



## STATE OF NEW JERSEY

In the Matter of M.D. Khan  
Jersey City, Police Department

CSC DKT. NO. 2018-985  
OAL DKT. NO. CSR 14819-17

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

ISSUED: JULY 9, 2019 BW

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The appeal of M.D. Khan, Police Officer, Jersey City, Police Department, removal effective September 11, 2017, on charges, was heard by Administrative Law Judge John P. Scollo, who rendered his initial decision on June 6, 2019. Exceptions were filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of July 9, 2019, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of M.D. Khan.

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 9<sup>th</sup> DAY OF JULY, 2019



Deirdré L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Christopher S. Myers  
Director  
Division of Appeals and Regulatory Affairs  
Civil Service Commission  
P. O. Box 312  
Trenton, New Jersey 08625-0312

Attachment



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. CSR 14819-17

AGENCY DKT. NO. N/A

**IN THE MATTER OF M.D. KHAN,  
CITY OF JERSEY CITY POLICE  
DEPARTMENT.**

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**Daniel J. Welsh, Esq., for Appellant, M.D. Khan**

**James B. Johnston, Esq., for Respondent, City of Jersey City Police  
Department**

Record Closed: April 22, 2019

Decided: June 6, 2019

**BEFORE JOHN P. SCOLLO, ALJ:**

**STATEMENT OF THE CASE**

Respondent, City of Jersey City Police Department (a/k/a Jersey City Police Department, the Department, or the City) brought a major disciplinary action against appellant, M.D. Khan (Khan), a police officer, removing him effective September 11, 2017.

### PROCEDURAL HISTORY

The Preliminary Notice of Disciplinary Action (PNDA) dated March 17, 2017 (R-2), was served on Khan on March 20, 2017, on which date Khan submitted a "Notice of Plea and Hearing Form" thus entering his "not guilty" plea and requesting a Departmental Hearing. The Departmental Hearing was held on August 31, 2017, after which the Hearing Panel rendered a Final Notice of Disciplinary Action (PNDA) dated September 8, 2017 (R-1), which sustained all but Charge Number Three of the following charges (listed by the charge numbers set forth in the PNDA):

1. (Violation of Rule 3:108 – Unbecoming Conduct), the FNDA's First Sustained Charge;
2. (Violation of Rule 3:123 – Obedience to Laws), the FNDA's Second Sustained Charge;
3. (Violation of 3:112 – Prohibition of Engaging in Criminal Acts), this was not sustained because "use immunity" was granted;
4. (Violation of Rule 3:122 – Knowledge of Laws and Regulations), the FNDA's Third Sustained Charge;
5. (Violation of Rule 3:157 – Knowledge of Rules and Regulations), the FNDA's Fourth Sustained Charge;
6. (Violation of Rule 3:157 – Knowledge of Rules and Regulations), the FNDA's Fifth Sustained Charge; and
- 7 (Violation of N.J.A.C. 4A:2-2.3(a)(6)). Charge Number 7 was merged into the First Sustained Charge.

The FNDA sets forth the Department's determination that the appropriate penalty would be removal of Khan from his position effective September 11, 2017. On September 8, 2017, Public Safety Director James Shea affirmed the findings of the Department's Hearing Panel.

The FNDA was served on Khan on September 12, 2017. On September 27, 2017, Khan's counsel filed a "Law Enforcement Officer and Firefighter Removal Appeal Form" requesting a hearing and forwarded simultaneous appeals to the Civil Service

Commission and to the Office of Administrative Law (OAL), pursuant to N.J.S.A. 40A:14-200 et seq. This matter was filed with the OAL on October 2, 2016, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The Tribunal held a Pre-Hearing telephone Conference, issued a Pre-Hearing Order setting Discovery deadlines, held status and settlement conferences, and set a Hearing Date for January 24, 2019.

On January 24, 2019, after a pre-trial conference, the parties decided that no testimony would be taken; that both sides would rely solely on the facts set forth in the Joint Stipulation of Facts (marked J-1) and Exhibits R-1 through R-19; that the Tribunal had all the factual information necessary to render its Initial Decision in this matter; and that counsel would submit written summations. Note: Exhibit R-19 consists of two audio CD's recorded on October 31, 2016 (a recording of the interview of Harish Sachdeva (Sachdeva) of Kwaliti Builders, LLC (Kwaliti) at the Hudson County Prosecutor's Office (HCPO)) and on January 19, 2017 (a recording of the interview of M.D. Khan at the HCPO). Exhibit J-1 is a Joint Exhibit and is in evidence. Exhibits R-1 through R-19 were admitted into evidence without objection. After the Tribunal received the summations on April 22, 2019, the record was closed.

### **DISCUSSION OF FACTS**

The facts set forth below were gleaned from the above-mentioned exhibits. The recitation of the facts below is not intended as a verbatim summary. Rather, these are the facts that I found to be the most important in deciding this case.

The events that gave rise to the charges brought against Khan are alleged to have occurred on various dates. The most notable allegations are the following: (1) that on January 15, 2016, after completing an off-duty job at 164 Congress Street, Khan requested that Harish Sachdeva, the owner of Kwaliti Builders, LLC, issue check number 1033 in the amount of \$232 (consisting of four hours of Khan's earnings at \$50 per hour, plus a \$32 administrative fee that was to be paid to the City) with the "pay to" line blank; and that Khan received the check from Sachdeva with the "pay to" line blank; and (2) that Khan, by virtue of being a Jersey City Police Officer was by Departmental

Rules required to know that contractor's checks for the services of off-duty police officers were only to be made payable to "City of Jersey City"; but he nonetheless wrote his own name onto the "pay to" line of check 1033; and on February 16, 2016, he deposited this check into his personal account, keeping the \$32 administrative fee that rightfully belonged to the City. Whether these allegations can be verified as fact or not is critical to the outcome of this matter.

