



STATE OF NEW JERSEY

In the Matter of Connor Rush
Morris County, Sheriff's Office

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

CSC DKT. NOS. 2017-2306 & 2017-
1871
OAL DKT. NOS. CSR 01345-17 &
CSV 01395-17
(Consolidated)

ISSUED: MARCH 29, 2019 BW

The appeals of Connor Rush, Sheriff's Officer, Morris County, Sheriff's Office, release at the end of the working test period and removal effective January 3, 2017, on charges, was heard by Administrative Law Judge Julio C. Morejon, who rendered his initial decision on February 19, 2019. No exceptions were filed.

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 March 27, 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 appeals of Connor Rush.

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 27th DAY OF MARCH, 2019



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

**IN THE MATTER OF CONNOR RUSH,
MORRIS COUNTY, SHERIFF'S DEPARTMENT,**

OAL DKT NO. CSR 01345-17
AGENCY DKT NO. N/A 2017-2306

CONNOR RUSH,

Appellant,

v.

MORRIS COUNTY SHERIFF'S OFFICE.

OAL DKT. NO. CSV 01395-17

AGENCY DKT. NO. 2017-1871

Robert J. Greenbaum, Esq., for appellant

Jeffrey M. Patti, Esq., for respondent (Patti and Patti, LLC, attorneys)

BEFORE JULIO C. MOREJON, ALJ:

Record Closed: January 7, 2019

Decided: February 19, 2019

STATEMENT OF THE CASE

Appellant Connor J. Rush (Rush), was hired as a Sheriff's Officer with the Morris County Sheriff's Office (Sheriff's Office). Among other things, said appointment was required Rush to complete the Basic Training Course for Sheriff's Officer at the Morris County Public Safety Academy (Academy). After graduation from the Academy, Rush was required to successfully complete a one year probationary period (probationary period) with the Sheriff's Office.

Rush would go on to graduate from the Academy in late November 2015. Following Rush's graduation from the Academy, and the entire time that he was employed by the Sheriff's Office in his probationary period, Rush was on limited duty and was not permitted to carry his firearm. The Sheriff's Office placed Rush on limited duty because of an incident that occurred prior to Rush's graduation from the Academy. Rush admitted that on November 13, 2015, he struck a fellow recruit, Kyle Kramer (Kramer) who had mocked Rush's personal appearance.

As a result of the November 13 incident, the Sheriff's Office conducted an internal affairs investigation, and on March 18, 2016, the Sheriff's Office issued a Preliminary Notice of Disciplinary Action (PNDA), charging Rush with violating N.J.A.C. 4A:2-2.3, for conduct unbecoming a public employee. Rush contested the PNDA and requested a hearing, which were conducted on August 23, 2016, and October 13, 2016, resulting the Sheriff's Office issuing a Final Notice of Disciplinary Action (FNDA) on January 3, 2017, removing Rush as a Sheriff's Officer on said date.

Prior to issuing the FNDA, on December 2, 2016, the Sheriff's Office removed Rush from his position as a Sheriff's Officer under N.J.A.C. 4A:2-4.1, Notice of Termination at End of Working Test Period.

The Sheriff's Office contends that Rush was terminated for conduct unbecoming a public employee under N.J.A.C. 4A:2-2.3, due to Rush striking Kramer. The Sheriff's Office also terminated Rush under N.J.A.C. 4A:2-4.1, for unsatisfactory performance of his duties due to his inability to carry a firearm and perform the duties of a Sheriff's Officer resulting from his conduct on November 13, 2015.¹

¹ For reasons that were not explained by the Sheriff's Office or Rush, the Sheriff's Office decided to issue the notice of termination on December 2, 2016, in accordance with N.J.A.C. 4A:2-4.1, when Rush had already been served with the PNDA on March 18, 2016, and had appealed the same. I can only surmise that the Sheriff's Office made its decision as the hearing officer below had not rendered his decision near the one-year anniversary of Rush's probationary period, and the Sheriff's Office may have felt obligated to issue the Notice of Termination on December 2, 2016. In any event, as the CSR and CSV dockets were consolidated, and the facts presented and legal arguments made concerned Rush's termination for conduct unbecoming a public employee, I have prepared my Initial Decision solely on the civil service termination.

