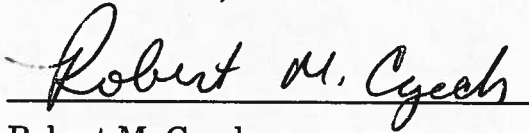


Re: Carlos Gomez

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
OCTOBER 22, 2014



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT.NO. CSR-02863-14

AGENCY DKT. NO. 2014-2122

**IN THE MATTER OF CARLOS GOMEZ,
CITY OF PASSAIC POLICE DEPARTMENT.**

Nancy A. Valentino, Esq., for Appellant (Alterman & Associates)

Anne Marie Rizzuto, Esq., for Respondent (Eric M. Bernstein & Associates)

Record Closed: June 27, 2014

Decided: July 2, 2014

BEFORE KIMBERLY A. MOSS, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Carlos Gomez (Gomez), appeals removal by respondent, City of Passaic Police Department (Passaic), on charges of statutory misconduct, conduct unbecoming an employee, violation of oath of office, violation of the code of ethics, violation of Articles VI and XII of the Administrative Code of the city, violation of the city's social media policy, violation of the city's internet policy, violation of the city's anti-harassment policy, and other sufficient cause for charges relating to Instagram postings by Gomez to C.C. and threatening to harm himself. Gomez denies engaging in any conduct that warrants major disciplinary action. At issue is whether Gomez engaged in

the alleged conduct, and, if so, whether it constitutes the above-mentioned violations warranting removal.

On February 11, 2014, Passaic served Gomez with a Preliminary Notice of Disciplinary Action. Gomez did not have a departmental hearing. Passaic served Gomez with a Final Notice of Disciplinary Action dated February 26, 2014, sustaining charges of statutory misconduct, conduct unbecoming an employee, violation of oath of office, violation of the code of ethics, violation of Articles VI and XII of the Administrative Code of the city, violation of the city's social media policy, violation of the city's internet policy, violation of the city's anti-harassment policy, and other sufficient cause.

Gomez requested a hearing and forwarded simultaneous appeals to the Civil Service Commission and the Office of Administrative Law (OAL). The appeal was filed with the OAL on March 5, 2014. The parties filed a motion on May 23, 2014, regarding respondent requiring appellant's attorney to sign a confidentiality agreement before it turned over Gomez's Internal Affairs file. I granted appellant's motion that respondent turn over Gomez's Internal Affairs file without the need for appellant's counsel to sign a confidentiality agreement. Respondent filed a motion for summary decision which was withdrawn at the hearing. The hearing was held on June 18, 2014, June 25, 2014, and June 27, 2014. I closed the record on June 27, 2014.

FACTUAL DISCUSSION

Testimony

Ana DelIntinis

Ana DelIntinis (DelIntinis) has been a police officer for Passaic for fourteen years. She has been assigned as a school resource officer (SRO) for the past five years. The duties of a SRO are to secure the school, educate students on the law, and mentor students. The majority of the work for SRO's occurs during the day. Passaic assigned two rookie police officers to be SRO's in September 2013. The SRO association does not recommend new officers have this assignment because they do not have enough

experience. She told the chief of police that it was not in the best interest of the department to have rookie SRO's. DelIntinis is assigned to Passaic High School with three other officers. The students are aware that they can contact the SRO's.

Plainfield High School also has a ROTC program, which has five hundred students and is affiliated with the United States Navy. The SRO'S and the ROTC participate in various activities together.

On December 3, 2013, DelIntinis was on duty at Passaic High School. A former student approached her in the hallway that morning to speak to her. Former students are allowed to enter the high school once they receive a pass at the door. The former student was at the school to say good bye to her former teachers as she was entering the military. After the former student graduated, DelIntinis gave the student her cell phone number. She and the former student had been in contact by text message on two occasions between June 2013 and December 2013. The text messages concerned birthdays and when the former student was shipping out. DelIntinis told her that she would speak to later. The former student approached DelIntinis that afternoon and stated that there was something on Instagram that had upset her. The former student showed DelIntinis Instagram postings between Gomez and C.C. (C.C. is also known as C.V.). The former student knew C.C. through social media and ROTC. DelIntinis took a screen shot of the Instagram postings using the former student's cell phone and sent the screen shot to her supervisor, Sergeant Villegas (Villegas). The Instagram postings had a picture of Gomez in a Navy uniform with the name of Navy Popii. He is not in dress uniform but he is in navy attire. Gomez's photo does not show that he is connected to Passaic. Under a photo on Instagram of C.C. (P-3; R-3) Gomez posted "Those Lips"; C.C. responded "LOL should I take that as a compliment." Gomez replied "O but it is ! Very sexy juicy lips." (R-1.) The Instagram exchange occurred in October 2013. P-1 appears to be a photo of C.C. P-3 is the identifier photo of C.C. for Instagram. There is nothing in the instagram postings by C.C. that indicated that she is sixteen years old or that she is in high school. DelIntinis used the PowerSchool network to access information for C.C. The PowerSchool network contains information regarding the students in Passaic schools.

