STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Jaime Velez,
Irvington Township

CSC Docket No. 2018-2778
OAL Docket No. CSR 05035-18

ISSUED: DECEMBER 7, 2018 (HS)

The appeal of Jaime Velez, a Police Sergeant with Irvington Township (Irvington), of his removal effective March 20, 2018, on charges, was heard by Administrative Law Judge Julio C. Morejon (ALJ), who rendered his initial decision on October 5, 2018. Exceptions were filed on behalf of the appellant and exceptions and a reply to exceptions was filed on behalf of Irvington.

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 November 21, 2018, did not adopt the ALJ's recommendation to modify the removal to a three working day suspension. Rather, the Commission modified the penalty to a 30 working day suspension.

DISCUSSION

Irvington removed the appellant on charges of violating the following departmental regulations: (1) Standard Operating Procedure (SOP) 2016-16.IV.B.3a (Duties and Responsibilities of Supervisory Personnel); (2) SOP 2016-16.IV.B.3c (Duties and Responsibilities of Supervisory Personnel); (3) SOP 2017-09.IV.G.3.1.31 (Performance Standards: Accountability of Supervisors); (4) SOP 2017-09.IV.G.3.1.29 (Performance Standards: Official Inefficiency & Incompetency); (5) SOP 2017-09.IV.H.3.1.32 (Performance Standards: Inefficiency or Incompetency of Supervisors and Superiors); and (6) General Order 2:00.IV.A (Responsibility for Preliminary and Follow-Up Investigations). Specifically, it alleged that the appellant failed to monitor all radio transmissions and personally respond to a

robbery to provide supervision and direction. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

Based on the testimonial and documentary evidence presented, the ALJ set forth in his initial decision that on October 12, 2017, the following officers were working the 8:45 p.m. to 7:00 a.m. shift (midnight shift) for the Irvington Police Department: Mark Green, Police Lieutenant; Jose Zepeda, Police Officer; Darryl Ewell, Police Officer; and the appellant. Ajah Dobson, Police Officer, was working as the radio dispatcher for calls to the police station, and the supervisors for the shift were Green, who was the desk supervisor, and the appellant. Near the end of the shift, the appellant arrested a man for heroin possession. Upon arrival at headquarters, the appellant brought the arrestee to Green. Thereafter, the appellant walked the prisoner to the report room where arrestees are processed. During this time, Zepeda and Ewell were in the report room. The appellant processed the prisoner between 6:04 a.m. and 6:13 a.m. At 6:02 a.m., Dobson received a 911 call from a robbery scene, a gas station/convenience market, but she had trouble understanding the caller and entered the call as a "fight." At 6:04 a.m., Dobson, knowing that the appellant had made an arrest earlier in the shift, called the appellant over the radio and asked if he still needed two officers. The appellant responded that she could "have Ewell back," meaning that Ewell was available to answer calls for service. At 6:07 a.m., Dobson received a second 911 call from the robbery scene. This time, Dobson was able to make out that the caller stated he had been "robbed." Not being able to reach Ewell, Dobson called the appellant in the report room by phone to ask if Ewell was with him. She did not mention anything about a robbery. Ewell answered Dobson's call, and Dobson dispatched him to the scene of the robbery report. At 6:13 a.m., Ewell arrived at the robbery scene. Ewell responded alone and did not receive assistance from any officer of the Irvington Police Department during the duration of his response. Ewell was aware that the rules required him to report the robbery to his supervisors, *i.e.*, the appellant and/or Green. Ewell never confirmed over the radio that a robbery had taken place. At 6:21 a.m., the appellant completed fingerprinting and photographing the prisoner. The appellant never heard Dobson say the word "robbery." Zepeda was the only officer who heard Dobson say the word "robbery" over the radio. At the time, Zepeda was assisting the appellant in processing a prisoner, but he did not recall where he was when he heard the word "robbery." Zepeda was wearing a shoulder microphone that sat about six inches from his ear when he heard the dispatch call for a "robbery." Green did not hear the initial dispatch from Dobson in which she used the word "robbery," despite seeing the call on his computer. It was undisputed by the witnesses, including the appellant, that supervisors are required to respond to a robbery call under Irvington Police Department policy. The appellant and Green acknowledged that the robbery call would take precedent over the processing of the prisoner.

