A-4

STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Thomas Coghan,
Middlesex County

CSC Docket No. 2015-1798
OAL Docket No. CSR 00812-15

ISSUED: JUN 18 2015 (LDH)

The appeal of Thomas Coghan, a Sheriff's Officer with Middlesex County, of his removal, effective December 8, 2014, on charges, was heard by Acting Director and Chief Administrative Law Judge Laura Sanders (ALJ), who rendered her initial decision on May 4, 2015. Exceptions were filed on behalf of the appointing authority and the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on June 3, 2015 accepted and adopted the Findings of Fact as contained in the initial decision. However, the Commission did not adopt the ALJ's recommendation to modify the removal to a 60 working day suspension. Rather, the Commission imposed a 90 working day suspension.

DISCUSSION

The appointing authority presented the appellant with a Final Notice of Disciplinary Action (FNDA) which indicated that he was removed on charges of conduct unbecoming a public employee and violation of various County rules and policies. Specifically, the appointing authority asserted that the appellant was untruthful in regard to improperly requesting paid military leave for four days in 2013. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In her initial decision, the ALJ indicated that it was undisputed that the appellant had attended Air National Guard training (military training) on April 18 and 19, 2013. However, he did not appear for military training on June 20 and 21, 2013 and he was not at work on those days. The ALJ noted that the record evidenced a March 9, 2013 Request and Authorization for Excusal from Scheduled Unit Training Assembly (UTA)/Annual Training in which the appellant requested to attend training on April 18 and 19, 2013, instead of June 20 and 21, 2013, since he had scheduled training with the Middlesex County Urban Search and Rescue Team for confined space and trench rescue training on June 20 and 21, 2013. The record also evidenced a March 28, 2013 notification from the Department of the Air Force (DAF) informing the appointing authority that the appellant would be attending military training from June 20, 2013 through June 23, 2013 and an April 9, 2013 notification from DAF informing the appointing authority that the appellant would be attending unit training on April 18 and 19, 2013. The ALJ also noted that the appellant submitted an April 8, 2013 Paid Military Request form to the appointing authority for "Active Duty Training" from June 20, 2013 through June 23, 2013 and an April 9, 2013 Paid Military Request form for "Active Duty Training" from April 18, 2013 through April 21, 2013. The ALJ noted that on June 27, 2013, the appellant filed a series of memoranda requesting vacation leave for June 20 and 21, 2013. The appellant stated, in part, that he was requesting that vacation leave be utilized for June 20 and 21, 2013 which he had previously requested paid military leave, but he was unable to attend as he was attending search and rescue training and he forgot he had submitted a request for paid military leave. In a separate memorandum, the appellant noted that he did not attend the search and rescue training.

The appellant testified that he had not attended the urban search and rescue training since he had arrived 15 minutes late to the training on June 20, 2013 and was informed that he was not allowed to "sign in." The appellant explained that because he used vacation leave for the volunteer search and rescue unit, he did not go to work once he was not allowed to attend the training because he believed he was on vacation. However, he maintained that he had no recollection of what he did on those two days. The appellant also testified that as a member of the National Guard, he is entitled to 90 days of paid military leave per year, regardless of the reason. Rafael Morales, the appellant's Air National Guard squad leader, and a Sheriff's Officer with the appointing authority, testified that Air National Guard members do not receive paid military leave for UTA, but that they would get paid when they receive "orders." Based on the foregoing, the ALJ concluded that the appellant's testimony lacked credibility. In this regard, the ALJ noted that in the appellant's first attempt to remedy the situation and request vacation leave, he lied and stated that he "was obtaining training" even though he was not. However, the ALJ found that the appellant erroneously believed that he was entitled to paid military leave for the UTA, which he did attend on April 18 and 19, 2013, and

therefore, found that removal was too harsh a penalty. Rather, she recommended a 60 working day suspension.

In its exceptions, the appointing authority argues that the appellant deliberately submitted his request for paid military leave for June 20 and 21, 2013, instead of having to utilize vacation leave for those days. The appointing authority argues that his attempt to rectify the matter after his leave was due to Morales investigating the matter. Moreover, the appointing authority contends that the appellant's claim that he was at search and rescue training on June 20 and 21, 2013, was not credible as he could not recall what he was doing on those days. Further, once he was not allowed to attend the search and rescue training for being late, it maintains that he should have immediately reported to work at the Sheriff's Office. Thus, the appointing authority argues that removal is appropriate because of the egregiousness of the appellant's actions.

