B-14

STATE OF NEW JERSEY

In the Matter of Mitchell Kafton, Jackson Township

CSC Docket No. 2014-1982

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

Request for Reconsideration and

ISSUED: AUG 15 2014 (CSM)

Mitchell Kafton, a Police Officer with Jackson Township, represented by Robert Rosenberg, Esq., seeks reconsideration of the attached decision rendered on December 18, 2013 which modified his 10 working day suspension to a formal written reprimand.

By way of background, the appellant was suspended for 10 working days on charges of conduct unbecoming a public employee, insubordination, and violation of the Jackson Township code by conducting personal business while on duty. Specifically, it was alleged that the appellant accessed and viewed reports related to an investigation involving the mayor because he learned that a member of his family may have been involved in the matter and that information about the investigation was leaked to a local newspaper on the day the appellant accessed the reports. The appellant appealed his suspension to the Civil Service Commission (Commission) which transferred the matter to the Office of Administrative Law (OAL) for a determination as a contested case. In his initial decision, the Administrative Law Judge (ALJ) found that the appointing authority had not sustained the charges of insubordination and conduct unbecoming a public employee as it did not have a formal or written policy prohibiting Police Officers from viewing accessible reports on the computer system. However, as the appellant admitted he viewed the report for strictly personal business, the ALJ sustained the charge of conducting personal business while on duty and, in his initial decision issued on November 13, 2013, recommended that the 10 working day suspension be modified to an oral reprimand. It is noted that the initial decision advised the parties that, within 13 days from the date on which the decision was recommended, any party could file written exceptions to the Commission. At its meeting on

December 18, 2013, the Commission accepted and adopted the Findings of Fact as contained in the ALJ's initial decision, but did not adopt the recommendation to modify the appellant's 10 working day suspension to an oral reprimand. Rather, since an oral reprimand is not a form of minor discipline specified by *N.J.A.C.* 4A:2-3.1(a), the Commission modified the suspension to a formal written reprimand.

In the appellant's January 10, 2014 request, he asserts that the matter was settled before he received the Commission's final decision. Specifically, he states that the penalty agreed upon was an oral reprimand consistent with the ALJ's initial recommendation. In support of this contention, the appellant provides a "Report of Training/Counseling Oral Reprimand" dated November 22, 2013 reminding him not to conduct personal business while on duty. The appellant also provides a copy of Jackson Township Police Department's Standard Operating Procedure in Disciplinary Actions, which he states demonstrates a significant difference between an oral reprimand and a formal written reprimand. Specifically, an oral reprimand is removed from an employee's file six months after the incident, but an official written reprimand is permanently placed in an employee's personnel file. Therefore, the appellant requests that the Commission's decision be vacated.

In response, the appointing authority, represented by Denis P. Kelly, Esq., states that it has not entered into a settlement agreement and did not negotiate, settle, or otherwise resolve the claims in advance of the Commission's final determination. Therefore, the appointing authority states that it will proceed as directed in the Commission's final decision in this matter.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

A review of the record indicates that there is no basis on which to grant reconsideration or to vacate the prior decision. Initially, the Commission acknowledges settlement agreements to allow for the resolution of matters properly before it. The Commission also reviews settlement agreements to ensure compliance with Civil Service law and rules. If a term of the agreement is later violated by either party, the Commission has jurisdiction to enforce the term. *See e.g., In the Matter of Donald Hickerson* (MSB, decided September 10, 2002). *See also, In the Matter of Police Officer and Superior Officer, Essex County* (1991 Layoffs), Docket No. A-5755-94T5 (App. Div. April 22, 1996).

N.J.A.C. 1:1-19.1 provides:

(a) Where the parties to a case wish to settle the matter, and the transmitting agency is not a party, the judge shall require the parties to disclose the full settlement terms:

1. In writing, by consent order or stipulation signed by the parties or their attorneys; or

2. Orally, by the parties or their representatives.

(b) Under (a) above, if the judge determines from the written order/stipulation or from the parties' testimony under oath that the settlement is voluntary, consistent with the law and fully dispositive of all issues in controversy, the judge shall issue an initial decision incorporating the full terms and approving the settlement.

However, in this case, the purported settlement was never before the ALJ *or* the Commission. Accordingly, the ALJ issued an initial decision based on the record before him and returned it to the Commission so it could render a final decision on the matter.