Gomez was an SRO at Lincoln Middle School in Passaic at this time. He was assigned to that position in September 2013. There were overlapping assignments between the SRO's at the high school, the middle school, and the ROTC. She saw Gomez at a football game where he was acting as an SRO. The ROTC was also present at that game. C.C. was in the ROTC. The former student was a former commander in the ROTC.

DelIntinis made an operations report regarding the Instagram postings. She contacted C.C. to check on her welfare. C.C. spoke to Villagas at the school. The Instagram postings were not mentioned at this time. This meeting lasted five to ten minutes. The former student also spoke to Villegas. The former student requested that she not be identified.

C.C.'s mother was contacted and she came to the school. DelIntinis escorted C.C. and her mother to the Passaic Police Internal Affairs office. DelIntinis was not initially part of the Internal Affairs questing of C.C. At some point during Internal Affairs questing of C.C., DelIntinis was asked to enter the room where the questioning was taking place. She spoke to C.C. at that time. DelIntinis knew C.C. from seeing her around Passaic High School because C.C. wore a ROTC uniform. After the interview with C.C., DelIntinis took C.C. back to school. DelIntinis has not had any further contact with C.C. or the former student. DelIntinis has never been a reporting officer on an Internal Affairs matter.

DelIntinis formally met Gomez at roll call. The only contact that she had with Gomez was between September 2013 and December 2013. On one occasion she saw Gomez going in and out of classrooms in the high school. He was off his post at that time. It is not the norm for SRO's to walk in and out of the classrooms unless there is an emergency. Another time she saw Gomez he was out of uniform because he was wearing sneakers instead of shoes. She never spoke to Gomez regarding the Instagram postings.

Milton Figueroa

Milton Figueroa (Figueroa) has been an officer with Passaic since 1994. He is currently a detective in the Internal Affairs department. The Internal Affairs department is governed by the Attorney General guidelines. Internal Affairs reports directly to the chief of police. Figueroa conducted the background investigation of Gomez in 2013, prior to Gomez going to the police academy. During the background check of Gomez there were no complaints of inappropriate conduct; Gomez came across as a decent person; and no negative information came up against Gomez. Gomez was in the police academy from February 2013 thru July 2013.

Internal Affairs has conducted two prior investigations regarding Gomez. One was for actions occurring on September 23, 2013, and the other was for actions occurring on October 4, 2013. The final determination of the September 23, 2013, charges were failure to take police action when necessary, failure to make a written report to his commanding officer, and improper use of a firearm. The discipline was a letter of reprimand. The final determination of the October 4, 2013, charge was using rude or insulting language and failure to submit properly written report in a timely manner. The discipline was a one-day suspension.

Figueroa was assigned to investigate Gomez regarding the Instagram postings. R-2 is photo that Gomez used on his Instagram home page. Gomez came to his office. Figueroa told him that he was the target of an investigation and that he was transferred from SRO to patrol. He told Gomez not to have any conduct with students that Gomez was not related to and to stop using social media. He did not discuss the Instagram postings with Gomez at that time. Figueroa did not see Gomez's Instagram account. He only saw screen shots of the account. Gomez deleted the Instagram account on December 3, 2013. The Instagram home page of Gomez (R-2) did not indicate Gomez's relationship with Passaic. R-2 does not contain vulgar or explicit language. Figueroa did not interview with the former student who informed DelIntinis of the Instagram postings. He did not know that Villegas spoke to the former student. He did not interview Villegas.