In its Preliminary Notice of Disciplinary Action (PNDA) dated March 17, 2017, (R-2) the City alleged that Khan violated certain Departmental Rules, most of which were sustained at the August 31, 2017, Departmental hearing and subsequently affirmed by the Director of Public Safety. See PNDA dated September 8, 2017, marked as R-1. Those Rules and alleged violations are listed below, as follows:

(1) Rule 3:108 (Conduct Unbecoming or Neglect of Duty) was allegedly violated when Khan received check number 1033 on January 15, 2016, from Kquality Builders, LLC, for payment of services rendered at an off-duty job, and on which Khan wrote his own name as payee even though he knew that the check should have been made payable to the City. The Department sustained this charge at the August 31, 2017, Hearing and it appears as Sustained Charge Number 1 on the FNDA.

(2) Rule 3:123 (Obedience to Laws, Regulations and Orders) was allegedly violated when Khan received from Kquality check number 1033 in the amount of \$232 (\$32 of which was an administrative fee belonging to the City), placed his own name on the check as payee and deposited it on February 16, 2016, into his own personal account, keeping the \$32 which belonged to the City, which would have been a theft had he been so charged. The Department sustained this charge at the August 31, 2017, Hearing and it appears as Sustained Charge Number Two on the FNDA.

(3) Rule 3:112 (Engaging in Criminal Acts) was allegedly violated when Khan received a check from Kquality in the amount of \$323, knowing that \$32 of that amount rightfully belonged to the City, deposited it into his own personal account, and did not pay the \$32 to the City. The Department did not list this as a sustained charge in the FNDA because the Hudson County Prosecutor's Office granted "use immunity" to Khan.

(4) Rule 3:122 (Obligation to know and follow all Laws, Ordinances, and Regulations including, but not limited to General Order 1-14, which governs the procedures for off-duty employment, and, in particular, Paragraph #8, which requires all police officers to submit their off-duty employment vouchers *immediately* after the work detail is completed) was allegedly violated by the fact that Khan, by his own admission, was unaware of the procedures. Although the Rule required that Khan was duty-bound to be aware of these work-related procedures, Khan admitted during his interview on February 17, 2017, at the Hudson County Prosecutor's Office, that he was unaware of the requirements of these procedures on the January 15, 2016, date of his off-duty job at Kwaliti. Further, Khan stated that could not specifically recall if he submitted the voucher for the January 15, 2016, job at Kwaliti to his off-duty supervisor or to the office of the off-duty billing coordinator (a/k/a the off-duty employment office), but he stated that although he found check number 1033 when he searched his damaged car at the repair shop, he could not find the voucher. He stated that he did not want to go through the hassle of procuring a substitute voucher for the January 15, 2016, job at Kwaliti by trying to ascertain the identity of the off-duty supervisor for January 15, 2016, the name of the contractor, the location of the job site, and the task of procuring signatures. When, during the interview, it was pointed-out to Khan that the name and address of Kwaliti was printed on the check and that he therefore could have contacted Kwaliti to obtain a copy of the voucher, Khan stated that he did not realize this before the interview. The Department sustained this charge at the August 31, 2017, Hearing and it appears as Sustained Charge Number Three on the FNDA.

(5) Rule 3:157 (Obligation imposed on all police officers to thoroughly familiarize themselves with all provisions of the Department's Rules and Regulations, one of which, General Order 1-14, Paragraph #8, which requires that off-duty employment vouchers must be immediately submitted to the City), was allegedly violated by Khan not only by failing to *immediately* submit the voucher on January 15, 2016, but by failing to submit the voucher to the City at all. The Department procured a copy of the January 15, 2016, voucher from Harish Sachdeva of Kwaliti Builders, LLC, who stated during his interview at the HCPO that Khan prepared the voucher. This document (part of Exhibit 6) shows no entries for the times that Khan started his work and ended his work at Kwaliti's site.

The Department's investigative records show that the Department checked with the off-duty employment office and learned that the subject voucher was *never* submitted. The Department sustained this charge at the August 31, 2017, Hearing and it appears as Sustained Charge Four on the FNDA.

(6) Rule 3:157 (Obligation imposed on all police officers to thoroughly familiarize themselves with all provisions of the Department's Rules and Regulations, particularly General Order 1-14, paragraph #15, which prohibits police officers from working more than sixteen hours within a twenty-four-hour period), was allegedly violated by Khan on ten different occasions. In Exhibit 12, the City offered proofs demonstrating that on ten different occasions Khan worked in excess of the hours permitted by General Order 1-14, paragraph #15. Appellant Khan did not make statements of fact nor did he submit arguments to contest the Respondent-City's allegations. The Department sustained this charge at the August 31, 2017, Hearing and it appears as Sustained Charge Five on the FNDA

(7) Rule 4A:2-2.3(6) (General Causes) was allegedly violated when Khan, while in the course of his employment with the City, received check number 1033 in the amount of \$232, which he received in payment of an off-duty job, and which he knew was to have been made payable to the City, but on which he wrote in his own name as payee and deposited it into his personal account, thus depriving the City of its \$32 administrative fee. The City deemed this to be conduct unbecoming a police officer. The Department did not specifically list this as a sustained charge in the FNDA, but it appears to have been merged into Sustained Charge One on the FNDA.