Within 45 days after receipt of the ALJ's initial decision by the transmitting agency, the agency, *i.e.,* the Commission, may enter an order or a final decision adopting, rejecting or modifying the ALJ's initial decision. *See N.J.A.C.* 1:1-18.6 *et seq.* In this case, the ALJ's initial decision was mailed to the parties on November 14, 2013. In accordance with *N.J.A.C.* 1:1-18.4(a) and (d), a party could file exceptions and replies to the exceptions to the ALJ's initial decision to the Commission within 13 days from the date the decision was mailed and within five days from receipt of exceptions. Therefore, the deadline to file any exceptions and replies was December 2, 2013. As no exceptions or any other notice was provided to this agency that the parties had settled, the matter was scheduled for review by the Commission at its December 18, 2013 meeting, where the Commission modified the penalty to an official written reprimand. However, it was not until January 10, 2014, three weeks after the Commission's action, that the appellant asserts that the matter was settled.

As noted earlier, the appellant's claim that the matter was settled prior to the Commission's action is based on the November 22, 2013 "Report of Training/Counseling Oral Reprimand." However, this document does not evidence that the appointing authority settled the matter. Moreover, the appointing authority has specifically indicated that it did not enter into a settlement agreement in this matter and did not negotiate, settle, or otherwise resolve the claim in advance of the Commission's final determination. Finally, even though the

ALJ's initial decision specifically advised the parties that they could file exceptions to his initial recommendation to the Commission within 13 days, neither party informed the Commission during the month between the ALJ's issuance of his initial determination and the Commission review of that determination that they had settled. Rather, given the timing, it appears that the Police Department may have received a copy of the initial decision and implemented it prior to the Commission's final review of the matter. Accordingly, there is no basis on which to vacate the prior decision.

ORDER

Therefore, it is ordered that this request for reconsideration be denied.

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 13TH DAY OF AUGUST, 2014

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries and Correspondence

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

Attachment

c: Mitchell Kafton
Robert Rosenberg, Esq.
Denis P. Kelly, Esq.
Kenneth Connolly
Joseph Gambino

A-3

STATE OF NEW JERSEY

In the Matter of Mitchell Kafton
Jackson Township
Police Department

CSC DKT. NO. 2012-184
OAL DKT. NO. CSV 8824-11

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: December 18, 2013 PM

The appeal of Mitchell Kafton, a Police Officer with Jackson Township, Police Department, of his 10 working day suspension, on charges, was heard by Administrative Law Judge Ronald W. Reba, who rendered his initial decision on November 13, 2013. No exceptions were filed on behalf of the parties.

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, at its meeting on December 18, 2013, accepted and adopted the Findings of Fact as contained in the attached Administrative Law Judge's initial decision, but did not adopt the recommendation to modify the appellant's 10 working day suspension to an oral reprimand. Rather, since the Administrative Law Judge concluded that a penalty was warranted on the charge of conducting personal business while on duty, but an oral reprimand is not a form of minor discipline specified by *N.J.A.C.* 4A:2-3.1(a), the Civil Service Commission modified the suspension to a formal written reprimand.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified. However, the Commission modifies the 10 working day suspension to a formal written reprimand and orders that the appellant be granted back pay, benefits, and seniority for the period of ten working days.

Re: Mitchell Kafton

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
DECEMBER 18, 2013

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. CSV 8824-11
AGENCY DKT. NO. 2012-184

**IN THE MATTER OF MITCHELL KAFTON,
JACKSON TOWNSHIP DEPARTMENT
OF PUBLIC SAFETY.**

Robert Rosenberg, Esq., for appellant Mitchell Kafton (Rosenberg, Kirby, Cahill & Stankowitz, attorneys)

Denis P. Kelly, Esq., for respondent Jackson Township Department of Public Safety (Gilmore & Monahan, attorneys)

Record Closed: October 15, 2013 Decided: November 13, 2013

BEFORE **RONALD W. REBA**, ALJ:

STATEMENT OF THE CASE

This matter arises from the suspension for ten working days of appellant, Mitchell Kafton, a police officer with the Jackson Township Police Department ("Department"), for insubordination and conduct unbecoming a public employee under the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and its implementing regulations, N.J.A.C. 4A:1-1.1 to 10-3.2, and for violations of the municipal code of Jackson Township, by respondent

Jackson Township ("Jackson"). At issue is whether Officer Kafton engaged in the alleged conduct, and, if so, whether the conduct warrants the imposed penalty.