Figuroa interviewed C.C. with her mother present on December 4, 2013. She emailed him a photo of herself, which became part of his file. She may have sent him the Instagram comments as well. C.C.'s date of birth is August 15, 1997. He met with her on one occasion. He interviewed her because she was the center of the investigation. He wanted to determine if there had been any contact between C.C. and Gomez other than the Instagram postings. Figuroa conducts his investigations in a neutral and objective manner. He does not reach a conclusion until all of the facts are received. During his interview of C.C. he told her that inappropriate comments were made. The fact that the comments were inappropriate was determined prior to the interview of C.C. He believes that his line of questioning with C.C. was appropriate. C.C. did not make a complaint against Gomez.

On December 3, 2013 at approximately 7:44 p.m., he received a call from Lieutenant Rawls that Gomez had threatened to commit suicide. Figuroa reported to headquarters. Several officers were at Gomez's home. Sergeant Merkerson was ordered to have Gomez report to headquarters. When an officer threatens to commit suicide, his weapon is taken from him. When Gomez arrived at the police station, his weapon and duty rig were confiscated. At that time Gomez was calm and well-mannered. Gomez's union representatives were present. They stated that they would take Gomez to Princeton House. Officer Merced was assigned to investigate the incident. Sergeant Merkerson is Merced's superior. At that time no employment action was taken.

On December 4, 2013, Figuroa interviewed Stephanie Rodriguez (Rodriguez), who is Gomez's former girlfriend. She was the person who contacted Officer Castrillion and reported that Gomez was threatening to kill himself. The interview was recorded. No oath was taken by Rodriguez during the interview. He believed that she was being truthful.

Figuroa interviewed Gomez on or about December 19, 2014. At that time Gomez stated that he deleted the Instagram account because of personal issues with his girlfriend. Gomez was shown R-3, the picture of C.C. on Instagram, during the interview. Gomez stated that he did post the Instagram comments under the username

Navy Papii, but he denied knowing the age of C.C. He also denied that he was her softball coach. He does not recall if Gomez told him when he began following C.C. on Instagram. During the December 19, 2013, interview Gomez stated that on December 3, 2013, he called Rodriguez because he wanted to speak to her and he "used his last card," which was telling Rodriguez that he was going to call the suicide hot line and that he wanted to harm himself.

Figueroa stated that in P-1 and P-2 (Photos of C.C.) C.C. does not look like she is sixteen. The P-3 photo of C.C. looks like a photo of a sixteen-year-old girl.

He concluded he could not substantiate a sexual relationship between C.C. and Gomez, but he did substantiate that Gomez posted inappropriate comments to a minor. The language of Gomez postings was inappropriate and the fact that the postings were made to a juvenile is also inappropriate. He did not find Gomez believable.

Figueroa does not know why Gomez was assigned to the SRO unit. He does not know of anyone who has been terminated due to use of social media. He has never previously recommended termination for violation of the social media policy.

M.G.

M.G. is fourteen years old. She lives in Passaic with her parents. She has played softball for the past five years. Gomez was her coach in 2011 and 2013. She was never uncomfortable with Gomez. He told the team that they could not wear short shorts or spaghetti-strap tops to practice. She has a Facebook and Twitter account. She does not follow Gomez on either account. The uniform for the softball team is a jersey, a tee shirt, and knee-length shorts. She is not on an email list from Gomez. She has never received a text message from Gomez. She has no contact with Gomez outside of softball. In 2011 she did not know that Gomez was a police officer. She found out he was a police officer from her mother. She does not believe that she knows C.C.

Erica Moya

Erica Moya (Moya) is the mother of M.G. She is married with four children. She knows Gomez because she is an acquaintance of his sister and he was the softball coach for two of her daughters. She met Gomez when he was a teenager. She is not a good friend of Gomez or his sister. Her main knowledge of him is through softball. She does not socialize with Gomez. She knew that he was a police officer because his sister told her.

She and her husband attend all of their daughters' softball games and practices. She has never seen Gomez acting with the team in a manner that made her uncomfortable. She would not have any problem leaving her children with Gomez. She has no complaints regarding Gomez. Her children have social media accounts which she monitors every two to three days. Her children do not follow Gomez on Facebook or Twitter. Approximately three years ago, she had asked Gomez to follow her older daughter, who was on the softball team, on Facebook, so that he could provide game information to her daughter. Gomez stated that he does not befriend any of his players on social media. Moya follows Gomez on Facebook. She has never seen any of her daughters' teammates on Gomez's Facebook account.

Moya does not know C.C. She does not know the person who is pictured in P-3. The username that is listed in P-3 does not occur in any of her daughters social media accounts. She knows Gomez's nickname is KuKi.