PROCEDURAL HISTORY

On December 14, 2016, Rush filed an appeal pursuant to N.J.A.C.4A: 2-4.2, with the Civil Service Commission (Commission), of the December 2, 2016, decision by the Sheriff's Office terminating Rush for unsatisfactory performance at the end of his working test period. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on January 30, 2017, to be heard as a contested case. N.J.S.A. 52:14B-1 to -15 and 14F-1 to -13.

On January 23, 2017, Rush filed an appeal pursuant to N.J.S.A. 40A:14-202d. with the OAL, concerning his termination from the Sheriff's Office effective January 3, 2017, for conduct unbecoming of a public employee.

A telephone conference was held on February 24, 2017. An Order to Consolidate both matters was entered June 9, 2017.

A hearing was initially scheduled for April 10 and 11, 2017. However, on April 5, 2017, counsel for Rush requested an adjournment and Rush agreed to waive the ability to collect back pay under N.J.A.C. 4A:2-2.10, and further waived the one-hundred eighty day requirement for a final administrative determination under N.J.A.C. 4A: 2-2.13.

The matter was then rescheduled for June 2 and June 30, 2017. At the June 2, 2017, hearing, the parties consented, and the undersigned agreed, to waive a plenary hearing before the OAL and for the undersigned to rely upon the record created at the departmental hearing on August 23, 2016 and October 13, 2016. The parties consented to the submission of the transcript of the departmental hearing conducted, which resulted in the FNDA of January 3, 2017, along with the documents admitted in evidence in the hearing. In addition, the parties agreed to submit stipulated facts regarding both matters, along with written summations.

Due to a portion of the audio recording of the departmental hearing resulting in a gap in the transcript, I requested that Rush and Kramer appear before me and that they be subject to direct and cross-examination testimony concerning Rush's striking of

Kramer. The parties appeared on December 28, 2018, and Rush and Kramer testified accordingly. Thereafter, the parties submitted their stipulation of facts, and written summations and on November 8, 2018, the transcript of the December 28, 2017 hearing was submitted.

The record remained opened to allow the undersigned to further read the transcript from the hearing below and examine the documents that were submitted in evidence. The record then closed on January 7, 2019.²

FACTUAL DISCUSSION AND FINDINGS

STIPULATED FACTS

The parties stipulated to the following facts and joint exhibits as contained in the Joint Stipulations and Exhibits, and I **FIND** the following to be the **FACTS** of this case:

1. At the time of the incident, Rush was an employee of the Sheriff's Office, and enrolled at the Academy. (T2:59-3 to 15).³
2. On November 13, 2015, approximately two weeks prior to graduating from the Academy, Rush struck fellow recruit Kramer in the groin causing injury to Kramer and requiring medical treatment. (T1:29-20 to 30-25) (T1:32-6 to 33-21) (T2:6-8 to 20) (J-2 and J-6).
3. Kramer thereafter lied to his superiors at the Academy and was ultimately dismissed due to the same (T1:34-25 to 37-7).

² An Order of Extension was entered on February 28, 2018, and a second Order of Extension entered March 28, 2018, extending the time to file an initial decision to May 14, 2018. However, it was later determined that the record had not closed on December 28, 2017, as the parties had not submitted their stipulation of facts and summations, and the transcript of the December 28, 2017, hearing had not been provided. Counsel for the Sheriff's Office submitted his written summation on May 15, 2018, and counsel for Rush submitted his summation on August 11, 2018. The parties submitted the stipulations by October 9, 2018. Thereafter, the December 28, 2017, transcript was received November 8, 2018, and the record closed January 2, 2019.

³ T1 refers to the transcript of the August 23, 2016, departmental hearing, and is marked J-23; T-2 refers to the October 13, 2016, departmental hearing, and is marked J-24. T-3 refers to the transcript of the December 28, 2017, OAL hearing.