PROCEDURAL HISTORY

By Preliminary Notice of Disciplinary Action (PNDA) served on appellant on May 4, 2011, appellant was notified of a proposed fifteen-day suspension based on multiple charges. Following a departmental hearing on June 15, 2011, by Final Notice of Disciplinary Action (FNDA) served on July 11, 2011, the Department notified Kafton that he would be suspended for ten days based on the charges that had been sustained. On July 14, 2011, appellant filed a timely appeal to the Civil Service Commission.

The matter was transmitted to the Office of Administrative Law, where on July 28, 2011, it was filed for determination 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. A hearing was held on June 7, 2012, October 25, 2012, and July 29, 2013. Upon receipt of post-hearing briefs, the record closed on October 15, 2013.

CHARGES

The sustained charges listed in the FNDA were: (1) Jackson Township Code: 24-31(b)—conduct unbecoming a police officer; (2) N.J.A.C. 4A:2-2.3(a)(6)—conduct unbecoming a public employee; (3) Jackson Township Code: 24-32(23)—insubordination; (4) N.J.A.C. 4A:2-2.3(a)(2)—insubordination; and (5) Jackson Township Code: 24-32(29)—conducting personal business while on duty.

FACTUAL DISCUSSION

The following is undisputed and is therefore **FOUND** as **FACT**.

Appellant, Mitchell Kafton, has been a member of the Jackson Township Police Department since August 18, 1997. On September 30, 2010, while visiting the

Department, the mayor of Jackson Township allegedly made a remark that resulted in a bias investigation. Kafton is accused of having accessed and viewed certain supplemental reports related to the bias investigation while on duty on October 18, 2010, despite lacking specific authorization to do so. The next day, an anonymous letter about the investigation was faxed to the Tri-Town News, a local newspaper.

Department computer records from November 2, 2010, showed that certain reports from the investigation were accessed and printed from the police station. The next day, a reporter for the Asbury Park Press emailed chief of police Matthew Kunz that the newspaper had received two copies of what was represented to be confidential reports regarding the investigation and sought comment but which was not provided. On November 4, 2010, the Asbury Park Press published an article that contained information from the confidential reports.

Upon learning of the article Chief Kunz ordered Capt. David Newman to conduct an internal investigation to determine the source of the leaked information. Over the next several months, Captain Newman interviewed persons of interest and reviewed relevant records. On November 9, 2010, Sgt. John Giovanetti informed Captain Newman of a conversation he had with Kafton around October 29-31, 2010 during which he warned Kafton not to view or print any reports related to the investigation, but that Kafton admitted that he had already viewed the supplemental reports because he thought his brother, a Jackson Township councilman and considered a political adversary of the mayor, was mentioned therein.

On February 1, 2011, Captain Newman notified Kafton that an Internal Affairs complaint had been filed against him in connection with his unauthorized access to confidential police information. On March 8, 2011, Captain Newman interviewed Kafton. On April 6, 2011, Captain Newman completed his investigation and recommended in a report that Kafton be charged with violations of various regulations under the Civil Service Act and the Jackson municipal code.

On April 25, 2011, Chief Kunz reviewed the report, signed Captain Newman's recommendation, and determined that a fifteen-day suspension should be imposed on Kafton. On April 29, 2011, Chief Kunz signed a PNDA proposing a fifteen-day suspension. On May 4, 2011, Kafton received the PNDA, which stated that Kafton had admitted that while on duty on October 18, 2010, he accessed and viewed reports related to the investigation involving the mayor; that Kafton viewed the reports because he learned that a member of his family may have been somehow involved in the matter; and that information about the investigation was leaked to a local newspaper a day after Kafton accessed the reports. Kafton adamantly denied being the source of the leak, but since Kafton was not involved in the investigation and had no official reason to view the reports, he was found to have conducted personal business while on duty.

The report that was provided to the newspapers was mistakenly not "locked down" with restricted access in the police computer system, and as a result the report was accessible via computers utilized by Department personnel. Reports maintained on the computers may be viewed by officers during the normal course of their shifts in order to obtain general information concerning what has transpired on other shifts. There is no formal regulation, written or otherwise, against police personnel viewing the reports in the computer. Even after the Internal Affairs investigation, it still could not be ascertained how the police report concerning the incident in question was received by the newspapers, and, as a result, no one from the Department was charged with providing this information to the newspapers.