In the appellant's exceptions, the appellant argues that the ALJ's determination that the appellant attempted to get paid military leave, instead of using his vacation time was not supported by the record. The appellant argues that he submitted paperwork to the appointing authority regarding the change in his military training from June to April. However, it was only on June 27, 2013 that he first became aware that June 20 and 21, 2013 were still entered in the Sheriff's Office system as paid military leave, so he sent a series of memoranda to his superior officers alerting them that the time utilized should have been vacation leave. Lastly, the appellant contends that the appointing authority offered no evidence or testimony to rebut his version of events. Thus, he maintains that the ALJ erred when she concluded that he was guilty of conduct unbecoming a public employee.

Based on its *de novo* review of the record, the Commission agrees with the ALJ that the charge of conduct unbecoming a public employee should be upheld. In her initial decision, the ALJ found, after an opportunity to assess the witnesses and their testimony, that the testimony of the appellant was not credible. In this regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was otherwise

arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). In this case, there is nothing in the record or in the appellant's exceptions which convinces the Commission that the ALJ's assessment of the credibility of the witnesses, including the appellant, was not based on the evidence, or was otherwise in error, or that her conclusions were improper. In this regard, the ALJ found that the appellant had lied in his first attempt to change his time from paid military leave to vacation leave.

However, the Commission does not agree with the ALJ's recommendation to modify the removal to a 60 working day suspension. In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. Moreover, 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 an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007).

In the instant matter, the ALJ concluded that removal was too severe since, although the appellant's conduct was inappropriate, the appellant did not know that unit training was not eligible for paid military leave, and thus did not originally attempt to improperly utilize paid military leave. However, regardless, the charge that was upheld is serious. In this regard, the appellant's actions were highly deceptive as he neither notified the appointing authority of the change in his military training from June to April nor did he correct his military leave request on the Sheriff's Office timekeeping system before the June dates. Similarly, he did not immediately report to his superior officers of his availability when he was "turned down" from the volunteer training on June 20, 2013. The Commission notes that the appellant was on a prior approved vacation from June 17 through June 19, 2013, and taking off June 20 and 21, 2013 would give him a full paid week off. Although the Commission agrees that removal is too harsh, it does not agree that a 60 working day suspension is sufficient. In this regard, it notes that the appellant has a history of absenteeism and his disciplinary history evidences a 10 working day suspension. Lastly, Sheriff's Officers, like municipal Police Officers, hold highly visible and sensitive positions within the community and are therefore, subject to a higher standard of conduct and responsibility than what is required of other public employees. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert.*

denied, 47 *N.J.* 80 (1966). *See also In re Phillips*, 117 *N.J.* 567 (1990). Therefore, based on the totality of the record, the Commission concludes that a 90 working day suspension is appropriate.

Since the appellant's removal has been modified to a 90 working day suspension, the appellant is entitled to mitigated back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. Mar. 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, the appellant was found guilty of the charges and the Commission only modified the penalty. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issue concerning back pay is finally resolved. In the interim, as the court states in *Phillips*, *supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the appointing authority's action in imposing a removal was not justified. Therefore, the Commission modifies the removal to a 90 working day suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority from the end of the 90 working day suspension to the date of actual reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the

appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 3RD DAY OF JUNE, 2015

Robert M. Czech

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 00812-15
AGENCY DKT. NO. N/A

IN THE MATTER OF THOMAS COGHAN,
MIDDLESEX COUNTY,

Lawrence Y. Bitterman, Esq., for appellant Thomas Coghan

Benjamin D. Leibowitz, Deputy County Counsel, for respondent Middlesex County (Thomas F. Kelso, County Counsel)

Record Closed: April 23, 2015 Decided: May 4, 2015

BEFORE **LAURA SANDERS**, Acting Director and Chief ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Sheriff's Officer Thomas Coghan ("appellant" or "SO Coghan") appeals the action by Middlesex County ("the respondent" or "the County") terminating his employment on grounds of conduct unbecoming, and violation of various County rules and policies. Specifically, he is charged with lack of truthfulness in regard to improperly requesting paid leave for four dates in 2013. The appellant contends that he has always understood the policy to call for payment during military leaves, and that when he discovered an oversight, he took prompt action to fix the mistake, such that no discipline is warranted here.