### **FINDINGS OF FACT**

After carefully considering the documentary evidence presented, I **FIND** the following **FACTS**:

1. I **FIND** that the Jersey City Police Department promulgated certain Rules and Regulations for members of the Police Department to become familiar with, to know, and to recall during the course of their duties as police officers. Many of



these are recorded in Exhibit 15. I **FIND** that among the Rules and Regulations that Khan was required to know were those dealing with off-duty employment, including provisions requiring that all checks for off-duty jobs were to be made payable only to the "City of Jersey City"; that all vouchers for jobs done while off-duty were to be submitted *immediately* after completion of the detail (i.e., the job) to the off-duty supervisor or the office-duty employment office; and that no Jersey City Police Officer was allowed to work more than sixteen hours in any twenty-four-hour period. I **FIND** that Khan, by his own admission, was aware on January 15, 2016, that officers were no longer permitted to accept checks payable to themselves from contractors for off-duty jobs and I **FIND** that he was aware that all checks from contractors for off-duty jobs were to be made payable to the City of Jersey City. I **FIND** that Khan, by his own admission, stated that he was unaware that off-duty job vouchers were required to be submitted immediately. I **FIND** that Khan never submitted the January 15, 2016, voucher for work done at Kwality. I **FIND** that Khan did not offer evidence as to whether he was aware or unaware of General Order 1-14, procedure #15 and I **FIND** that Khan did not offer evidence contesting the allegation that he, on ten occasions, worked more than sixteen hours during a twenty-four-hour period.

2. I **FIND** that the testimony of Harish Sachdeva established that he was desirous of ensuring that all payments for the services of off-duty Jersey City police officers by his company, Kwality Builders, LLC, were properly credited to his account. I **FIND** that Mr. Sachdeva's efforts resulted in the revelation that check number 1033 in the amount of \$232 (for four hours of work done by Khan on January 15, 2016, at \$50 per hour plus a \$32 administrative fee) was not paid to the City of Jersey City but was instead paid to Khan. I **FIND** that this revelation prompted the Internal Affairs Unit (IAU) of the Jersey City Police Department to launch an investigation into Khan's off-duty job activities.

2. I **FIND** that Mr. Sachdeva's statements to the IAU established that on January 25, 2016, Khan: rejected a check that Sachdeva was in the act of writing, which was being made payable to Jersey City; that Khan requested a check that left the "pay to" line blank; that at Khan's request Sachdeva gave

check number 1033 in the amount of \$232 to Khan with the "pay to" line blank. I **FIND** that Sachdeva was told by Khan that Khan would take check 1033 and drop off the check for him at the off-duty office. I **FIND** that Sachdeva's statements to the IAU were objective, coherent, unbiased, verifiable, and thus credible.

3. I **FIND** that once he was granted use immunity by the Prosecutor's Office, Khan gave statements under oath that established the following as matters of fact:

that he received check number 1033 from Sachdeva for the four-hour off-duty job he performed for Kwaliti at 164 Congress Street on January 15, 2016;

that Khan, by his own admission, understood that only \$200 of the \$232 contained in check number 1033 belonged to him and that the remaining \$32 belonged to Jersey City;

that when he received check 1033 from Sachdeva, Khan knew that the "pay to" line was blank;

that Khan filled out a voucher for the five-hour job he performed from 7:00 a.m. to 12:00 Noon on January 15, 2016, for E&V Dirt Works and submitted that voucher to the off-duty office on January 15, 2016;

that Khan filled out a voucher for the January 15, 2016, job at Kwaliti's jobsite at 164 Congress Street, but left the "start time," "end time," and "total hours worked" lines blank;

that when the IAU asked Khan if he submitted the voucher for the January 15, 2016, job at Kwaliti to the off-duty office, Khan did not immediately respond with a categorical "yes" or "no" answer, but eventually he did agree that the "Kwaliti" voucher for work done on January 15, 2016, was never submitted to the City;

that during his interview at the HCPO Khan stated that he thought it would be burdensome to obtain another copy of the "Kwaliti" voucher or to obtain a new voucher for the January 15, 2016, job;

that Khan did not give check number 1033 to the City because, as he stated, he knew that if he did so without an

accompanying, corresponding voucher the City would keep the entire amount of the check;

that the name and address of Kwaliti Builders, LLC was printed on check number 1033.

that because he works so many off-duty jobs, Khan estimated that he has been shortchanged about \$1,000 to \$1,200 by the City due to his inability to submit his paperwork in a timely and organized manner or to check to see if the City had paid him for all his off-duty jobs;

that Khan, by his own admission, wrote his own name onto the "pay to" line of check 1033 and on February 16, 2016, deposited the check into his personal account;

that Khan stated to the IAU that when he deposited check number 1033 into his personal account on February 16, 2016, it did not cross his mind that \$32 of the \$232 amount belonged to the City; and

that Khan, by depositing the entire check of \$232, comingled the City's money (the \$32) with his own money (the \$200) rather than segregating these monies by depositing only \$200 of the \$232 check and taking back the City's \$32 in cash to give to the City.