TESTIMONY

Sgt. John Giovanetti

Sgt. John Giovanetti testified for the respondent. He has been with the Department for twelve and a half years, and is assigned to the midnight shift. He testified that he was aware of the incident regarding the mayor and his statement regarding a certain segment of the population, and that the mayor's comment was common knowledge throughout the Department. Giovanetti stated that on or about

October 29, 2010, while working on the midnight shift with appellant, they had a conversation during which Kafton asked him what would happen if someone printed reports pertaining to the incident involving the mayor that was being investigated, at least one of which had been "locked down." Kafton explained to Giovanetti that he had heard that his brother, who was a councilman, might have been mentioned in a report, and that he wanted to look at the report and determine what had been said, if anything. Sergeant Giovanetti testified that he told Kafton, in no uncertain terms, not to print any reports pertaining to the investigation, and that if those materials were ever released to the public, the person who released them could be in very serious trouble, and possibly lose his job. The appellant then told him that he had already reviewed some of the reports not "locked down" but he had not printed anything. Giovanetti stated that he never viewed the reports himself; however, at some point thereafter he saw a newspaper article concerning the incident, and remembered the conversation he had with the appellant. He arranged a meeting with the appellant and told him that he was going to inform the Department of their conversation, and appellant understood and did not object. Sergeant Giovanetti spoke to Captain Newman, who was conducting an internal investigation of the matter. Newman instructed him to write a report concerning his conversation with Kafton. (R-1.)

On cross-examination, Giovanetti confirmed that the appellant never said that he had printed the reports. Giovanetti said that this was the first time in the years that they had been keeping reports on the computer system that reports had been "locked down," or secured. It was his understanding that reports had been generated because of statements made by the mayor, and that it apparently had become a very sensitive matter. The mayor purportedly was disturbed that a newspaper had obtained a Department report that had not been secured in the computer, but rather was made part of a supplemental report that was able to be viewed by anyone in the Department. Giovanetti admitted that he knew that three lieutenants were being sued by the mayor regarding this incident. He testified that he never knew of any order or regulation prohibiting officers from reviewing reports that were maintained on the computer system.

Matthew Kunz

Chief Matthew Kunz testified for the respondent. He stated that he was informed either by the Township business administrator or the mayor's office that a report had been generated involving an incident between the mayor and other individuals. He ordered the report to be locked down because of its sensitivity, as it involved elected officials. He gave this order to Sergeant Clark, who was in charge of locking down the reports; however, one supplemental report apparently was not locked down, and was accessible on the computer to any officer who worked for the Department. This report was provided to a local newspaper, which according to the chief was prohibited, and indicated a leak in the Department. The Township business administrator contacted the chief and asked how the newspaper could have received the report, and, accordingly, the chief ordered an Internal Affairs investigation. The investigation was conducted by Captain Newman, who prepared a report. (R-3.) It was determined that officers had had access to a supplemental report that should have been locked down. The appellant had admitted to viewing the report, having heard that his brother might have been mentioned in the report, but he had denied releasing the report to anyone outside the Department. Kunz testified that Internal Affairs did not ascertain who released the information to the newspaper. However, because of the appellant's admission that he had viewed the police report for strictly personal reasons, it was determined that appellant had been conducting personal business on Department time without permission, which constituted unbecoming conduct.

The chief testified that he was aware that the Department's computers were used by members of the Department during the course of their shifts, but rejected the concept that all members were free to review all reports. They were expected to access only the information that they needed for police business. He emphasized that there are daily briefings for the officers before they begin work, during which necessary information is provided to the officers. Therefore, it would not be necessary to view information on the computers. However, on cross-examination he admitted that there was no regulation or ordinance that specifically barred any member of the Department from viewing reports that were accessible on the computer system, although he opined

that the officers should be performing their police duties rather than reviewing reports on a computer. He also admitted that in addition to appellant, another individual, Sgt. Lisa Matusz, also viewed the reports pertaining to the mayor's comment, but her only discipline was counseling. He opined that based on appellant's actions, which he felt were out of the ordinary, and his prior disciplinary history, a suspension was justified.