Additionally, as a threshold matter, he raises the legal question of whether the County can take any action, having waited past the statutory deadline to act. This argument is based on the fact that the initial Preliminary Notice of Disciplinary Action (PNDA) provided to him on September 16, 2014, (R-16) improperly stated that he was charged with violations in relation to military duty in April and June 2014. It was not until November 7, 2014, after the November 6, 2014, departmental hearing, that an amended PNDA addressing the correct dates in April and June 2013 was issued. Given that the County had notice at least by August 28, 2014, of the likelihood of charges, the amended PNDA is well past the 45-day deadline set by statute. The County contends that the 45-day provision applies to violations of rules, but not to misconduct, and, in any case, appellant was provided sufficient due-process rights to comply with the statute.

The County released a Final Notice of Disciplinary Action on December 8, 2014, terminating appellant effective December 8, 2014. SO Coghan appealed the termination to the Office of Administrative Law (OAL), where the appeal was filed on January 8, 2015 (N.J.S.A. 40A:14-202(d)). It was heard on March 23, 2015, and the record left open to April 23, 2015, for receipt of a copy of the recording of the County's investigative interview (J-1), and closing summations.

FACTUAL DISCUSSION AND FINDINGS

With regard to the threshold issue regarding timing, the parties have stipulated to additional dates beyond those recited in the procedural history. They agree that in 2013, the file and investigation conducted by the County Sheriff's Office was forwarded to the Middlesex County Prosecutor's Office for evaluation. It was returned to the County on August 20, 2014, and SO Coghan was interviewed by the County on August 28, 2014. The first PNDA, identifying the dates in 2014, was released on September 16, 2014, which was twenty-seven days from August 20, 2014. The second PNDA, incorporating the correct year of 2013, was given to appellant on November 7, 2014, which was seventy-nine days after August 20, and seventy days after August 28, 2014.

The substantive factual and legal dispute concerns whether SO Coghan knowingly filed paperwork improperly requesting County pay during four days of state Air National Guard duty in April and June 2013. The parties agree that appellant did attend Air National Guard training on April 18 and 19, 2013, and that he did not do so on June 20 and 21, 2013. They also agree that he was not at work in the Sheriff's Office on June 20 and 21, 2013. The leave requests and supporting documentation are as follows:

- March 9, 2013—Request and Authorization for Excusal from Scheduled UTA/Annual Training filed with the Department of the Air Force seeking approval to attend training on April 18 and 19, 2013, as a substitution for training scheduled for June 20 and 21, 2013. The justification section states, "I have scheduled training with the Middlesex County Urban Search and Rescue Team for confined space and trench rescue on 20, 21 June 2013." (R-1.)

- March 28, 2013—Letter from the Department of the Air Force notifying the County that SO Coghan would be attending Unit Training Assembly from June 20, 2013, through June 23, 2013. (R-3.)

- April 8, 2013—Paid Military Leave Request Form filed by SO Coghan for "Active Duty for Training" from June 20, 2013, through June 23, 2013. (R-2.)

- April 9, 2013—Letter from the Department of the Air Force notifying the County that SO Coghan would be attending Unit Training Assembly from April 18, 2013, through April 19, 2013. (R-5.)

- April 9, 2013[1]—Paid Military Leave Request Form filed by SO Coghan for "Active Duty for Training" from April 18, 2013, through April 21, 2013. (R-4.)

[1] R-4 reflects a signature date of April 9, 2012, but is treated here as if properly dated April 9, 2013.

Testimony from Rafael Morales, a Middlesex County sheriff's officer who also happened to be appellant's squad leader in the state Air National Guard, established that for whatever reason, Coghan's request to switch April attendance for June attendance was not sent to him for approval, as it should have been. Consequently, Morales said, on June 20 and 21 he was trying to figure out where his missing squad member was. Eventually, Morales spoke with First Master Sergeant Georgeson, who located the request form, which Georgeson, and not Morales, had approved.

