as his signature confirmation of receipt of those Standards.

Appellant Bertram identified Appellee’s Exhibit F as a post he put on Facebook. It was a picture of the White House with the Confederate flag superimposed over it. Appellant Bertram testified he felt the confederate flag is a historical symbol. He opined he does not feel it should be removed from display in all instances and testified he understood that his First Amendment rights are more limited when acting as a representative of NERC.

Appellant Bertram acknowledged that some of his coworkers were offended by his initial post; however, he noted that his privacy status on Facebook is “friends only” so that his page is not public and if someone did not agree with something that he posted, then they could “unfriend” him.

Appellee’s second witness was Warden Sherry Clouser. Warden Clouser testified she was the Acting Warden in June, 2015 and became the Warden in September, 2015. She explained that NERC houses approximately 630 female inmates who are considered low risk security. The mission of NERC is to get the inmates ready to be released and they are program focused. That is why the institution has more volunteers than other facilities. She stated she holds weekly staff meetings and approximately twelve (12) out of fifteen (15) of her executive staff members are minorities. She testified Appellant Bertram represents her and the facility publicly in the discharge of his duties.

Warden Clouser recalled that David A. Brown Jr., Unit Management Chief, was quite upset when he showed her Appellant Bertram’s posting. In response, she reported the matter to the Regional Director and forwarded him Appellant Bertram’s posting. Warden Clouser testified she couldn’t believe Appellant Bertram had posted something like that on Facebook. She stated she felt it was inappropriate.

Warden Clouser decided the matter should be investigated. She testified that the matter was being talked about within the facility. For this reason, she placed Appellant Bertram on administrative leave. She stated she was upset because it was affecting other staff and causing internal conflict at the facility, as some employees agreed and others disagreed with the posting.

After receiving the completed investigation, Warden Clouser determined a pre-disciplinary conference was appropriate. She noted that “we are always on duty” and that what Appellant Bertram posted on Facebook could be taken a lot of different ways. Warden Clouser testified she now has concerns about Appellant Bertram acting as a pre-discipline hearing officer with African American employees due to his posting on Facebook.

Warden Clouser testified she did not think that Appellant Bertram’s intent was racist. However, some employees interpreted his posting that way and she felt she had to show zero tolerance for these types of posts.

### **FINDINGS OF FACT**

1. At the time of his suspension, Appellant Bertram was a Warden's Assistant at Northeast Ohio Reintegration Center ("NERC"). He had no active prior discipline and has approximately twenty-eight (28) years of service.
2. As the Warden's Assistant, Appellant Bertram was familiar with the Employee Standards of Conduct and identified his written receipt of the same.
3. On or about July 2, 2015, Appellant Bertram posted a picture of the confederate flag superimposed upon the White House with the caption, "Now that's more like it. And the South shall rise again!" on his Facebook account.
4. At all relevant times, Appellant Bertram maintained a personal Facebook account and posted while off duty. In order to view his page contents, a user must be a friend of Appellant Bertram on Facebook due to his privacy settings.
5. On or about July 6, 2015, a co-worker and Facebook friend, David A. Brown Jr., filed an incident report alleging that Appellant Bertram posted the aforementioned picture and that it was racially offensive. Mr. Brown's incident report lamented Appellant Bertram's post in light of "what the [confederate] flag means currently".
6. As a result of the incident report, Warden Clouser ordered an investigation, which culminated in a timely pre-discipline hearing and issuance of an Ohio Revised Code 124.34 Order suspending Appellant Bertram for (10) ten days.

### **CONCLUSIONS OF LAW**

In order for Appellee's suspension of Appellant Bertram to be affirmed, Appellee had the burden of proving by a preponderance of the evidence the allegations contained in the suspension order. Appellee has not met its burden.

Appellant Bertram argued that under the First Amendment, his post was not subject to discipline because: (1) he was speaking as a private citizen as on a matter of public concern; (2) his post was not public and he did not sufficiently hold himself out as a representative of NERC when making the post in order to come within the ambit of the Work Rules; and (3) the off duty conduct does not bear a sufficient nexus to impose discipline under Ohio Revised Code section 124.34.

In order to support the discipline, Appellee argued the fact that one can ascertain Appellant Bertram is employed by NERC from reading his Facebook page and that this brings discredit to the employer because of the derisive and insensitive subject matter of his post. Also, a co-worker and Facebook friend of Appellant Bertram was offended by the post and the post was a topic of discussion in the institution.

In *Pickering v. Bd. Of Edu.*, 391 U.S. 563, 88 S. Ct. 1731, 20 L.Ed.2d 811 (1968), the U.S. Supreme Court affirmed the notion that public employees may speak as private citizens under the First Amendment on matters of public concern. The Court employed a balancing test to determine if particular speech is protected, weighing the interest in public discourse against the government-employer's interest in maintaining efficiency and order within its operation. The Court set out a two-step inquiry: (1) initially, a court must determine whether the speech that led to an employee's discipline regarded a matter of public concern; and (2) if it does, free speech concerns are balanced against efficient public service concerns.

The first question then is whether the aforementioned posting of the picture is a matter of public concern. There is no doubt that the picture and comment is controversial, derisive and offensive to some of the people who saw Appellant Bertram's post. The confederate flag (and whether it should be displayed) is clearly part of the current public debate. News organizations and social media freely discussed and reported on the debate in South Carolina regarding the flying of the Confederate flag in that state. Appellee itself stated that Appellant Bertram's post was made amid a time of great controversy about the Confederate flag. Obviously, the question must be answered in the affirmative as the topic of the post was being freely discussed and opined on within the public.