Sgt. Frank Mendez

Sgt. Frank Mendez testified for the appellant. He has worked for the Department for twelve years, and he stated that at the time of the incident he may have been working in the Detective Bureau. He testified that police reports were maintained on the computer, where they were accessible for viewing. Mendez said that the reports dealing with the incident involving the mayor were the first reports that had been "locked." There had never been a prohibition on officers viewing reports. He asserted that officers were encouraged to look at reports, in case there were things that they needed to know while on patrol. Mendez said that officers' access and view reports even while parked for the purpose of showing a police presence. An officer could review reports to get himself up to speed regarding events of the day, and learn about incidents that occurred before he reported to work. He also said that the incident involving the mayor was common knowledge in the watch commander's office. On cross-examination, he admitted that he did not read any report concerning the incident, but said that there could be multiple reports regarding one incident. He also agreed that public perception of the Department is important; positive public perception helps to facilitate the everyday business of the Department.

Anthony Senator

Anthony Senator testified for the appellant. He stated that he spent twenty years with the Jackson police department, and another eleven years with other departments, representing thirty-one years of police work. He felt that it was important that the police were visible to the public, meaning they would sometimes be parked in public areas. If

an officer were parked in a shopping center or similar area to show police presence, the officer could be reviewing information on the computer to familiarize himself with incidents that happened around town and get himself up to speed on any incidents that happened before he came on duty. He said that the police department had the ability to lock reports on the computer, and that if a report were unlocked; it was something that officers could view. He confirmed that there was no directive not to review reports. He was aware of two other sergeants who also viewed the report reviewed by appellant, and neither of them had been charged. His belief was that the matter was politically motivated, and that pressure was being put on the police department, as there was general knowledge about the incident. On cross-examination, he indicated that he would not read reports, because he was not a supervisor, but that there were no prohibitions or regulations regarding reading reports.

After reviewing the documents submitted and the testimony of the witnesses, I find that the following are the pertinent facts of this case.

Sometime before October 18, 2010, an incident occurred in the watch commander's office in the Jackson Township Police Department wherein an elected official allegedly made some insensitive remarks regarding a particular segment of the population. A complaint was made by certain individuals in the Department, and, accordingly, an investigation was ordered by the police chief. The chief ordered that the investigation reports were to be "locked down," and were not to be accessible in the Department's computers or to the general public. A supplemental report regarding the incident inadvertently was not locked down, and was maintained in the Department computer system, which could be accessed by members of the Department at the station or in the police vehicles.

The appellant acknowledged to Sgt. John Giovanetti that he had looked at a report of the incident for purely personal reasons, to see if it contained information about his brother. He asked Giovanetti whether or not he could print this report. Giovanetti told appellant that he should not print any information pertaining to the incident, and that doing so would be a serious matter. The appellant indicated that he

had not printed any reports concerning the incident. Soon thereafter, a letter about the accessible report was received by a local newspaper and excerpts from the report leaked to the Asbury Park Press, which ran a story on the incident. Thereafter, the chief of police, upon the request of the Township business administrator, ordered an Internal Affairs investigation regarding how this information had been leaked to the newspapers. An investigation was conducted by Captain Newman, but he was unable to ascertain how the report was leaked.

In addition to appellant, other officers had viewed the report that inadvertently had not been locked down, and one of those officers received a discipline of counseling. There is even today no memorialized Department policy or regulation prohibiting officers from viewing reports that are accessible on Department computers.

LEGAL DISCUSSION AND CONCLUSIONS

The Civil Service Act, N.J.S.A. 11A:1-1 et seq., governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576, 581 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). The Act sets forth that State policy is to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). To carry out this policy, the Act authorizes the discipline (and termination) of public employees. N.J.S.A. 11A:2-6.

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. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied 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, 149 (1962); In re Polk, 90 N.J. 550, 561 (1982). 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). Therefore, 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).

In the instant matter, the sustained charges listed in the FNDA were: (1) Jackson Township Code: 24-31(b)—conduct unbecoming a police officer; (2) N.J.A.C. 4A:2-2.3(a)(6)—conduct unbecoming a public employee; (3) Jackson Township Code: 24-32(23)—insubordination; (4) N.J.A.C. 4A:2-2.3(a)(2)—insubordination; and (5) Jackson Township Code: 24-32(29)—conducting personal business while on duty.