James Massano, another County sheriff's officer, also served in the Air National Guard until his retirement from the unit on January 1, 2014. Massano testified that having spoken to Georgeson about appellant's absence from the drill on June 20 and 21, he checked to see if appellant was at work on those days. Discovering that appellant was not, Massano talked to him sometime after the June exercise, inquiring as to whether he ever changed the military-leave designation in his request to the County.

A series of memoranda concerning vacation on June 20 and 21, 2013, was filed by the appellant with his chain of command. These are:

- A June 27, 2013, memo to Captain Chaney stating, "I am requesting vacations [sic] days be deducted for 6-20-13 and 6-21-13 which previously was scheduled as military leave. I was obtaining training and was unable to attend my military unit training assembly." (R-6.)

- A memo on the same date to Lieutenant Rizzi, stating, "I was scheduled to attend training by the New Jersey State Police Task Force-1 for the Middlesex County Urban Search and Rescue Team on June 17–21." (R-7.)

- Also on June 27, 2013, a memo to Chief Warrant Officer Sandra Mackiewicz re: "Discrepancy of days." It states:

  > I was scheduled to attend training by the New Jersey State Police Task Force-1 for the Middlesex County Urban Search

> and Rescue Team on June 17–21. I was also scheduled for a four day military drill from June 20–23. I had originally put in for the 20–21 as military. My unit granted me these 2 days off at which time I forgot to withdraw from military leave and enter as vacation. Upon review of my info share record I found this discrepancy and immediately notified my supervisor Lt. Rizzi and requested an opportunity to have 2 vacation days be deducted to compensate for the days. The Middlesex County Urban Search and Rescue Team is an all volunteer organization made up of Firefighters, EMT's, and Law Enforcement personnel under the State Fire Marshall out of Sayreville Fire Academy.
>
> [R-8.]

- On June 28, 2013, another memo to CWO Mackiewicz, on "Discrepancy of days." In it he repeated that he was scheduled to attend the rescue team on June 17 through 21, and had

> requested vacation days for June 18–19 through a request form due to the days being blacked out on or around June 6 to Sgt. Hnatowski which were approved. I was also scheduled for a four day military drill from June 20–23. I had originally put in for June 20–21 in the month of March as military. After a request my unit granted me these 2 days off to attend the training on April 20 at which time I forgot to withdraw from military leave and enter as vacation. I served a period of suspension from June 10–17. As time elapsed and I served my suspension without review of my info share I was unaware of the fact that I was still listed as being on military. When I looked on my calendar I had written the word off on each day for the week. Upon my return to work and my review of my info share record I found this discrepancy and immediately notified my supervisor Lt. Rizzi and requested an opportunity to have 2 vacation days be deducted to compensate for the days.
>
> [R-9.]

Appellant testified that he did not actually attend the urban-search-and-rescue training. He said he arrived fifteen minutes late at the eight a.m. training on June 20, and was told he could not sign in because he had missed the safety briefing. Since the search-and-rescue unit is purely voluntary and he uses vacation time to attend, once it

fell through on June 20 he did not go to work that day or the next because he believed he was on vacation. He had been on suspension from June 10 to Monday, June 17, and already had approved vacation for Tuesday, June 18, and Wednesday, June 19, of that week. (Tr. at 47, 109; R-9.) He maintained that he had no recollection of what he did on those two days. (Tr. at 112.)

Appellant returned to work on June 25, and testified that he was looking at the County computer system, known as InfoShare, to catch up on things, when he realized that the June dates were still entered as military. He "kind of panicked" and called his superior officer, Lieutenant Rizzi, who instructed him to do a memo. (Tr. at 100.) He could not remember exactly who directed him to do the other follow-up memos, but he did recall the chief yelling and cursing at him on the phone about it. (Tr. at 100.) Asked why, on June 27, he wrote in the first memo that he "was obtaining training," when he clearly had not trained that day, he denied any intent to mislead, characterizing the phrasing as "a poor choice of word." (Tr. at 110.) Later, he acknowledged that prior to his determination to check InfoShare, he received a call from First Sergeant Georgeson asking whether June 20 and 21 were still listed as military leave. (Tr. at 119.)