4. Nicole Leo ("Leo") of the Sheriff's Office was notified of the incident (T1:36-2 to 17) (T1:59-2 to 11).
5. Rush was assigned to a post in the Sheriff's Office while the incident was investigated (T2:59-24 to 60-19) (J-18).
6. The Sheriff's Office contacted the Prosecutor's Office to conduct an investigation of potential criminal conduct by Rush for striking Kramer (T1:66-2 to 7).
7. The Prosecutor's Office declined to prosecute and returned the matter to the Sheriff's Office (T1:66-8 to 10) (J-5).
8. On behalf of the Sheriff's Office, Leo opened and undertook an internal affairs investigation (IA) (T1:66-15 to 67-10).
9. During the IA inquiry, Rush claimed a conflict of interest by Leo (J-3, J-4, and J-7).
10. Leo recused herself from the investigation based upon the alleged conflict, and Kelly Zienowicz (Zienowicz) of the Sheriff's Office completed the inquiry (T1:75-5 to 17).
11. At the conclusion of the IA process, Sheriff Rochford ("Rochford"), the appointing authority, charged Rush with conduct unbecoming of a public employee and other sufficient causes pursuant to N.J.A.C. 4A:2-2.3 (T2:10-23 to 12-8).
12. Upon graduating from the Academy in December 2015 and for a period of one year, Rush was a probationary employee at the Sheriff's Office. During his time as a probationary employee, the IA inquiry and departmental hearing occurred and Rush was put on restricted duty and had to relinquish his weapon (T2:12-9 to 25).

Testimony

Regarding the testimony of witnesses in this matter, the parties consented to the transcript of the departmental hearings held on August 23, 2016 (J-23), and October 13, 2016 (J-24), as joint exhibits and for the undersigned to accept the said testimony in the within matter.

However, due to a problem with the audio recording device at the departmental hearing on August 23, there was a gap in the transcript concerning the testimony of Kyle Kramer. The parties were then asked to have Kramer and Rush appear before the undersigned at the OAL. On December 28, 2017, Kramer and Rush appeared and provided testimony regarding the incident of August 13, 2015. The remaining witness who testified in the departmental hearings were not requested to appear, and the undersigned read their testimony contained in joint exhibits J23 and J24.

Kyle Kramer

Kyle Kramer (Kramer) testified that on November 13, 2015, he along with other recruits had been "riding" Rush about how tight he wore his pants. Kramer stated that as he excited a classroom to go perform activities, he gripped his pants in a manner to mimic Rush's pants, and as Kramer and other recruits laughed at his gesture, Rush turned around and "uppercut" Kramer with a closed fist striking Kramer in the groin. Kramer testified that he was in a lot of pain as a result of Rush's action and he could not fully perform his activities with the other recruits.

Kramer testified that later that night he would go to an emergency room for treatment of the pain to his groin, and was advised to ice the affected area and not perform physical activity until the swelling had subsided. Kramer testified that initially he did not inform his superior officer of what had happened, and instead told him that he was injured while playing basketball. Kramer stated that he did so because he believed that law enforcement subscribe to a "blue wall" code of silence, so as not to "rat out" Rush for what he had done. Kramer testified that Rush had approved of Kramer not telling the truth as it was consistent with the code of the blue wall.

Several days after the incident, Kramer testified that he received a phone call from Detective Sargent Nicole Leo (Leo) who inquired as to how Kramer was doing. Kramer stated that he told Leo that Kramer had hit him, but that Kramer had moved his leg when Rush struck him causing Rush to strike him in the groin. Kramer admitted that his description of how he was struck by Rush was not accurate, he told Leo that Rush struck

him in the groin because he moved his leg so as to "protect" Rush. Kramer stated that Leo encouraged him to tell the truth to Sargent Meehan.

Thereafter, Kramer testified that he prepared a written statement whereby he stated that Rush had struck him with a closed fist and that he had not injured himself playing basketball. Kramer stated that as a result of his failure to initially tell the truth he was offered the opportunity to resign from the Academy or be expelled. Kramer testified that he chose to resign and thereafter, he filed an IA complaint against Rush for striking him in the groin.

On cross-examination, Kramer admitted that his written statement of the incident did not disclose that Rush had turned around and got down on one knee and uppercut Kramer in the groin, but stated that Rush had hit Kramer in the leg. Kramer admitted that the first time he stated that Rush crouched down before striking him was at the August 23rd departmental hearing and that he did so because he was asked more detailed questions than before. Kramer testified that regardless of how he was struck by Rush, Rush intended to strike him because Kramer had made fun of Rush.

Also on cross-examination, Kramer testified that he filed the IA complaint to seek "justice" for what Rush did to him. Kramer admitted that had he not been dismissed from the Academy he would still covered for Rush and not told the truth as to what had occurred. Kramer testified that he had no disciplinary problems while at the Academy and the he and Rush had socialized with fellow cadets, personally and in social media, Kramer testified that had no animosity with Rush before or after the August 13 incident.