Moya did not find the comment "Those lips tho" posted by Gomez on C.C.'s Instagram account to be objectionable. She found the posting "O but it is very sexy juicy lips" to be a complement. She would not be shocked to find similar postings on her daughters' social media accounts.

The softball season is from mid-March to June. The softball travel season is June and July. Gomez was the coach of the travel team. Last year Gomez was not the lead coach for the recreation team, but he was the lead coach for the travel team. The

travel softball season consists of ten to fifteen games played on week nights. She does not remember how many travel games Gomez attended last summer. The practice times are determined by the coaches' schedule. Gomez would text her to let her know where and when the softball practice would be.

C.C.

C.C. is a high school sophomore. Her date of birth is August 15, 1997. She lives in Passaic. She has had an Instagram account for a year and a half. She does not play sports currently. She has been in the ROTC for two years. She played recreation softball for Passaic when she was in the fifth and sixth grade. She also played in either the seventh or eighth grade as well as in the ninth grade. She never played on the softball travel teams.

She knows Gomez from being on the softball team. He was also at her tryouts when she was either in the seventh grade or the ninth grade. C.C. signed up for softball at the recreation department in Passaic with her mother. Gomez was never her coach. On the day of her tryout she asked Gomez a question about the travel team. Other coaches and players were present when she asked him the question.

C.C.'s Instagram screen name is crystal_marie x3. She uses the name C.V. at times but her actual name is C.C. P-1 is a photo of her that was posted to Instagram by her friend Reba, thirty-two weeks before the photo was printed. It was taken in October 2013 by a photographer. The photo was for her portfolio. A friend of hers, Reba, did her hair and makeup. That picture would come up in Reba's instagram account. Gomez follows Reba on Instagram. P-2 is a photo of her that was taken five weeks before it was printed.

C.C. received a friend request on instagram from Gomez. She knew who he was when she accepted the friend request. She does not know when Gomez sent her the friend request. She thought he knew who she was. She requested to follow Gomez even though she was under eighteen.

P-2 was posted to her Instagram account after Gomez deactivated his Instagram account. P-1 was posted to Instagram around the time that she received Gomez's friend request on Instagram. P-3 is a picture of her that she posted on Instagram that Gomez posted comments on. It was taken in October 2013, one week before Halloween. People that she does not know do not normally comment on her photos on Instagram. She does not focus on the comments on Instagram.

She was not upset or offended by the comments Gomez posted on Instagram regarding P-3. R-1 are the comments that were under P-3 including Gomez's comments. C.C. knows all of the people who posted comments in R-1; all of them except Gomez were under eighteen years old. All of the comments in R-1 were posted in one week. She responded to Gomez's first comment within minutes of him posting the comment. C.C. did not want to read the second comment Gomez posted under P-3 in the hearing. C.C. and Gomez did not post any comments to each other on Instagram regarding whether they knew each other. They did not have any conversations in person regarding Instagram.

C.C. has between one thousand and two thousand followers on Instagram. She does not know if many of her followers are over eighteen years old. She has pictures from her sweet-sixteen party on Instagram. She randomly posts her sweet-sixteen pictures to Instagram.

She did not know why she was being questioned by the police. She had one conversation with Gomez at softball tryouts. That conversation was not inappropriate. She never saw Gomez do anything inappropriate. There are six recreation teams for each age group. Each team has thirteen members.

She does not have Gomez's cell phone number. She has not received emails from Gomez. She is not concerned to be around Gomez. The photos in P-1 and P-2 do not depict the way she would look when playing softball.

C.C. does not know how the postings came to the attention of the police. She did not know Gomez was a police officer. She never saw anything on Instagram to indicate that Gomez was a police officer.

C.C. is not in an ROTC chat room. Gomez was not involved in ROTC at Passaic High School. She did not see Gomez at football games. She knew that Gomez had a girlfriend because C.C. has seen her.

C.C. saw Gomez in the spring of 2013 at a softball game. She was fighting with a teammate at a game. After the fight ended Gomez told her calm down and to leave. Gomez was approximately ten feet away from her. She did not speak back to Gomez. The softball season ended in June 2013.

Rosario Capuana

Rosario Capuana (Capuana) is the acting chief of Passaic. He has been the acting chief of the past ten and a half months. He is in charge of the day-to-day operations of the police department. He was not involved in the hiring of Gomez. He assigned Gomez as a SRO officer in August 2013. He is familiar with Gomez's two prior disciplines.