The ALJ stated that during the morning crime meeting following the midnight shift, Kenneth Price, Police Captain, read the incident report regarding the robbery call and viewed the store surveillance video. Noticing only Ewell at the scene, Price questioned why the appellant was not at the scene and summoned him. This was the first time the appellant learned that there was a robbery during the midnight shift. The appellant told Price that he did not respond to the crime scene as he was processing a prisoner. Price did not ask any further questions of the appellant because he determined the appellant violated departmental policy in not being at the scene and assigned Clinton Franks, Police Lieutenant, to investigate the matter. Franks reported back to Price on October 13, 2017. Franks' report found potential violations for the officers involved, including the appellant for failing to monitor his radio and respond to a robbery scene. Franks listened to the dispatch and created the chart of the various dispatch calls for the incident. Based on that report, Price sent an administrative report to Stephen Yannotti, Deputy Police Chief, on October 27, 2017. Price agreed with Franks' findings. Specifically, the radio dispatch at 6:10:52 a.m. dispatched a robbery, and the appellant did not respond. Price forwarded the findings to Yannotti, as it was typical procedure to first review a matter internally within the Patrol Division to determine if it warranted further investigation by Internal Affairs. Maurice Taylor, Police Officer, was the Internal Affairs investigator in the case and drafted a report dated December 12, 2017. Taylor reported that the appellant failed to monitor his radio, failed to respond to the robbery, failed to be aware of the response and actions of his subordinate Ewell, and violated General Order 2:00 IV.A in failing to ensure that an adequate and complete preliminary investigation was completed at the crime scene. Taylor's report was approved on December 15, 2017, and a Preliminary Notice of Disciplinary Action (PNDA) was issued on December 25, 2017 and mailed to the appellant on December 26, 2017. The ALJ found that in removing the appellant, Irvington considered the hearing officer's recommendation, which included the appellant's disciplinary history and plea agreement in a previous 90-day suspension in 2016. In that case, the hearing officer stated that Irvington would "move for" removal in the event the appellant was found guilty of untruthfulness or incompetency in the future. The ALJ noted that the appellant did not sign a settlement agreement in the 2016 discipline case and that Irvington relied upon the recording of the hearing in that case as a "last chance" agreement in removing the appellant in this case. The ALJ stated that it was undisputed that the appellant was removed because he did not hear Dobson say the word "robbery" in a single transmission over the radio while he was fingerprinting and photographing an arrestee in police headquarters.

The ALJ determined that the appellant admitted that he did not hear Dobson's radio transmission of a robbery call, failed to monitor his radio as required by SOP 2016-16.IV.B.3a (Duties and Responsibilities of Supervisory Personnel) and that the appellant's conduct was inefficient and incompetent under SOP 2017-09.IV.G.3.1.29 (Performance Standards: Official Inefficiency & Incompetency). In