Connor J. Rush

Connor J. Rush (Rush) testified that he received a Bachelor of Arts in Communications with a concentration in Leadership and Public Advocacy. After college, he attended the police academy and then was hired by the Wildwood, New Jersey Police Department in June of 2012 where he worked until he was hired by the Morris County Sheriff's Office on July 8, 2015, and enrolled in the Academy on July 13, 2015.

Rush testified that prior to the within incident, he had never been in any trouble while in college, and he had a flawless record with the Wildwood police department. He testified further that during his one-year probationary period at the Sheriff's Office his performance was perfect. Rush testified that he considered Kramer a friend while at the Academy and they socialized together as well as in social media.

Rush admitted that on November 13, 2015, he struck Kramer with his fist in the groin. He acknowledged that it was improper to strike Kramer in any manner. Rush testified that he hit Kramer because Kramer and other cadets had been teasing him about the tightness of his pants throughout the entire day. However, Rush was clear to point out that he did not target the groin area, as he was attempting a backward chopping motion, a "charley horse" to Kramer's thigh. Rush testified that he intended to strike Kramer but only to give Kramer a dead leg and not to hit him in the groin and that his conduct was only "horseplay", and not out of "anger". Rush reiterated that he did not intend to strike Kramer in the groin. He did not intend to cause him such pain.

Rush testified that when Kramer told him that he had spoken with Leo, and that she told Kramer to tell the truth, that Rush encouraged Kramer to do the same and tell them that Rush had struck Kramer. Rush testified that in his written statement he stated that he struck Kramer by giving him a "backhand charley horse".

Rush confirmed that he was allowed to graduate from the Academy while the matter was investigated.

On cross-examination, Rush admitted that he intended to hit Kramer and cause him pain for making fun of him. The only distinction in striking Kramer, Rush admitted was that he meant to hit Kramer in the leg and not the groin. Rush admitted that how he struck Kramer was a "cheap shot". Rush also admitted that he would not have told his superiors that he struck Kramer but for Kramer speaking to Leo and then stating what had occurred in his written statement.

Rush also admitted that he knew that he could have informed his superiors that the Cadets had been making fun of him as they had on the August 13, and that he did not do so because it would have made the situation “worse’.

Nicole Leo

Detective Sargent Nicole Leo (Leo) testified at the departmental hearing on August 23, 2016. She is employed by the Morris County Sheriff's Office in the Internal Affairs department. She stated that an investigator informed her by text message that a recruit had been injured and “did not want to throw another recruit under the bus.” She would later learn the recruits involved were Kramer and Rush.

Leo testified that she spoke to Kramer by phone and he admitted that Rush struck him in the groin and that had not told Meehan what had actually occurred. Leo stated that she told Kramer that he needed to tell Meehan what had happened.

Leo testified that she spoke to Kramer on the day he was dismissed and she confirmed that he filed an IA complaint two days after being dismissed. Leo stated further that she initially conducted the investigation of Kramer's IA complaint and sent the IA complaint to the Morris County Prosecutor's Office (Prosecutor's Office) due to Rush striking Kramer. Leo confirmed that the Prosecutor's Office declined to prosecute, and that she then continued her investigation. Leo stated that her interview of Police Officer Michael Johnson (Johnson) confirmed what Kramer had said about Rush striking him in the groin. Leo testified that she would eventually recuse herself from the IA investigation at Rush's request, as he believed that Leo could not be impartial due to statements she made about Rush on the day Kramer was dismissed.

Kelly Zienowicz

Kelly Zienowicz (Zienowicz) is a Lieutenant in the Sheriff's Office, and she was assigned to continue with the IA investigation filed by Kramer after Leo had recused herself. As part of her investigation, she interviewed Rush and prepared a report

regarding the same (J-2 and J-15). Zienowicz testified that as a result of her investigation, the Sheriff's Office determined to terminate Rush (J-1).

Sheriff Edward Rochford

Morris County Sheriff Edward Rochford (Sheriff Rochford) testified that he had been sheriff for twenty-four years and that he was aware of the incident of August 13. Sheriff Rochford confirmed that he decided to terminate Rush because he struck Kramer, regardless of the reason for the same or Rush's status as a probationary officer. Sheriff Rochford stated that a law enforcement officer will face much more than teasing by fellow officers and that Rush should not have reacted in the manner he did, and therefore, he decided that Rush be terminated.

Credibility

Prior to conducting a legal analysis and making conclusions, it is necessary to address the credibility of the testimony of the witnesses, in order to assess what has occurred. "The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . trier of fact, whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952). The choice of accepting or rejecting the witness's testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963).