6. I **FIND** that in J-1, the Joint Statement of Facts, numbered paragraph 9, Khan admits that he did not submit the "Kwaliti" voucher to the City for the work he performed for Kwaliti at 164 Congress Street on January 15, 2016.

7. I **FIND** that Khan admitted that he never attempted to pay or reimburse the City for the \$32 administrative fee which was part of Check number 1033, which he deposited into his own account. I further **FIND** that when Khan failed to submit the \$32 administrative fee to the City, he not only deprived the City of its property, but he also failed to allow the City to make the required deductions for items like Federal Income Tax, Medicare Tax, New Jersey State Income Tax, and New Jersey Unemployment Insurance.

8. I **FIND** that the IAU's investigation into the issue of whether Khan had worked more than the maximum-allowed sixteen hours in a twenty-four-hour

period yielded objective and convincing information demonstrating that on ten occasions Khan worked in excess of sixteen hours in a twenty-four-hour period.

### **APPLICABLE LAW**

#### **Employee Discipline**

The Civil Service Act and the implementing regulations govern the rights and duties of public employees. N.J.S.A. 11A:1-1 to 12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. The Act is an important inducement to attract qualified personnel to public service. It is to be liberally constructed toward attainment of merit appointments and broad tenure protection. See Essex Council No.1 N.J. Civil Serv. Ass'n. v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of New Jersey is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). To carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

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. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; and N.J.A.C. 4A:2-2.3. Major discipline involves removal, suspension, or fine for more than five working days.

An appointing authority may discipline an employee on various grounds, including inability to perform duties, conduct unbecoming a public employee, insubordination, and other sufficient cause. N.J.A.C. 4A:2-2.3(a). Such action is subject to review by the Civil Service Commission, which after a de novo hearing makes an independent determination as to both guilt and the "propriety of the penalty imposed below." W. New York v. Bock, 38 N.J. 500, 519 (1962); In the Matter of Morrison, 216 N.J. Super. 143 (App. Div. 1987); Ennslin v. Twps. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994), certif. denied, 142 N.J. 446 (1995).

## **The Necessity for Maintaining Discipline**

Maintenance of strict discipline is important in quasi-military settings such as police departments and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div. 1995), certif. denied, 142 N.J. 446 (1995). City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). In such settings, the primary duty of the officers and supervisors is the safety and security of the facility. Police (and correction) officers are held to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966).

## **Burden of Proof in Disciplinary Matters**

In a civil-service disciplinary case, the employer bears the burden of providing sufficient, competent and credible evidence of facts essential to the charge. N.J.S.A. 4A:2-1.4. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). Put another way, in an administrative proceeding concerning a major disciplinary action, the appointing authority must prove its case by a "fair preponderance of the believable evidence." N.J.A.C. 4A:2-1.4(a); Polk, 90 N.J. at 560; Atkinson, 37 N.J. at 149. 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). Greater weight of credible evidence in the case—a preponderance—depends not only on the number of witnesses, but "greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975) (citation omitted). Similarly, credible testimony "must not only proceed from the mouth of a credible witness, but it must be credible in itself." In re Estate of Perrone, 5 N.J. 514, 522 (1950). The judge must "decide in favor of the party on whose side the weight of the

evidence preponderates, and according to the reasonable probability of truth.” Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E.&A. 1933).

### **Applicable Regulations, Rules, and Orders**

The list of General Causes of action for Civil Service employee discipline are set forth in N.J.A.C. 4A:2-2.3(a), which provides:

An employee may be subject to discipline for:

1. Incompetency, inefficiency or failure to perform duties;
2. Insubordination;
3. Inability to perform duties;
4. Chronic or excessive absenteeism or lateness;
5. Conviction of a crime;
6. Conduct unbecoming a public employee;
7. Neglect of duty;
8. Misuse of public property, including motor vehicles;
9. Discrimination that affects equal employment opportunity (as defined in N.J.A.C. 4A:7-1.1), including sexual harassment;
10. Violation of Federal regulations concerning drug and alcohol use by and testing of employees who perform functions related to the operation of commercial motor vehicles, and State and local policies issued hereunder;
11. Violation of New Jersey residency requirements as set forth in P.L. 2011, c. 70; and
12. Other sufficient cause.

Conduct Unbecoming a Public Employee, Insubordination, and Neglect are three of the above-listed types of charges that are frequently litigated. A brief analysis of each of these three charges follows.

### **N.J.A.C. 4A:2-2.3(a)(6), Conduct Unbecoming a Public Employee**

Under N.J.A.C. 4A:2-2.3(a)(6), an employee may be subject to major discipline for conduct unbecoming a public employee. Although not strictly defined by the Administrative Code, “conduct unbecoming” has been described as that conduct “which affects the morale or efficiency of the [governmental unit] [or] which adversely affects

the morale or efficiency" of the public entity or tends "to destroy public respect for . . . [public] employees and confidence in the operation of . . . [public] services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960); see Karins v. City of Atl. City, 152 N.J. 532, 554 (1998) (citation omitted). The conduct need not 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)). Unbecoming conduct may include behavior that is not in accord with propriety, modesty, good taste or good manners, or behavior that is otherwise unsuitable, indecorous or improper under the circumstances. Conduct unbecoming a public employee may be less serious than a violation of the law, but it is inappropriate to on the part of the public employee. Ferrogine v. State Dep't. of Human Servs., Trenton Psychiatric Hosp., CSV 2441-98, Initial Decision (April 17, 1998), modified, MSB (July 6, 1998), <http://njlaw.rutgers.edu/collections/oal/>. It is a fact-sensitive determination rather than one based on a legal formula.