Gomez was assigned as an SRO because Capuana needed to assign six new officers to the SRO unit. He assigned four veteran officers and two rookie officers. He assigned Gomez because he was told that Gomez was involved with recreation department baseball and softball teams and he had a military background. He has not reviewed Gomez's personal file.

Gomez attended harassment and ethics training classes with the city of Passaic. The city of Passaic has a social media policy. Police officers must follow the City of Passaic's anti-harassment policy, internet policy, code of ethics, and equal opportunity policy. Officers receive the Passaic Police Department rules and regulations before the graduate from the police academy. Capuana signed the Preliminary Notice of Disciplinary Action against Gomez and the Final Notice of Disciplinary Action in this

matter. Gomez acknowledged receipt of the social media policy of the City of Passaic when he worked in the recreation department for Passaic. The City of Passaic has an employee handbook and a code of ethics. Gomez received a conditional offer of employment from Passaic on January 22, 2013. Gomez had perfect attendance when he was in the police academy.

Capuana is familiar with the events of this investigation. Lieutenant Sinkowitz showed Capuana the Instagram postings of Gomez in R-1. There are no profane or sexually explicit comments in Gomez's postings.

Gomez's postings are at a minimum immature. There is no indication on Gomez's Instagram page that he is a Passaic police officer. Capuana also received the report of Officer DeIntinis. He did not speak to DeIntinis regarding her report. He was not aware that the former student was going into the military. There would be no need for Villegas to write a report if it contained the same information as the DeIntinis report. He sent the matter to Internal Affairs to investigate. He wanted to determine if the postings were indeed made by Gomez. He stated that a student brought the postings to the attention of a guidance counselor. Capuana later testified that a former student brought the postings to someone's attention. Once he received the information regarding the Instagram postings of Gomez, he removed Gomez as a SRO and switched him to a patrol unit on December 3, 2013.

After he transferred Gomez to patrol, he received a call informing him that Gomez threatened to harm himself. At that point he contacted the head of Internal Affairs and told him to take Gomez's weapon. Capuana's main concern was with the safety of the community and the safety of Gomez. He called Officer Ferrallo and told him to bring Gomez to the station to turn in his gun. He wanted Gomez to be told that he was relieved of duty before he was taken to a care facility.

Capuana did not personally follow up with the investigation. He did not view the DVD's of the interviews. He does not know who was present during Gomez's interview with internal affairs on December 19, 2013. He does not micro-manage the Internal Affairs investigations. He reviewed all of Internal Affairs documents. He was told that

Gomez deleted his Instagram account. He believes that investigation should have determined if they could retrieve Gomez's Instagram account. He does not know if that would have been possible. He has seen P-3, which is a picture of C.C. In P-1 C.C. appears to be in the age range of fourteen to twenty. She had sweet-sixteen pictures on her Instagram page.

Capuana reviewed the Preliminary Notice of Disciplinary Action before he signed it. He has never worked in Internal Affairs or went to a special internal affairs school. He uses his knowledge and experience in determining whether to bring disciplinary charges. He had no contact with Gomez.

The misconduct charge in the Notice of Disciplinary action is based on Gomez posting sexually charged comments on Instagram to a juvenile. If the posting had been sent to a stranger it would still be a violation. Gomez is also charged with a violation of the police department code of ethics. The violation of the code of ethics is based on the fact that whether on or off duty you must carry yourself as a police officer. A police officer must keep his private life unsullied and not bring disrepute to himself or the police department. Gomez also violated article six of the code of ethics and the code of professional responsibility because police officers are supposed to protect the weak. Children under eighteen are considered weak because they cannot make decisions on their own. Gomez violated his oath by conducting himself in an unprofessional manner Gomez willfully violated the rules and regulations by posting sexually charged comments on the internet and threatening to harm himself. Gomez's conduct was unbecoming of a public employee because he did not conduct himself in a professional manner and he became a danger when he threatened to harm himself.

The Passaic Police Department does not have a social media policy in place; it uses the City of Passaic's social media policy.