FINDINGS OF FACT

There is no dispute from the testimony provided and I **FIND** as fact that Rush intentionally struck Kramer, inasmuch as he had admitted to the same in the hearing. Rush presents as mitigating circumstances 1) that he struck Kramer because he had been teased by Kramer and his fellow recruits and 2) that he did not intend to strike Kramer in the groin but meant to give him a “charley horse.” I **FIND** Rush’s testimony as to the mitigating circumstances to be unconvincing and of no consequence, and therefore, I **FIND** that Rush meant to strike Kramer and did strike Rush, and that as a result of the same caused injury to Kramer.

As for Kramer’s testimony, I **FIND** that once he decided to tell the truth that Rush struck him and not that he injured himself playing basketball, that his testimony was consistent regarding the events of August 13, and therefore I **FIND** that Kramer was struck in the groin by Rush causing him injury. As with Rush’s testimony and the reason for striking Kramer, I **FIND** it of no consequence whether or not Kramer moved his leg so as to cause the blow to land in his groin as I **FIND** that Rush’s admission that he intended to strike Kramer and cause him pain overrides the mechanics of how Kramer was struck.

I **FIND** from the testimony of Leo, Zienowicz and Sheriff Rochford that the Sheriff’s Office terminated Rush for conduct unbecoming a public employee after it conducted an internal affairs investigation regarding the incident of August 13. I **FIND** further that the ultimate decision to terminate Rush was made by Sheriff Rochford at the conclusion of the internal affairs investigation.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

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. An employee who commits a wrongful act related to his or her duties or who gives other just cause may be subject to major discipline. N.J.S.A. 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). In a civil service disciplinary case, the employer bears the burden of sufficient,

competent and credible evidence of facts essential to the charge. N.J.S.A. 11A:2-6(a)(2), -21; N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-2.1, "burden of proof"; N.J.A.C. 4A:2-1.4. That burden is to establish by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982).

An appointing authority may discipline an employee on various grounds, including conduct unbecoming a public employee, neglect of duty 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 an administrative proceeding concerning a major disciplinary action, the appointing authority must prove its case by a "fair preponderance of the believable evidence." Polk, 90 N.J. at 560 (citation omitted); N.J.A.C. 4A:2-1.4(a); Atkinson, supra, 37 N.J. at 149.

The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). The greater weight of credible evidence in the case—the preponderance—depends not only on the number of witnesses, but "the greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975). 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).

On March 18, 2016, the Appointing Authority charged Rush with violating Civil Service Rule N.J.A.C. 4A:2-2.3(a)(1), conduct unbecoming a public employee and N.J.A.C. 4A: 2-2.3(a)(2) other sufficient cause. "Unbecoming conduct" is broadly defined as any conduct that adversely affected the morale or efficiency of the governmental unit or that has a tendency to destroy public respect and confidence in the delivery of governmental services. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). Unbecoming conduct may include 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 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.

It is undisputed that Rush, while at the Academy, intended to strike Kramer, and did strike Kramer in the groin causing him extensive injury. It is immaterial that Rush claims that his conduct occurred as a result of being teased by Kramer and other recruits. It is equally immaterial that Rush meant to give Kramer a "dead leg" and would not have struck Kramer in the groin had Kramer not moved his leg. I surmise such a reasoning to someone stating that he meant to shoot someone in the shoulder but shot the person in the head and thus resulting in more serious injury, or quite possibly death, because the bullet did not strike where intended. How irrational then does Rush's statement and reasoning sound when he admits to closing his fist, turning around, striking Kramer, with intent to hurt him, but only to cause a "charley horse". Such a statement by someone hired to be a law enforcement officer cannot be tolerated and therefore, I **CONCLUDE** that Rush by his own admission has demonstrated conduct unbecoming a public employee and the Sheriff's Office has proven by a preponderance of the credible evidence that Rush has violated N.J.A.C. 4A:2-2.3(a)(1).

In addition to Rush's own conduct in striking Kramer, he has demonstrated incredibly poor judgment in agreeing to go along with Kramer's decision to lie regarding the incident of August 13. If not for being confronted by Leo, both Rush and Kramer would have continued their deception, and therefore, I **CONCLUDE** that the Sheriff's Office has demonstrated by a preponderance of the credible evidence that Rush exhibited conduct unbecoming a public employee for said behavior.