failing to respond to the robbery call, the appellant failed to patrol all activities of Dobson and Ewell via the radio and via the mobile data computer as required by SOP 2016-16.IV.B.3c (Duties and Responsibilities of Supervisory Personnel). The ALJ found unpersuasive the appellant's defense that not hearing the radio does not equate to failure to monitor. The appellant was not attentive to the reason Dobson was inquiring if Ewell was available, and thus, he not only failed to monitor his radio but also failed to monitor the situation as required of supervisory officers. The ALJ further found that Ewell's mistakes in handling the robbery would have been corrected had the appellant responded to the robbery as required by Irvington's SOPs, and thus, the appellant was accountable for Ewell's conduct and failed to adhere to SOP 2017-09.IV.G.3.1.31 (Performance Standards: Accountability of Supervisors). However, the ALJ found that the charges that the appellant violated SOP 2017-09.IV.H.3.1.32 (Performance Standards: Inefficiency or Incompetency of Supervisors and Superiors) and General Order 2:00.IV.A (Responsibility for Preliminary and Follow-Up Investigations), respectively, were not upheld. With respect to the penalty, the ALJ found that neither the document incorporating the 2016 90-day suspension nor the recording of the 90-day suspension hearing make any mention of a last chance agreement or that the appellant would be automatically removed for any future sustained disciplinary charges. The ALJ noted that Ewell and Dobson each received a one working day suspension for violating the departmental regulations in failing to notify the supervisory officers of a robbery and that Green received a three working day suspension for conduct similar to that of the appellant. Thus, the ALJ determined that the appellant, like Green, should receive a three working day suspension.

In addition, the ALJ rejected the appellant's argument that Irvington did not comply with the 45-day time period for filing disciplinary charges found in *N.J.S.A.* 40A:14-147 (45-day rule). The appellant had argued that the 45-day time period began when Internal Affairs received the preliminary investigation report rather than when Internal Affairs conducted its own investigation. The 45-day rule provides:

> 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 . . . A failure to comply with said provisions as to the service of the complaint and the time within which a complaint is to be filed shall require a dismissal of the complaint.

The ALJ noted that it was undisputed that in Irvington, Internal Affairs makes charging decisions and issues PNDAs. The ALJ found that Internal Affairs had sufficient information upon which to base a complaint at the conclusion of its investigation on December 8, 2017 and not when it received Franks' report on

October 27, 2017. The assigned Internal Affairs investigator conducted witness interviews to uncover what happened, to confirm whether Franks' preliminary report was correct and to determine whether there was information that may exonerate any of the officers. Thus, the ALJ determined that Irvington complied with the 45-day rule when Internal Affairs signed off on the PNDA on December 25, 2017.

In his exceptions, the appellant contends that a suspension for not being able to hear the single word "robbery" is "patently unjust."

In its exceptions and reply to exceptions, Irvington argues that removal is the required penalty in this case. Specifically, it states that in 2016, the appellant pled guilty to a matter in which he was facing removal and accepted a 90-day suspension along with an understanding that if there was any further discipline involving either truthfulness or incompetency/inefficiency, Irvington would move for removal. Irvington proffers that the most obvious interpretation of the plea agreement is that the appellant would be removed if there is another sustained charge of inefficiency, incompetency or making a false statement. Irvington emphasizes that since it could always *move* for removal, any contrary interpretation would render the terms of the plea agreement meaningless. It contends that as incompetency/inefficiency on the appellant's part has been proven in this case, removal is the appropriate penalty under the plea agreement giving the appellant a last chance. Additionally, Irvington contends that based on the appellant's disciplinary history, disregarded by the ALJ by his inappropriate reduction of the penalty to the same one imposed on Green, removal is the logical next step under the concept of progressive discipline even without the plea agreement.

The Commission agrees with the ALJ's determination that Irvington complied with the 45-day rule and the ALJ's determination of the charges. The Commission also agrees with the ALJ's determination that there was no last chance agreement, in that there is no such written document in the record. Even assuming there were, it must be noted that the Commission is not strictly bound by a last chance agreement but rather uses it as a factor to be considered when determining the appropriate penalty in an appeal. 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 this case, the Commission finds that the appellant's infraction was not so egregious as to warrant his removal, especially in light of the discipline imposed on the other involved individuals. Still, the ALJ incorrectly ignored the appellant's own prior record, which includes a 90 working day suspension, and incorrectly overreduced the penalty based on a comparison to the discipline imposed on the other involved individuals. Considering all factors, including the appellant's prior record, his actual infraction in this case, and the discipline imposed on the other involved individuals, the Commission finds a 30 working day suspension to be the appropriate penalty.