#### **N.J.A.C. 4A:2-2.3(a)(2), Insubordination (or Disobedience of Orders)**

"Insubordination" is not defined in the regulations. Assuming that its presence is implicit, courts generally apply its ordinary definition since it is not a technical term or term of art, and because there are no circumstances indicating that a different meaning is intended. Ricci v. Corp. Exp. of the E., 344 N.J. Super. 39, 45-46 (App. Div. 2001).

Black's Law Dictionary 802 (7th Ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. Insubordination is always a serious matter, especially in a paramilitary context. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

### **N.J.A.C. 4A:2-2.3(a)(7), Neglect of Duty**

The term "neglect" means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" means conformance to "the legal standard of reasonable conduct in light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty has been interpreted to mean that "an employee . . . neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009) (citation omitted), adopted, Civil Service Commission (March 27, 2009), <http://njlaw.rutgers.edu/collections/oal/>. Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing, Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job.

### **Penalties and Progressive Discipline**

In determining the appropriateness of a penalty, several factors must be considered including, but not limited to: the nature of the offense, the previous use of progressive discipline, the employee's prior record, and the seriousness or severity of the offense under consideration.

The theory of progressive discipline is based on the following principles:

(1) that discipline should be designed to be corrective and to further the development of the employee; (2) that the penalty should be proportionate to the severity of the offense; and (3) that where there is a pattern of violations, progressively more severe penalties should be imposed for each occurrence. The disciplinary process in New Jersey's Civil Service incorporates the concept of progressive discipline. It is well-settled that an employee's past disciplinary record may be used as guidance in determining what an appropriate penalty should be in a given case. See W. New York v. Bock, 38 N.J. 523 (1962). However, the theory of progressive discipline is



not a fixed and immutable rule to be followed without question. Some disciplinary infractions are so serious that removal is appropriate notwithstanding an unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007).

Theft is considered a serious offense. A police officer who commits a theft is subject to removal. In re Cohen, 56 N.J. Super. 502 (App. Div. 1959) (upholding the removal of a police officer in the theft of parking meter funds); In re Hall, 335 N.J. Super. 45, 51 (App. Div. 2000) (sustaining the removal of a police officer for attempted theft).

### **LEGAL ISSUES PRESENTED**

The parties agreed in the Joint Stipulation of Facts and at the Pre-Hearing conference on January 24, 2019, that the two questions to be answered by this Tribunal are the following:

- (1) Has the Jersey City Police Department proven, by a preponderance of the credible evidence, that the disciplinary charges set forth in the FNDA should be sustained?
- (2) If so, was the removal of Khan from the JCPD the appropriate disciplinary penalty?

The Appellant, in his summation papers, has also requested that the following two questions be answered as well:

- (3) [Was] the termination of M.D. Khan following a forty-day suspension commensurate with the Jersey City Police Department's progressive disciplinary system?
- (4) [Did] the termination of M.D. Khan amount to disparate treatment?

### **ANALYSIS AND CONCLUSIONS OF LAW**

In the matter at bar, the charges set forth in the PNDA fall into the following types of categories: Conduct Unbecoming a Police Officer; Insubordination/Disobedience of Orders; and Neglect of Duty (failure to know the Department's Rules).

The Tribunal will now apply the above-stated findings of fact to the applicable principles of law to reach conclusions about the propriety of the determinations set forth in the FNDA.

Although Khan stated that he could not precisely recall his January 15, 2016, conversation with Sachdeva regarding the check, Sachdeva's testimony convinces this Tribunal that Khan specifically requested check number 1033 with the "pay to" line blank. Khan admitted that he later wrote his own name on the "pay to" line of this check making himself the payee rather than the City of Jersey City. Khan also admitted that the check was in the amount of \$232 and that only \$200 of this was his and that the remaining \$32 belonged to Jersey City. Khan admitted that he deposited check number 1033 into his personal account and did not forward the \$32 to the City. I **CONCLUDE** that Khan, by exercising control of the money that belonged to Jersey City, by keeping it for himself, by committing an act connected to his police work that was dishonest, by committing an act that that was made known to a member of the public (Mr. Sachdeva), and by committing an act that could reasonably be expected to degrade public respect for the Jersey City Police Department, thereby engaged in Conduct Unbecoming to a Police Officer under N.J.A.C. 4A:2-2.3(6) and violated Rule 3:108. I also **CONCLUDE** that the decision of the Hearing Panel regarding the PNDA's first charge (violation of Rule 3:108) and set forth as the first sustained charge in the FNDA was supported by a preponderance of the credible evidence and should be affirmed.

I **CONCLUDE** that Khan's admission that he knew that on January 15, 2016, the contractor's check was supposed to be made payable to the City of Jersey City and his admission that he wrote his own name on the check and deposited it into his own personal account, and his admission that he made no attempt to pay the \$32 administrative fee to the City together constitute conclusive proof that he violated the

requirements of Rule 3:123. I also **CONCLUDE** that the decision of the Hearing Panel regarding the PNDA's second charge (violation of Rule 3:123) and set forth as the second sustained charge in the FNDA was supported by a preponderance of the credible evidence and must be affirmed.

I **CONCLUDE** that by granting use immunity to Khan, the Department intended to abandon the third charge of the PNDA (violation of Rule 3:112 prohibiting members from engaging in criminal acts).