I **CONCLUDE** that Rush's allegations that Leo was conflicted so as to diminish the findings by the Sheriff's Office in terminating Rush, are overridden by Rush's own admission that he struck Kramer and that he agreed to initially lie about his conduct, and thus, the Sheriff's Office has sustained its burden by a preponderance of the credible evidence that Rush's conduct was unbecoming of a public employee. Similarly, I am

unpersuaded by Rush's argument that he reacted in the manner he did because he was teased by Kramer and other recruits.⁴

It is expected that Rush as a sheriff's officer was required to present an image of personal integrity, dependability, and respect for the law and authority. Miccio v. Mid-State Correctional Facility, CSV 2428-87, Initial Decision (June 8, 1987), aff'd, Merit Sys. Bd. (July 14, 1987). A finding or conclusion that a public employee engaged in conduct unbecoming need not be based upon the violation of a particular rule or regulation and may be based upon the implicit standard of good behavior governing public employees consistent with public policy. City of Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955); Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992).

Appropriateness of Penalty

In determining the proper penalty, the appointing authority may consider the concept of progressive discipline. Consideration of past misconduct can be a factor in the determination of the appropriate penalty for present misconduct. In re Herrmann, 192 N.J. 19, 29 (2007) citing West New York v. Bock, 38 N.J. 500, 522. An employee's past disciplinary record can be a relevant consideration when determining the reasonableness of the penalty imposed. Herrmann, 192 N.J. at 29 citing Bock, 38 N.J. at 523.

It is well established that where the underlying conduct is of an egregious nature a penalty up to and including removal is appropriate. Henry v. Rahway State Prison, 81 N.J. 571 (1980). Such conduct negates the need for progressive discipline. In re Carter, 191 N.J. 474 (2007). This is particularly true where, as here, the offending conduct was caused by a law enforcement officer. Law enforcement officers are held to a higher standard than other public employees. See In re Phillips, 117 N.J. 567, 577 (1990). A law enforcement officer "is a special type of public employee...He represents the law and order and must present an image of personal integrity and dependability in order to have

⁴ It is very unfortunate that Rush did not report Kramer's conduct and that of his fellow recruits to his superiors, for fear that "it would make it worse" as he stated in his response to the undersigned on December 28, 2017. I liken what Rush was going through to a student being bullied in school. However, Rush's decision to lash out physically and then lie about it reveals a flaw in his ability to perform the duties of a law enforcement officer.

the respect of the community." Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965).

The Sheriff's Office terminated Rush twice for his conduct on November 13. First, on January 3, 2017, when the Sheriff's Office issued the FNDA notice that he was to be removed effective January 4, 2017, and affirming the PNDA notice of March 18, 2016, removing Rush effective April 4, 2016, due to his conduct. The Sheriff's Office also issued a termination notice on December 2, 2016, that Rush was terminated due to "unsatisfactory performance" during his working test period. The conduct complaint of in both terminations occurred prior to Rush graduating from the Academy and prior to the commencement of his working test period, however they concern conduct by an individual who was hired to be in law enforcement.

Although the Sheriff's Office chose to remove Rush on two occasions under different procedures, the underlying conduct complaint of remained the same and involved Rush's comportment in striking Kramer with the intent to inflict injury. Rush's employment history contained no prior disciplinary history, both at the Academy and when he had been employed as a seasonal police officer in Wildwood, New Jersey. While Rush argues that termination is not the appropriate penalty because this was the first infraction he has committed, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. Carter v. Bordentown, 191 N.J. 474 (2007). The theory of progressive discipline is not "a fixed and immutable rule to be followed without question." Id. at 484.

Instead, the Supreme Court has recognized that "some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197-98, (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense). Thus, the question for the courts 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.'" In re Polk License Revocation, 90 N.J. 550, 578, (1982) (considering punishment in license revocation proceeding) (quoting Pell v. Bd. of Educ., 356 N.Y.S.2d 833 (1974)).

Our Appellate Division, likewise, has both acknowledged and adhered to this principle, upholding dismissal where the acts charged, with or without any prior discipline, have warranted the imposition of that sanction. Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App.Div.2006) (affirming termination of county CPA with no prior disciplinary record who could not competently perform basic accounting duties), certif. denied, 191 N.J. 318, 2007 N.J. LEXIS 655 (2007); Cosme v. Borough of East Newark, 304 N.J. Super. 191, 205-06, (App.Div.1997) (finding termination appropriate for police officer who went on unauthorized paid vacation), certif. denied, 156 N.J. 381, (1998); City of Newark v. Massey, 93 N.J. Super. 317, 322-25, (App.Div.1967) (concluding that police officer's multiple acts of insubordination and his careless handling of police weapon warranted termination).