Since the penalty has been modified, the appellant is entitled to be reinstated with back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10, following the 30 working day suspension. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), an 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 this case, the Commission upheld most of the charges and 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 Irvington. 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 issues concerning back pay are finally resolved. In the interim, as the court stated in *Phillips, supra*, if it has not already done so, upon receipt of this decision, Irvington shall immediately reinstate the appellant to his position.

ORDER

The Commission finds that Irvington's action in removing Jaime Velez was not justified. Therefore, the Commission modifies the penalty to a 30 working day suspension. The Commission further orders that the appellant be granted back

pay, benefits and seniority for the period following his 30 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 and an affidavit of mitigation shall be submitted by or on behalf of the appellant to Irvington 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.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of the 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 21ST DAY OF NOVEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
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Civil Service Commission
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT NO. CSR 05035-18

2018-2778

IN THE MATTER OF JAIME VELEZ,

v.

IRVINGTON TOWNSHIP,
APPOINTING AUTHORITY.

Peter B. Paris, Esq., for appellant Jamie Velez (Law Office of David Beckett, attorneys)

Joseph M. Hannon, Esq., for respondent Irvington Township [1] (Genova Burns, LLC, attorneys)

Record closed: September 26, 2018 Decided: October 5, 2018

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE

Appellant, Jamie Velez (Velez), was employed as a Police Officer, with respondent, Township of Irvington (Irvington), having attained the rank of Sargent. Velez appeals his termination on March 20, 2018, for allegedly failing to respond to a robbery call as the supervisory officer at the scene on October 12, 2017.

[1] The appeal filed with the Office of Administrative (OAL) refers to respondent as "Irvington Township, Appointing Authority." The respondent's correct name is "Township of Irvington."

PROCEDURAL HISTORY

On December 26, 2017, Irvington issued a Preliminary Notice of Disciplinary Action (PNDA), which alleged that Velez violated the following regulations:

1) SOP 2016-IV.B.3a, Duties and Responsibilities of Supervisory Personnel;
2) SOP 2016-IV.B.3c, Duties and Responsibilities of Supervisory Personnel;
3) SOP 2017-09 IV.G.3.1.31 Performance Standards: Accountability of Supervisors;
4) SOP 2017-09.IV.G.3.1.29, Performance Standards: Official Inefficiency & Incompetency;
5) SOP 2017-09.IV.H.3.1.32, Performance Standards: Inefficiency or Incompetency of Supervisors and Superiors, and
6) General Order 2:00 IV.A., Responsibility for Preliminary and Follow-Up Investigations (charges).

Velez plead not guilty to the charges and a hearing was scheduled for March 20, 2018, at the office of the Irvington's Director of Public Safety. At attendance for the hearing were the following individuals: Hearing Officer Joseph Santiago (Santiago), Velez, his legal counsel Mr. Paris, legal counsel for Irvington, and Detective Wesley Mondelus (Mondelus). Velez waived his right to a hearing and Santiago then made a recommendation to Director of Public Safety, Tracey Bowers (Bowers), to substantiate all of the charges against Velez. Bowers accepted Santiago's recommendations substantiating all of the charges against Velez and signed off on a Final Notice of Disciplinary Action (FNDA), dated March 20, 2018, substantiating the charges and terminating Velez effective the same date (R-1).

Thereafter, on March 27, 2018, Velez filed an appeal with the Office of Administrative Law pursuant to N.J.S.A. 40A:14-202(d), contesting the substantiated charges and termination in the FNDA. On April 5, 2018, Velez filed with the New Jersey Civil Service Commission, (Commission), a letter amending his appeal to include an alleged violation against Irvington of N.J.S.A. 11A:2-24, Protection Against Reprisals

(reprisals allegation). Velez alleged that agents of Irvington conspired to terminate Velez "in retaliation for [his] disclosure of information on the violation of any law or rule, government mismanagement or abuse of authority."