The term "conduct unbecoming a public employee" has been described as an elastic phrase that includes "'conduct which adversely affects the morale or efficiency'" of the public entity or "'which has a tendency to destroy public respect for [government] employees and confidence in the operation of [government] services.'" In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted); see Karins v. Atl. City, 152 N.J. 532 (1998).

Black's Law Dictionary 870 (9th ed. 2009), defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation.

> "Insubordination" is not defined in the agreement. Consequently, assuming for purposes of argument that its presence is implicit, we are obliged to accept its ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended.

[Ricci v. Corp. Express of the East, Inc., 344 N.J. Super. 39, 45 (App. Div. 2001) (citation omitted).]

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.

Maintenance of strict discipline is particularly important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64 (App. Div.), certif. denied, 59 N.J. 269 (1971); Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell, supra, 115 N.J. Super. at 72. Police officers are held to a high standard of conduct both on and off the job. In re Phillips, 117 N.J. 567, 577 (1990). A police officer "represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966).

With regard to the charges of violation of Jackson Township Code sections 24-31(b)—conduct unbecoming a police officer, and 24-32(23)—insubordination, as well as N.J.A.C. 4A:2-2.3(a) (6)—conduct unbecoming a public employee, and (4) N.J.A.C. 4A:2-2.3(a) (2)—insubordination, I **CONCLUDE** that the Department has not proven violations by appellant. The Department did not submit any formal or written policy or regulation prohibiting officers from viewing accessible reports on the Department's computer system.

However, with regard to the charge of violation of Jackson Township Code section 24-32(29)—conducting personal business while on duty, I **CONCLUDE** that appellant was conducting personal business when he viewed a supplemental report regarding the investigation involving the mayor, which inadvertently had been left accessible, for the sole reason that he wanted to see if his brother was mentioned in the report. Although appellant's witnesses testified that officers were permitted, and

perhaps even encouraged, to review reports of incidents that they had not been involved with in order to keep abreast of what was happening in the Township, appellant admitted that he viewed the report on Department time for strictly personal reasons, which constitutes a violation of the Township Code. The Department prohibits conducting personal business on Department time, and, as with any business, expects employees to be working on their assignments while on duty. Appellant was not prohibited from viewing the report generally, as it had not been locked down and it was accessible to the entire Department, but he was prohibited from doing so for personal reasons while on duty.

PENALTY

Once a determination is made that an employee has violated a statute, regulation or rule concerning his employment, the concept of progressive discipline must be considered. W. New York v. Bock, 38 N.J. 500 (1962). However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate regardless of the individual's disciplinary history. Henry v. Rahway State Prison, 81 N.J. 571 (1980). Progressive discipline is not a "fixed and immutable rule to be followed without question." Carter v. Bordentown, 191 N.J. 474, 484 (2007). Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished record. Ibid.

Kafton's prior disciplinary record reflects that he was cited four times for what appears to be generally performing his duty in a lackluster manner, or refusing a job assignment, for which he received oral reprimands in December 2009 and April 2010, and a one-day suspension in October 2010.

The Department has not shown any aggravating factors that would warrant imposition of a suspension for the one violation of the Township code that has been sustained in this matter. There is no evidence that appellant's viewing of the report, which the Department acknowledged that it failed to "lock down," for personal reasons

on Department time caused him to be derelict in his job duties. Nor has his viewing of the report been shown to have been connected to the leak to the newspapers. Further, it was not disputed that other individuals also viewed the report, and, in at least one case, received only minor discipline. Under the circumstances of this case, I **CONCLUDE** that an oral reprimand is the appropriate penalty.

ORDER

It is hereby **ORDERED** that the charge of the violation of Jackson Township Code section 24-32(29)—conducting personal business while on duty is **AFFIRMED**, and the remaining charges against the appellant are **DISMISSED**. It is further **ORDERED** that the penalty be modified to an oral reprimand.

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, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 13, 2013
DATE

Ronald W. Reba
RONALD W. REBA, ALJ

Date Received at Agency: 11/13/2013

Date Mailed to Parties: 11/14/2013

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LIST OF WITNESSES

For Appellant:

Frank Mendez
Anthony Senator

For Respondent:

John Giovanetti
Matthew Kunz

LIST OF EXHIBITS

For Appellant:

P-1 Report Logs

For Respondent:

R-1 Investigation Report, Sgt. John Giovanetti
R-2 Final Notice of Disciplinary Action, dated July 8, 2011
R-3 Internal Affairs Investigation Report