Having established that Appellant Bertram's posting and caption is a matter of public concern, the question then becomes whether Appellant Bertram's right to express himself is outweighed by NERC's need to run an efficient and orderly operation under this particular set of facts.

Appellant Bertram stated his post was in opposition to the issue of gay marriage, another public concern. There is no indication that his post was in any way part of his official duties. NERC argued that Appellant Bertram holds a special position with the Warden, as her assistant, and is the Public Information Officer. Appellee also argued that Appellant Bertram listed his employer in his profile on his Facebook page. Appellant Bertram argued he was not posting on behalf of the Appellee, but as a private citizen expressing an opinion. Nowhere in his post did he mention Appellee and he did not post it as representing the agency. The mere listing of NERC as his employer does not suddenly turn his Facebook page into a NERC sponsored page. As Appellant Bertram stated, many employees list in their

profile who they work for, but by doing so, that does not turn every post on their Facebook page into something attributable to their employer or as representing their employer.

Case law suggests that the employer may limit or punish otherwise protected speech where such speech disrupts the agency in carrying out its mission or creates a serious disruption to employee relations. *Carney v. City of Dothan*, 2016 U.S. Dist. LEXIS 10266, Case No. 1:14-CV-392-WKW.

In *Ridpath v. Bd. Of Governors Marshall Univ.*, 447 F.3d 292, 317 (4<sup>th</sup> Cir. 2006) the court listed several factors to consider when analyzing if a public employee's speech is protected under the second prong of the *Pickering* test. This includes:

How much did the speech impair the maintenance of discipline by supervisors?

Was harmony impaired among co-workers?

Were close personal relationships damaged?

Did the speech impair the employee from discharging his duties?

Did the speech interfere with the operation of the institution?

Did the speech undermine the mission of the institution?

Was the speech communicated to the public or to co-workers in private?

Did the speech conflict with the employee's duties in the institution?

When considering the employee's role, did the speech constitute an abuse of authority or public accountability?

All of those questions must be answered as "no". There was no evidence of supervisors not being able to maintain discipline or of harmony being impaired among co-workers. There may have been damage to the relationship between Appellant Bertram and Mr. Brown, but there was no evidence presented on that issue and if even there was damage, the damage was limited to two (2) people and not between many co-workers.

In the instant case, the record is devoid of any evidence that order at NERC was jeopardized. The cost to NERC is essentially the investigation itself and the disturbance between Mr. Brown and Appellant Bertram. The Warden testified that inmates and staff were talking about Appellant Bertram's posts but she did not indicate that inmates or staff became unruly or that operations at the facility were in any way disrupted. There was no evidence that Appellant Bertram could not perform his duties as a result of his post. Appellee only stated that the post "could (emphasis added) compromise or impair [his] ability to effectively carry out your duties and bring discredit to the ODRC and NERC...". There was no evidence whatsoever that Appellant Bertram was compromised or impaired in carrying out his duties. Warden Clouser testified she envisioned the possibility of problems if Appellant Bertram served as a pre-disciplinary hearing officer for an African American employee, but once again, there was no evidence of any problem. Discipline cannot be levied on the possibility of something happening.

There was also no evidence of any discredit being attributed to the Appellee. The only official document filed regarding Appellant Bertram's post was from Mr. Brown. There were not mass grievances or incident reports filed, there was no media reporting on the posting and there was no evidence of any negative press regarding NERC due to Appellant Bertram's posting. There also was no evidence of any complaints filed by citizens with regard to the post. The post was limited to Facebook friends and not the general public. Appellant Bertram did apologize on his Facebook page and clarified his remarks as an opposition parody of President Obama's illumination of the White House with rainbow colors after the Supreme Court's decision upholding the right of same sex couples to marry.

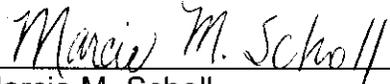
The absence of further disturbance to the employer's operation in the record seems to suggest that Appellant Bertram's later apology was sufficient to quell much of the ill feelings and offense he created with his original post. The record also suggests that Appellant Bertram was able to resume his duties successfully and without any disruption to the Appellee.

In this case, Appellant Bertram's right to speak as a private citizen on matters of public concern trumps the Appellee's interest in being free from minor disruption.

It is important to note that the work rules fail to incorporate First Amendment protections at all for classified employees. The rules are so overly broad that they make any off duty conduct disciplinable if it "could" compromise the ability to carry out one's duties as a public employee. Under Rule 37, just about any utterance made anywhere by an employee "could" qualify as prohibited if it offends someone that the employee has to work with or serve because it "could" impair their relations with that person. The same over broadness is attributable to Rule 39, in that it states that "any act that 'would' bring discredit to the employer" is grounds for

discipline. (Emphasis added). The rules are overly subjective and not fact-based. An act either does or does not bring discredit or does or does not offend or impair relations. Once again, discipline cannot be founded on something that "may or may not" or "could or could not" happen. It either did or it didn't. In this case, the facts establish that none of the possibilities took place. Despite Appellee's assertion that an employee is always on duty, the First Amendment allows a citizen to just be a citizen without the cloak of one's employer on constantly. The evidence has established that Appellant Bertram's post was not made on behalf of his employer and did not in any way impinge on neither his nor his employer's ability to carry out its functions and duties.

Therefore it is my **RECOMMENDATION** that Appellee's ten (10) day suspension of Appellant Bertram be **DISAFFIRMED** pursuant to section 124.34 of the Ohio Revised Code.

  
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Marcie M. Scholl  
Administrative Law Judge