The second issue in regard to both the June and April leaves was whether SO Coghan knew that he was not due any pay for that type of National Guard service. The appellant testified that "anybody that's in the National Guard, whether it's Army or Air [is] entitled to 90 working days each year." (Tr. at 90.) He also said, "Any time I'm in that uniform I'm on active duty." (Tr. at 142.) As far as he knows, any time he is in uniform, for up to ninety days, he is entitled to get paid because he is on active duty. The County contends that there is a difference between the type of drill known as "Unit Training Assembly" and the kind called "orders," and that as a longtime member of the National Guard the appellant knew that the County does not pay for unit Training Assembly, but does pay for orders.

Detective Bruce Palomba testified that he has been with the Middlesex County Sheriff's Office since June 1999. When the file on SO Coghan's leave returned from the Prosecutor's Office, Palomba said, he served the appellant with notice concerning charges related to June 20 to June 28, 2013, (R-10) sometime after August 18, 2014,

but before August 28, 2014. The charges related to April 18 and 19, 2013, (R-11; R-12) were served when appellant came to the interview on August 28, 2014, with his attorney.

In that interview (J-2), Palomba is heard questioning appellant extensively about whether regular drill counts as active duty. At one point, appellant notes that regular drill is generally on weekends; these just happened to extend into Thursday and Friday as well.

SO Morales testified that it is his understanding that state Air National Guard members do not get paid for what is known as "Unit Training Assembly" but do get paid when they receive orders.

The County submitted three documents addressing pay policy. A page from the County's Policy manual, entitled 1:13-5 Military Leave, states that National Guard members "required to engage in active duty, shall be granted a military leave of absence with pay . . . of such time as is required by State and Federal law." (R-15.) The County also provided a Department of Community Affairs Local Finance Notice from 2004, entitled, "Review of Military Leave for Public Employees." Near the bottom of page two in a six-page document, a single paragraph addresses the difference between active duty and other duty. "A separate category of duty is Inactive Duty Training, commonly known as 'drill.' This usually occurs on weekends, but can take place on any day or days of the week and at any time during the year. There is no statutory obligation or employee entitlement to receive employer pay for Inactive Duty Training." (R-14.) The advisory makes no mention of Unit Training Assembly, nor does the County policy. The County also notes that N.J.A.C. 5A:2-2.1(b) states that "Leaves of absence with pay are not authorized for Inactive Duty Training [which] is defined by Army, Air Force, National Guard and State Regulations and includes, but is not limited to: 1. Unit Training Assemblies (UTA); This training is commonly known as weekend drill," or for training which is a makeup period for a UTA. N.J.A.C. 5A:2-2.1(b)(2), (3); (R-13). The County had no evidence that it ever has provided a copy of the civil service regulation to its employees. Since the time that SO Coghan was charged in relation to seeking payment for Unit Training Assembly, the County has changed its form. Where

previously the "Paid Military Leave Request Form" (R-2) had three lines to check some kind of active duty, one line for annual training, and one for "other," "other" has been replaced with "Unpaid/Drill/UTA/RUTA." (A-1.)

Whether SO Coghan's failure to rescind his request for military leave until June 27 was related to a simple oversight, as he stated, or was deliberate, as the County charged, requires a credibility determination. The determination of factual findings thus requires a weighing of the credibility of the witnesses, i.e., "the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "'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.) (citation omitted), certif. denied, 10 N.J. 316 (1952).

SO Coghan knew almost immediately upon his return to work at the end of June 2013 that he was in trouble over his absence the prior week. Nonetheless, he maintained that he has no recollection whatsoever of his whereabouts in the time period for which he was in trouble. This lacks credibility, since the mere fact that he was in trouble over it was likely to burn whatever he was actually doing into his memory. Moreover, he had no trouble remembering his annoyance over the manner in which his superior officer expressed unhappiness about his conduct in that period. Additionally, his first attempt at remedying the situation involved a lie. He wrote that he "was obtaining training," when he was not. These lapses, in turn, affect his credibility with regard to the April 8 and April 9 leave-request forms. Nothing about them indicates that the April 9 is intended to rescind the April 8 request. Even assuming that he really did plan to attend the rescue training, this has the appearance, and I **FIND**, that he was seeking to get paid for what should have been vacation time.