I **CONCLUDE** that Khan's admission that he did not know that off-duty job vouchers were required to be immediately submitted to the off-duty office proves conclusively that he violated the requirements of Rule 3:122 and Rule 3:157. Certainly, Khan's admission, by itself, constitutes a preponderance of the credible evidence that Khan neglected his duty to read, know, and follow the Rules. I also **CONCLUDE** that the decisions of the Hearing Panel regarding the fourth and fifth charges of the PNDA (violations of Rule 3:122, particularly General Order 1-14, procedure #8); and Rule 3:157, and set forth as the third and fourth sustained charges in the FNDA were each supported by a preponderance of the credible evidence and must be affirmed.

I **CONCLUDE** that Khan's failure to contest the proofs offered in support of the allegation that on ten occasions he worked more than sixteen hours within a twenty-four-hour period proves (i.e., by a preponderance of the credible evidence) that he is guilty of violating Rule 3:157 on ten occasions. I also **CONCLUDE** that the decision of the Hearing Panel regarding the sixth charge of the PNDA (violation of Rule 3:157, particularly General Order 1-14, Procedure #15) and set forth as the fifth sustained charge in the FNDA was supported by a preponderance of the credible evidence and must be affirmed.

#### **ANALYSIS OF THE PENALTY IMPOSED**

On January 25, 2016, Khan worked for five hours (7:00 a.m. to 12:00 Noon) for E&V Dirt Works and then worked for four hours for Kwaliti Builders, LLC. He worked his regular eight-hour tour of duty from 4:00 p.m. until midnight according to Exhibit 18.

Together, these would total seventeen hours within the same twenty-four-hour period, which would violate Rule 3:157, General Order 1-14, procedure #15. Khan's explanation for why he submitted the voucher for work done on January 15, 2016, for E&V Dirt Works, while failing to submit a voucher for the work he did for Kquality is inadequate. The voucher presented by Kquality (Exhibit 10) shows that Khan completed almost the entire voucher form. It only lacked entries for the "Start Time" line, "End Time" line, and "Total Hours Worked" line. This certainly would take mere seconds for Khan to complete and would not have made it impractical for him to submit the "Kquality" voucher at the same time as he submitted the "E&V Dirt Works" voucher. I **CONCLUDE** that the reason why Khan requested that check 1033's "pay to" line be left blank and the reason why he presented only one voucher instead of two for the January 15, 2016, off-duty jobs was so that he could avoid being accused of violating of Rule 3:157, General Order 1-14, procedure #15.

It cannot be overlooked that submission of the "Kquality" voucher on January 15, 2016, would have to be accompanied by check number 1033. If Khan were to submit check number 1033, it could not have been submitted with a blank "pay to" line. I **CONCLUDE** that Khan did not intend to submit the voucher for work done on January 15, 2016, to the City. I **CONCLUDE** that Khan did not intend to submit check number 1033 to the City. Khan's action of depositing the entire \$232 amount of check 1033 into his personal account coupled with his admission that he never paid or reimbursed the City for the \$32 administrative fee leads to the inference, and I so **CONCLUDE**, that early on Khan intended to keep the check 1033 in the entire amount of \$232 for himself.

### **The Question of Motivation**

Khan's statements during the interview at the HCPO provide insights into his motives. Khan stated that he believed that he had already lost between \$1,000 to \$1,200 due to the fact that he worked many off-duty jobs and was unable to keep up with the paperwork required to be paid for his time and because he lacked the time to check his records to ensure that the City had paid him for all of the off-duty jobs he had worked. He was also fearful that the City would unfairly deprive him of his earnings for the January 15, 2016, Kquality job if he were to submit check 1033 without a voucher.

Khan's statements lead to an inference that although Khan knew full well that he would be depriving Jersey City of its \$32 administrative fee, he was so desirous of recouping part of his estimated losses of \$1,000 to \$1,200 that he requested Sachdeva to leave the "pay to" line of check 1033 blank and formed the intent not to report the work that he performed on January 15, 2016, for Kwality to the City. The inferences drawn from the established facts of this case are such, and I **CONCLUDE**, that Khan's wrongful actions were motivated by a distrust of the City and by his desire to rectify his own shortcomings and his perceived shortchanging at the hands of the City.

I **CONCLUDE** that Khan's statement about having previously lost an estimated \$1,000 to \$1,200 provided some, if not all, of the motivation for Khan's actions. Khan's statement that it did not cross his mind as he deposited the \$232 check into his personal account that \$32 of that amount belonged to Jersey City, combined with the fact that Khan admitted that he never gave or in any way reimbursed the \$32 to the City, demonstrates either an indifference to his obligation to properly distinguish between the City's money and his own money, or an intent to permanently deprive the City of its money.

### **The Question of Self-help**

As noted above, the maintenance of strict discipline is important in quasi-military settings such as police departments. See Rivell, 115 N.J. Super. at 72. I have concluded that Khan's distrust of the City and his desire to rectify past mistakes or perceived shortchangings motivated him to ignore and to disobey the Department's Rules. I **CONCLUDE** that Khan devised a plan involving unjustified acts of self-help when he solicited, received and deposited the check. This was a serious breach of discipline. This type of behavior cannot be tolerated. Grievances are not to be rectified through private, self-help measures, but must be raised and voiced only through the appropriate channels, following established procedures, and in the proper and open forums.