Carlos Gomez

Gomez saw a photo of C.C. on his Instagram feed. The photo, P-1, was posted by a friend of his named Reba. Reba is an acquaintance of his. He followed Reba on

Instagram and then met her at the movie theater where she works. Reba is also makeup artist. Gomez never went to any of Reba's makeup shoots. Reba is nineteen years old. He has never spoken with Reba regarding C.C. Based on the photo (P-1), Gomez thought that C.C. was a model. After he saw the photo, he sent C.C. a follow request. C.C. accepted his follow request in mid-October 2013. P-3 is a photo of C.C. that he saw on his Instagram feed a few days after she accepted his follow request. He did not know her age. He thought that she was in her early twenties. He had no reason to believe that he had previously seen C.C. He learned who C.C. was on or about February 26, 2014. Gomez deleted his Instagram account on December 3, 2013, approximately 10:00 to 11:00 a.m. through his cell phone.

FINDINGS OF FACT

In light of the contradictory testimony presented by respondent's witnesses and appellant's witnesses, the resolution of the charges against Gomez requires that I make credibility determinations with regard to the critical facts. 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, 60 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). A fact finder "is free to weigh the evidence and to reject the testimony of a witness even though not contradicted when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521-522 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to observe the demeanor of the witnesses, I FIND that DelIntinis, Figueroa, and Capuana were credible. DelIntinis stated that the SRO

association does not believe rookie officers should be assigned as SRO's and she spoke to Capuana regarding the issue. There was no testimony that she had any personal bias against Gomez. She stated that she gave the former student her cell phone number after she graduated from high school. She also stated that she had received text messages from the former student regarding her birthday and her upcoming military assignment. DeIntinis was truthful in her testimony. Figueroa was also credible in his testimony. He did the background check for Gomez to be a police officer and found no negative information regarding Gomez. He admitted that C.C. looked older in the P-1 and P-2 photographs. Capuana was also credible. He clearly described the process he goes through before he issues a disciplinary notice. There was no indication in his testimony that he had a bias against Gomez. He admitted that he did not check the facts in the Internal Affairs report because he does not micro-manage the Internal Affairs department. Although he initially stated that a student brought the postings to a guidance counselor's attention, he later stated that was not the case. He clearly testified as to the charges that he believes Gomez violated. He also stated that he thought that Internal Affairs should have attempted to retrieve Gomez's Instagram account that he deleted.

I **FIND** the testimony of M.G., Erica Moya, and C.C. also to be credible. M.G. was clear, truthful, and concise in her testimony. I found Moya credible although it's is not clear how Gomez could be the softball coach of her daughter's teams from March 2013 through July 2013, while he was going to the police academy at the same time. I found C.C. credible for the most part. However, she contradicted herself when she testified that she did not find the postings of Gomez offensive, but in the hearing as well as in her taped interview with the police she did not want to read verbally the posting of Gomez that stated "O but it is very juicy sexy lips." She did not read that posting verbally in the hearing.

I **FIND** Gomez not to be credible. It is not credible that he deleted his Instagram account between 10:00 and 11:00 a.m. one December 3, 2013, prior to Figueroa telling him on the same day that he was the target of an investigation and to stop using social media.

Having reviewed the testimony and evidence and credibility of the witnesses, I make the following additional **FINDINGS** of **FACTS**.

Gomez graduated from the Passaic Police Academy in July 2013. He was assigned as an SRO at Lincoln Middle School. Gomez had previously worked for the City of Passaic's recreation department. He coached girls softball from 2011 through 2013. The softball season is from March to June. The softball travel season is June and July. Gomez is the lead coach of the under-fourteen girls travel softball team. He is also a coach of the recreation softball team. There are six under-fourteen softball teams. Each team has thirteen players. C.C. was a member of the under-fourteen softball team in 2013. C.C. is presently sixteen years old. She attends Passaic High School. She had previously been a member of the softball team when she was in the fifth, sixth, seventh or eighth grade, and the ninth grade. Gomez was never her coach. She spoke to Gomez once when she asked him about the travel team in the presence of other players and students. In the summer of 2013, C.C. and another player were fighting at a game. Gomez told her to calm down and leave.

Gomez had an Instagram account. His username is Navy Papii. C.C. has an Instagram account. Gomez and C.C. follow Reba, who is nineteen on Instagram. Reba posted a photo of C.C. (P-1) on Instagram in October 2013. Since Gomez follows Reba on Instagram, the photo (P-1) came up on his Instagram feed. The photo had C.C.'s username. C.C. has between one thousand to two thousand followers on Instagram. Gomez sent a follow request to C.C., which she accepted.