With regard to the allegation that he knew that Unit Training Assembly did not count as paid duty, the County has not met its burden. The County's policy leaves it to the employee to figure out what active duty is under the requirements of state and federal law. The Department of Community Affairs communication never mentions Unit

Training Assembly, and even if the County had given the notice to its employees (and there was no evidence it had), the "Active Duty for Training" category, which is paid, "[e]ncompasses a wide variety of training/duty other than annual training or active duty." (R-14 at 2.) The civil service regulation spells things out in detail, but there was no evidence that the County has ever shared that regulation with ordinary employees. While SO Morales testified that he is aware of the difference between Unit Training Assembly and the paid categories, he is also a National Guard officer, with the experience and knowledge that comes with his position. Additionally, the County did receive copies of the orders, which clearly stated that they were for Unit Training Assembly. For these reasons, I am persuaded that SO Coghan did believe, however erroneously, that he was entitled to pay for that kind of duty under the County's policy.

LEGAL ANALYSIS AND CONCLUSIONS

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; N.J.A.C. 4A:2-2.3. 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 (1962); In re Polk, 90 N.J. 550 (1982).

Sheriff's Officer Coghan argues that the County failed to comply with the 45-day requirement set down in N.J.S.A. 40A:14-147, and, therefore, the proposed discipline must be dismissed. The statute at issue states, in pertinent part:

> A complaint charging a violation of the internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. The 45-day time limit shall not apply if an investigation of a law enforcement officer for a violation of the internal rules or regulations of the law enforcement unit is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws

> of this State. The 45-day day limit shall begin on the day after the disposition of the criminal investigation.
>
> [N.J.S.A. 40A:14-147.]

Here, no matter whether one counts August 20 (the day the file returned from the Prosecutor's Office) or August 28 (the day of the Internal Affairs interview) as the date the County had sufficient information to file, the initial PNDA was timely, as it was released twenty-seven days after August 20, 2014. Similarly, even with the best date of August 28, the second PNDA was well beyond time, as it was given to appellant on November 11, 2014, which was seventy-four days after August 28.

The County argues that the 45-day period does not apply at all, because SO Coghan is accused of misconduct, not violation of an internal rule or regulation. See McElwee v. Borough of Fieldsboro, 400 N.J. Super. 388, 394 (App. Div. 2008); In re Carter, No. A-4808-11 (App. Div. January 28, 2015), <http://njlaw.rutgers.edu/collections/courts/>. Additionally, it contends that the fact that the correct dates were addressed at the departmental hearing on November 6, 2014, demonstrates due process, such that the statute's requirement of dismissal is not triggered.

Conduct unbecoming is a term that encompasses actions adversely affecting the morale or efficiency of a governmental unit or having a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Attempting to extend vacation time by treating it as military time is a form of lying, which the Civil

Service Commission repeatedly has determined to be misconduct. In re Hubbs, CSV 6528-06, Initial Decision (August 31, 2007), modified, CSC (October 25, 2007) (sixty-day suspension for failing to testify truthfully at a deposition); see also In re Manson, CSV 02390-08, Initial Decision (September 5, 2008), aff'd, CSC (October 10, 2008) (twenty-day suspension for police officer who failed to be truthful to Internal Affairs regarding his whereabouts on a particular date); see also, e.g., In re Rowe, CSV 3470-05, MSB (November 21, 2007) (police officer with a poor disciplinary record received a twenty-day suspension for neglecting duty and falsifying charges).[2] Therefore, I **CONCLUDE** that the County has met its burden with regard to the conduct-unbecoming charge, and that because the charge is misconduct, it is not subject to dismissal for the failure to adhere to the 45-day requirement.