I **CONCLUDE** that Khan's actions (i.e., his words and his deeds: ignoring the Department's Rules, requesting that the "pay to" line be left blank; depositing of the

check into his personal account, and his failure to ever reimburse the City) and his motive (i.e., recoupment of the estimated \$1,000 to \$1,200 which he claims to have lost through his own failure to keep up with his paperwork and through the City's failure to deal fairly with him) separately or together demonstrate conduct in the course of his duties that is unbecoming to a police officer, neglectful of and indifferent to the Department's Rules, and disobedient of the Department's Rules. I **CONCLUDE** that Khan's self-helping, theft-related actions and his motives are serious in nature and call for the imposition of a severe penalty.

### **The Question of Whether Progressive Discipline is Germane to this Matter**

The following is an analysis of whether progressive discipline is germane to the matter at hand. The theory of progressive discipline emphasizes corrective action to avoid further problems and to further develop the employee. Progressive discipline seeks to keep the severity of the penalty in line with the seriousness of the offense. Finally, progressive discipline, when addressing a series of or pattern of violations, employs more stringent penalties for each additional or continuing offense. In New Jersey, an employee's past disciplinary record may be used as guidance in determining what an appropriate penalty should be in a given case. See Bock, 38 N.J. 523 . The Supreme Court has made it clear that progressive discipline is not a fixed and immutable rule to be followed without question. It added that some disciplinary actions are so serious that removal is appropriate even if the employee has an unblemished prior record. See Carter, 191 N.J. 474.

In the matter at bar, Khan's prior disciplinary record since his appointment in December of 2013 (Exhibit 9) consists of two incidents. Discipline was imposed (loss of one day) for an incident involving improper inventorying of impounded items. Discipline was also imposed (forty working days) arising out of major disciplinary charges of failing to report an off-duty, family-related argument and physical altercation. Neither of the prior charges are similar to the one under consideration in the pending matter. Neither of the prior charges involved a theft-like or theft-related offense.

The matter at bar does not involve inadvertence, sloppy record-keeping, mistake, or oversight. It involves Sachdeva, a member of the public and a businessman whose company was doing business with the City, seeking off-duty policemen to control traffic-related and other public order duties at a construction site. It involves Khan, a police officer, who on January 15, 2016, while in uniform and in the course of his City-sanctioned off-duty employment activities, requested from Sachdeva a check with a blank "pay to" line while knowing that checks for the services of off-duty police officers were only to be made payable to "City of Jersey City." Khan did not immediately submit his work voucher; indeed, he never submitted it at all. Khan received the check and deposited it into his personal account without informing the City. Khan's activities were surreptitious. If Sachdeva had not inquired with the City about the status and accuracy of his records with the City, the incident may not have come to light at all.

As noted above, theft is considered a serious matter. It is one of the offenses that alone can justify the penalty of removal. Considering the nature of the theft-related offense and the particular circumstances surrounding it, I **CONCLUDE** that the offenses charged in the matter at bar bring this matter outside the considerations of progressive discipline.

### **Khan's Additional Questions Regarding the Penalty of Removal**

Khan's counsel's first additional argument is that the penalty of removal, following a forty-day suspension, is too severe because it is not in keeping with the theory of progressive discipline. However, there has been no showing that the offenses under consideration in this matter are linked to Khan's prior instances of misconduct so that the previous use of a type of progressive discipline can be re-employed and amplified to further the offender's development. On the contrary, the forty-day suspension was for an entirely different type of offense. There is no suggestion, much less evidence, that the penalty of removal imposed in the present matter has anything to do with the previous charges or forty-day suspension. Moreover, the facts of the matter at bar are very different from Khan's prior offenses. A theft-like or theft-related charge against a police officer is a serious matter that stands alone and outside the usual and routine infractions that take place in the day-to-day course of police work and departmental

procedures, e.g., charges arising out of punctuality, the timing of sick calls, the timing and frequency of prisoner checks, maintaining radio contact with headquarters, dressing in proper police attire, the handling and securing of equipment or weapons, and other regulations peculiar to police procedures. A theft-like or theft-related offense, if charged, would be a substantive violation of a statute, or an inherently wrongful act termed a *malum in se*. I **CONCLUDE** that the evidence against Khan was sufficient to find him guilty of the sustained charges and that these charges are inherently wrongful (*malum in se*) and serious. Khan himself admitted to what he did and he offered nothing substantial to justify a lighter penalty. I **CONCLUDE** that, under the circumstances, the penalty of removal is not overly severe and actually is appropriate.

Khan's counsel's second additional argument (disparate treatment) will now be addressed. Counsel for Khan alleges (1) that there are officers presently working at their jobs in the Jersey City Police Department who have had disciplinary or IAU charges sustained against them; and (2) that there are officers presently working at their jobs in the Jersey Police Department who have indictments presently pending against them. It must be remembered that indictments are not convictions. The essence of the "disparate treatment" argument is that if the City allows the other officers to continue working while denying Khan the opportunity to work, it amounts to disparate treatment and is inherently unfair. The City did not deny counsel's assertions about other officers being allowed to work despite their legal troubles, but it argues that Khan's argument is irrelevant and misses the point of the matter at bar.