Approximately one week before Halloween 2013, C.C. posted a photo of herself (P-3; R-3)¹ on Instagram. Shortly thereafter Gomez posted under the photo (P-3; R-3) "Those lips tho." C.C. posted a response to Gomez and another person "LOL should I take that as a compliment or not?" Gomez posted a reply "Oh but it is ! Very sexy and juicy lips."

¹ P-3 and R-3 are the prints of the same photo of C.C. except one is a color print of the photo and one is a black and white print of the photo.

On December 3, 2013, a former student of Passaic High School brought the posts to the attention of DeIntinis. DeIntinis determined that the posts were made on C.C.'s Instagram account by Gomez. On that day Figueroa told Gomez that he was the subject of an investigation and not to use social media. Gomez deleted his Instagram account on December 3, 2013.

On the evening of December 3, 2013, Gomez threatened to harm himself. He was brought to headquarters by the PBA president. He was relieved of duty. He also had to surrender his weapon. He was taken to Princeton Hills after he left police headquarters.

Gomez was interviewed by Figueroa on December 19, 2013. He told Figueroa that on the night of December 3, 2013, he called his ex-girlfriend (Rodriguez). Gomez wanted to speak to her that he "used his last card," which was telling Rodriguez that he was going to call the suicide hot line and that he wanted to harm himself.

C.C. knew who Gomez was when she saw his follow request. Gomez did not know C.C.'s age when he posted the comments to her picture. He did not know who she was at the time of the postings. Gomez used his cell phone to make the postings.

LEGAL ANALYSIS AND CONCLUSION

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the charges of statutory misconduct, conduct unbecoming a public employee, other sufficient cause, violation of oath of office, violation of code of ethics, and violation of Articles VI and XII of the administrative code of the Passaic Police Department, are sustained. I **CONCLUDE** that the charges of violation of the City of Passaic's social media policy, violation of the city's internet policy, and violation of the city's anti-harassment policy are not sustained.

The purpose of the Civil Service Act is to remove public employment from political control, partisanship, and personal favoritism, as well as to maintain stability and continuity. Connors v. Bayonne, 36 N.J. Super. 390 (App. Div.), certif. denied, 19

N.J. 362 (1955). The appointing authority has the burden of proof in major disciplinary actions. N.J.A.C. 4A:2-1.4. The standard is by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). Major discipline includes removal or fine or suspension for more than five working days. N.J.A.C. 4A:2-2.2. Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee, and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. An employee may be removed for egregious conduct without regard to progressive discipline. In re Carter, 191 N.J. 474 (2007). Otherwise, progressive discipline would apply. W. New York v. Bock, 38 N.J. 500 (1962).

Hearings at the OAL are de novo. Ensslin v. Twp. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994), certif. denied, 142 N.J. 446 (1995).

“Unbecoming conduct” is broadly defined as any conduct which adversely affects the morale or efficiency of the governmental unit or which has a tendency to destroy public respect and confidences in the delivery of governmental services. 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. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

The charges that were sustained in this case merge. Gomez posted suggestive comments under a photo of C.C. on her Instagram account. It was not proved by a preponderance of the evidence that Gomez knew that C.C. was a minor when he posted the comments on R-1. However, he nonetheless posted suggestive comments on the Instagram account of someone who he stated he did not know at the time. His comments on the photo were not only seen by C.C. but could be seen by all of her one thousand to two thousand followers. The comments he posted, specifically the phrase “very juicy sexy lips” is a sexually charges phrase. It is clear from the testimony that C.C. was not comfortable with the phrase being used about her. She did not want to read the words of that phrase when she was interviewed by Figueroa or when she testified at the hearing. In addition, Gomez conveniently deleted his Instagram account the same day that Figueroa told him to stop using social media.

Gomez also threatened to harm himself. He admitted to Figueroa that he wanted to talk to his ex-girlfriend, Rodriguez. He stated that he "Used his last card, which was telling her that, he was going to call the suicide hot line and that he wanted to harm himself. The fact that Gomez would use the threat of harming himself to get the attention of his ex-girlfriend is clearly conduct unbecoming a public employee. It also shows a clear lack of judgment. His action required police officers to go to his location, bring him back to headquarters, relive him of duty, and take his weapon. His attempt to manipulate Rodriguez to speak to him had the effect of causing Passaic to expend officers to respond to him.