With regard to penalty, in general, principles of progressive discipline apply. W. New York v. Bock, 38 N.J. 500, 523 (1962). SO Coghan's record includes five prior notices of discipline related to some form of absenteeism, including two written warnings, two one-day suspensions, and a three-day suspension. It also includes a ten-day suspension pursuant to a settlement of an "other sufficient cause" standard-of-conduct matter. In some instances, an infraction is so serious that termination is warranted even without prior discipline. In re Carter, 191 N.J. 474, 484 (2007) (citing 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)); see also In re Herrmann, 192 N.J. 19, 33 (2007). This is particularly likely where the employee is a member of the law-enforcement community, as police and other law-enforcement officers are held to a higher standard. In re Phillips, 117 N.J. 567, 576 (1990).

As noted above, I am persuaded that, however erroneously, SO Coghan thought that all forms of military service that occurred during work time were paid, up to ninety days. Moreover, had he not believed he was entitled to pay, the attempt to squeeze two extra vacation days out of the military leave would have made no sense. While the lie here is serious, and more serious than that in Manson, it is not at the level of severity

[2] All opinions available at <http://njlaw.rutgers.edu/collections/oal/>.

requiring dismissal. Thus, based on the cases cited above, I **CONCLUDE** that SO Coghan should be suspended for sixty days.

ORDER

The County's termination of appellant is hereby **NOT AFFIRMED**, and I hereby **ORDER** that the appellant be **SUSPENDED** for sixty days.

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, 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.

May 4, 2015
DATE

Laura Sanders
LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency: May 4, 2015

Date Mailed to Parties: May 4, 2015

/caa

WITNESSES

For appellant, Thomas Coghan

Thomas Coghan

For respondent, Middlesex County

Rafael Morales

James Massano

Bruce Palomba

EXHIBITS

Joint Exhibits

J-1 CD, recording of the County's investigative interview

J-2 Leave Entry by Staff Search List

For appellant, Thomas Coghan

A-1 Paid Military Leave Request Form

A-2 Internal Affairs Disposition Recommendations dated September 4, 2014

A-3 Report of charges sustained dated September 4, 2014

For respondent, Middlesex County

R-1 Request and Authorization for Excusal from Scheduled UTA/Annual Training dated March 9, 2013

R-2 Paid Military Leave Request Form for June 20, 2013, through June 23, 2013

R-3 Department of the Air Force Memorandum for Middlesex County Sheriff Office for June 20, 2013, to June 23, 2013

R-4 Paid Military Leave Request Form for April 18, 2013, through April 21, 2013

R-5 Department of the Air Force Memorandum for Middlesex County Sheriff Office for April 18, 2013, to April 19, 2013

R-6 Memo to Capt. Chaney from SO Thomas Coghan dated June 27, 2013

R-7 Memo to Lt. Rizzi from SO Thomas Coghan dated June 27, 2013

R-8 Memo to CWO Mackiewicz from SO Thomas Coghan dated June 27, 2013

R-9 Memo to CWO Mackiewicz from SO Thomas Coghan dated June 28, 2013

R-10 Internal Affairs Complaint Notification dated August 18, 2014

R-11 Internal Affairs Complaint Notification dated August 28, 2014

R-12 Middlesex County Sheriff's Office Internal Affairs Administrative Advisement Form

R-13 Email with copy of N.J.A.C. 5A:2-2.1 General Policy

R-14 Local Finance Notice concerning Review of Military Leave for Public Employees dated July 15, 2004

R-15 Middlesex County personnel policy, Section 1:13-5, Military Leave

R-16 Preliminary Notice of Disciplinary Action served September 16, 2014

R-17 Letter dated November 7, 2014, sending amended PNDA

R-18 Final Notice of Disciplinary Action served December 8, 2014

R-19 Prior Disciplinary History

R-20 New Jersey Air National Guard Special Order for June 6, 2011, through June 8, 2011

R-21 New Jersey Air National Guard Special Order for June 28, 2011, through March 12, 2012,

R-22 New Jersey Air National Guard Special Order for April 10, 2010, through April 17, 2010

R-23 New Jersey Air National Guard Special Order for March 19, 2011, through March 26, 2011

R-24 New Jersey Air National Guard Special Order for March 31, 2012

R-25 New Jersey Air National Guard Special Order for June 4, 2012, through June 6, 2012

R-26 New Jersey Air National Guard Special Order for April 30, 2011