The City's primary argument for imposition of the penalty of removal is that Khan's actions concerning the check are inherently wrong and that he attempted to conceal his actions. As a secondary argument, the City asserts that Khan's removal is necessary because future criminal cases may be compromised. It elaborates that if the findings against Khan are affirmed, the fact that Khan has been found guilty of Departmental charges involving dishonesty would disable him henceforth from being an effective witness for the prosecution (i.e., theft-like offenses would be considered matters of dishonesty, thus exposing Khan's reputation for honesty as an issue every time he takes the witness stand). Thus, the City argues that not only should Khan be removed for the sustained theft-like charges themselves, but the testimonial "disability"



mentioned above makes his removal all the more appropriate. Counsel for Khan counters by arguing that the use of a police officer's disciplinary file to cross-examine that officer on an unrelated criminal matter simply would not be allowed and that the Supreme Court has interpreted N.J.R.E. 608 as prohibiting the use of alleged acts of prior misconduct by a police officer to cross-examine that officer. See State v. Spivey, 179 N.J. 229, 242 (2004); State v. Herrera, 211 N.J. 308 (2012). Khan's counsel also argues that while sustained disciplinary charges and/or Internal Affairs complaints cannot be used against a police officer on cross-examination as stated above, it is allowable under N.J.R.E. 611 for a criminal defendant to use the fact that an indictment is pending against a police officer to attack that police officer's credibility. See State v. Bass, 224 N.J. 285, 302-07 (2016); State v. Landano, 271 N.J. Super. 1 (App. Div.), certif. den., 137 N.J. 164 (1994). He makes the point that the City cannot maintain that Khan should be removed because he testimonially "disabled," while allowing other testimonially "disabled" officers to continue working.

I agree that it would not be likely for a criminal court to allow the prior disciplinary records of a police officer to be used to cross-examine him in a case not related to the disciplinary matter. I agree that N.J.R.E. does allow a defendant to cross-examine a police officer regarding a pending criminal indictment against him. While Khan's counsel's points are well-taken, the argument ignores the overriding fact that Khan admitted facts that demonstrate that he is not honest. Indictments are accusations, not convictions. Khan's admissions of dishonesty are tantamount to convictions. In light of Khan's admissions of dishonesty, the "disparity" between him and others evaporates. Khan has offered little on which to base an argument for "disparity of treatment." It cannot be maintained that the Department has treated Khan differently unless Khan were to demonstrate that others who have admitted their dishonesty or who have been convicted of offenses involving matters of honesty are allowed privileges which are denied to him. Khan's "disparate treatment" argument might be relevant if the City's sole argument for imposing the penalty of removal was based on testimonial "disability," but even then his admissions would undermine his claim to "disparate treatment." I **CONCLUDE** that there has been no disparity in the Department's treatment of Khan.

The City's primary argument for removal is based on the seriousness and severity of the violations. The City needlessly added the "disability" argument as a secondary argument. This Tribunal does not even need to reach the merits of the City's secondary argument because the Tribunal accepts the City's primary argument—that it has proven that Khan is guilty of theft-related violations, which by their nature call for the penalty of removal. I **CONCLUDE** that the imposition of the penalty of removal was justified by the theft-related circumstances of this case and I hereby affirm the imposition of the penalty of removal imposed on Khan.

### **ORDER**

It is **ORDERED** that all the sustained charges set forth in the FNDA are **AFFIRMED**; and

It is further **ORDERED** that the penalty of removal, effective September 11, 2017, is **AFFIRMED**.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. 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.

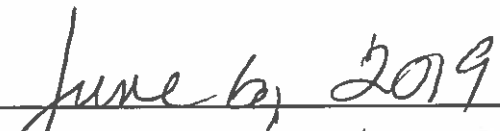
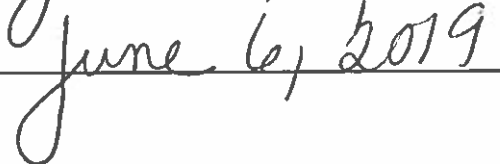
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JOHN P. SCOLLO, ALJ

Date Received at Agency:

Date Mailed to Parties:  
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## APPENDIX

### List of Witnesses

#### For Appellant:

None

#### For Respondent:

None

### List of Exhibits

#### Joint Exhibits:

J-1 Joint Stipulation of Facts

#### For Respondent:

- R-1 FNDA dated September 8, 2017
- R-2 PNDA dated March 17, 2017
- R-3 Municipal Ordinance re: Off-Duty Employment
- R-4 Kquality Builders' check number 1033
- R-5 HCPO IAU Report (December 20, 2016)
- R-6 JCPD Off-Duty Voucher (Kquality Builders January 15, 2015)
- R-7 North District Evening Tour Roll (January 15, 2016)
- R-8 Check Detail for Khan (January 9, 2016, through January 22, 2016)
- R-9 Progressive Discipline: 1-FNDA January 30, 2017, Conduct Unbecoming (forty-day suspension)
- R-10 Payment Voucher for first job on January 15, 2016 (E&V Dirt Works)
- R-11 Court Notice
- R-12 Excess Overtime Records
- R-13 General Order 1-14 (Off-Duty Employment), paragraph 8 and paragraph 15
- R-14 Internal Affairs Notice to Khan (February 17, 2017)
- R-15 JCPD Relevant Rules and Regulations
- R-16 HCPO Close-out Memo (February 10, 2017)

R-17 Khan Report (February 17, 2017)

R-18 Nieves Report (March 17, 2017)

R-19 Two CDs: Interviews of Sachdeva (October 31, 2016) and Khan (January 19, 2017)