Capuana admitted that Passaic Police Department does not have a social media policy. Although Gomez received the City of Passaic social media policy when he worked for the Passaic Police Department, he did not receive a social media policy from the police department because there is no such policy. Since Gomez did not receive a social media policy from the police department when he was hired, it stands to reason that the other incoming police officers did not receive a copy of a social media policy from the police department. There cannot be a situation where police officers who worked for the City of Passaic prior to becoming officers have to adhere to a social media policy that police officers who did not previously work for the City of Passaic do not know about.

There was no clear testimony as to the content of the internet policy of the City of Passaic. There was no testimony that it was Gomez's intent to harass anyone by posting the comments to C.C.'s photo on Instagram. The only testimony regarding anti-harassment was that Gomez attended a seminar.

When determining the appropriate penalty to be imposed, the Board must consider an employee's past record, including reasonably recent commendations and prior disciplinary actions. Bock, supra, 38 N.J. 500. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, suspension or fine no greater than six months. N.J.S.A. 11A:2-6-a; N.J.S.A. 11A-2-20; N.J.A.C.

4A:2-2.2; N.J.A.C. 4A:2-2.4. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number, and proximity of prior disciplinary infractions evaluated by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential. Gomez graduated from the police academy in July 2013. He received discipline for an incident that occurred on September 23, 2013, which resulted in a reprimand. He received a second discipline for an incident that occurred on October 4, 2013, which resulted in a one-day suspension.

The Instagram postings in this case occurred in late October 2013 and the threat to harm himself occurred in December 2013. Since Gomez graduated from the police academy in July 2013, he has had four incidents which he will receive discipline. These incidents have occurred within three months. The posting of sexually charged comments to someone he did not know—who turned out to be a minor—and threatening to harm himself to get attention reflect extremely poor judgment. The discipline in this case of removal is appropriate.

ORDER

Based on the foregoing findings of fact and applicable law, it is hereby **ORDERED** that the determination of Passaic that Carlos Gomez be removed from employment 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. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, 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.

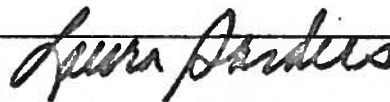
7-2-14

DATE



KIMBERLY A. MOSS, ALJ

Date Received at Agency:



Date Mailed to Parties: JUL - 3 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

WITNESSES

For Appellant:

M.G.
Erica Moya
C.C.

For Respondent:

Ana DeIntinis
Milton Figueroa
Rosario Capuana

EXHIBITS

For Appellant:

- P-1 Color photo of C.C. that was posted on Instagram
- P-2 Color photo of C.C. that was posted on Instagram
- P-3 Color photo of C.C. that was posted on Instagram
- P-4 Internal Affairs policy and procedure

For Respondent:

- R-1 Copy of Instagram comments under C.C.'s photo (P-3) on Instagram
- R-2 Photo of Gomez's Instagram homepage
- R-3 Photo of C.C. that was posted on Instagram
- R-4 PowerSchool Printout
- R-5 Not in Evidence
- R-6 Not in Evidence
- R-7 Letter of Reprimand
- R-8 Not in Evidence
- R-9 Operations Report of Gomez accepting discipline for incident of October 4, 2013
- R-10 Not in Evidence

- R-11 Department of Recreation and Cultural Affairs application of C.C. dated March 12, 2012
- R-12 Department of Recreation and Cultural Affairs application of C.C. dated April 4, 2013
- R-13 Not in Evidence
- R-14 Passaic Police Rules and Regulations Sign for Sheet dated May 9, 2013, signed by Gomez
- R-15 Certification of Carlos Gomez
- R-16 Signature Sheet Signed by Gomez for the City of Passaic Employee Handbook
- R-17 Not in Evidence
- R-18 Not in Evidence
- R-19 Passaic Police Department Rules and Regulations
- R-20 Not in Evidence
- R-21 Passaic Employee Social Media Policy
- R-22 Not in Evidence
- R-23 Passaic Ordinance Establishing Code of Ethics dated October 8, 2008
- R-24 Conditional Offer of Employment of Carlos Gomez dated January 22, 2013
- R-25 Student Data Record of Carlos Gomez
- R-26 Preliminary Notice of Disciplinary Action (provided in the Court file)
- R-27 Final Notice of Disciplinary Action (provided in the Court file)
- R-28 Not in Evidence
- R-29 Not In Evidence