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.A.C. 4A:2-2.3. Major discipline may include removal, disciplinary demotion, or a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a); N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.4.

I **CONCLUDE** that the penalty of removal imposed by the Sheriff's Office with or without consideration of Rush's disciplinary history is appropriate inasmuch as Rush's conduct of striking Kramer and causing him physical injury was egregious, and thus warranted the Sheriff's Office decision to remove him without consideration of progressive discipline.

CONCLUSIONS

I **CONCLUDE** that for the reasons set forth herein, the Sheriff's Office has established by a preponderance of the credible evidence that Rush committed conduct unbecoming a public employee when he struck Kramer causing him serious physical injury.

ORDER

I **AFFIRM** the action of the appointing authority, in removing the appellant from his position as Sheriff's Officer in the Morris County Sheriff's Office.

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.

February 19, 2019

DATE



JULIO C. MOREJON, ALJ

Date Received at Agency:

February 19, 2019

Date Mailed to Parties:

Ir

APPENDIX

WITNESSES

For Appellant:

Conner Rush

Kyle Kramer

For Respondent ⁵ :

Detective Sargent Nicole Leo, Morris County Sheriff's Office

Lieutenant Kelly Zienowicz, Morris County Sheriff's Office

Edward Rochford, Morris County Sheriff

EXHIBITS

Joint Stipulations and Exhibits

- J-1 Preliminary Notice of Disciplinary Charges (31A).
- J-2 March 16, 2016 supplemental report from MCSO signed by Kelly D. Zienowicz.
- J-3 March 4, 2016 Letter from Officer Rush to remove Sergeant Leo from investigation.
- J-4 Internal memo from Officer Rush to Sheriff Rochford dated March 14, 2016 that he was filing a grievance against Leo.
- J- Morris County Prosecutor's Office to Sheriff Rochford regarding referral sending letter back.
- J-6 Internal Affairs Compliant form dated November 20, 2015.

⁵ The respondent's witnesses appeared in the departmental hearings on August 23, 2016 and October 13, 2016, and their testimony was contained in transcripts that were admitted in evidence by consent.

- J-7 Undated Letter from Sergeant Leo to Attorney Frank P. Arleo (indicating she will remove herself from the investigation).
- J-8 Handwritten statement of Officer Kramer dated November 19, 2015.
- J-9 Handwritten statement of Officer Rush dated November 19, 2015.
- J-10 Partial handwritten statement of Officer Michael Johnson date November 19, 2015.
- J-11 Text Messages (six pages).
- J-12 Transcript of Officer Kramer's recorded statement of November 20, 2015.
- J-13 Transcript of Officer Johnson's recorded statement of March 2, 2016.
- J-14 Transcript of Officer Rush's recorded statement of March 16, 2016.
- J-15 Void
- J-16 Civil Service Handbook
- J-17 Letter of Officer Rush dated June 24, 2016,
- J-18 Personnel Order dated November 30, 2015.
- J-19 E-mail to Officer Rush (about the Standard Operating Procedures).
- J-20 Snapshot of Power DMS receipts for Internal Affairs Policy signed December 16, 2015.
- J-21 Snapshot of Power DMS receipts for Behavior Modification signed December 16, 2016.
- J-22 Excerpt of Academy Rules.
- J22A MCS-1 Lieutenant Zienowicz's March 17, 2016 Report
- J22B MCS-2 Sergeant Leo's Initial Report
- J22C MCS-3 Sergeant Leo's Supplemental Report
- J22-D E-I March 10, 2016 Letter from Mr. Arleo to Sergeant Leo
- J-23A J23 Hearing report from Chief Robert Verry, dated January 3, 2017⁶

⁶ Exhibits J22A, J22B, and J22C, were originally labeled "MCS-1, MCS-2 and MCS-3", respectively; Exhibit J22D, was originally labeled "E-1"; and Exhibit J23A, was originally labeled "J23" by the parties. Exhibits

J-23 Transcript of departmental hearing conducted August 23, 2016

J-24 Transcript of departmental hearing conducted October 13, 2016

J-23 and J-24, are the departmental transcripts and were added to the record on December 28, 2017. All of the said exhibits were re-labeled to conform to the J exhibit list originally provided by the parties.