The Commission responded on June 13, 2018, that the appeal was amended to include Velez's reprisals violation charge against Irvington, and that Velez was instructed to present his proofs of the same in the underlying matter. [2]

A prehearing telephone conference was held April 13, 2018, where counsel for Velez, Mr. Paris, and Dwayne Warren, Township Attorney (Mr. Warren) appeared. The parties agreed to exchange discovery as expeditiously as possible, considering the 180-day rule under N.J.S.A. 40A:14-201(a). A telephone status conference was scheduled for April 20, 2018, to allow the Commission to process Velez's amendment to his appeal concerning the allegations of reprisals violations by Irvington.

On April 20, 2018, a telephone status conference was held with Mr. Paris and Mr. Warren, wherein Irvington agreed to provide discovery by May 30, 2018. A Prehearing Order was issued on April 30, 2018, ordering that discovery be completed by May 30, 2018, scheduling a telephone status conference for May 14, 2018, and setting hearing dates for June 14 and 20, 2018.

On May 14, 2018, a telephone status conference was held and counsel for Veles informed the undersigned that discovery had not been completed and Irvington had not provided responses to interrogatories propounded by Velez. Counsel for Irvington agreed to provide all document discovery by May 31, 2018, and notwithstanding this date, agreed to provide Velez with a preliminary response to the Interrogatories and document discovery request by May 21, 2018. On May 18, 2018, an Amended Prehearing Order was issued to include the discovery compliance dates for Irvington, and the scheduling of a telephone status conference for June 5, 2018.

[2] During the hearing held on July 27, 2018, Velez informed the undersigned that he would not be proceeding with his claim against Irvington for reprisals violation and moved to dismiss the same. No opposition was made by Irvington, and the reprisals violation was dismissed.

On June 1, 2018, counsel for Velez wrote to the undersigned informing me that Irvington had not provided discovery as set forth in the Amended Prehearing Order of May 18, 2018, and that Irvington was no longer represented by Mr. Warren, and was now represented by Joseph Hannon (Mr. Hannon) from the law firm of Genova Burns.

On June 5, 2018, a telephone status conference was held, and Mr. Paris and Mr. Hannon appeared, wherein the following resulted: the hearing dates of June 14 and 20, 2018, 'were adjourned to July 25 and 27, 2018, to allow Irvington to provide discovery by June 30. Velez objected to a waiver or extension of the 180-day rule, however, he agreed to the new hearing dates as he could not proceed with the hearing dates of June 14 and June 20, as discovery had not been provided by Irvington, and Velez could not prepare for the June hearing dates. On June 5, 2018, a Second Amended Prehearing Order was issued incorporating the hearing and discovery completion dates.

On July 2, 2018, a telephone status conference was held and the parties informed the undersigned that discovery was completed, and the parties were prepared to proceed with the hearing scheduled for July 25 and 27, 2018. [3]

On July 30, 2018, the parties concluded submission of proofs in their respective cases, and it was agreed that mutual written summations would be submitted by August 17, 2018.

On August 15, 2018, counsel for Irvington wrote to the undersigned that the parties had not received the hearing transcripts and therefore, could not provide the written summations by August 17, 2018. A telephone status conference was held on August 15, 2018, and the parties were given an additional week to August 24, 2018, to submit their written summations.

On August 24, 2018, written summations were submitted by Velez and Irvington. On August 28, 2018, by letter from the undersigned, Velez and Irvington were informed

[3] During the hearing conducted July 27, 2018, the parties agreed to an additional hearing date of July 30, 2018.

that the 180-day provision under N.J.S.A. 40A:14-201b(4) [4], was tolled 35-days between June 20, 2018, the original hearing date, and July 25, 2018, the adjourned hearing date. Consistent with my ruling on August 28, 2018, the record closed on August 24, 2018, and the 180 calendar days was calculated to expire on October 28, 2018.

Thereafter, on September 26, 2018, a telephone converse was had with counsel, wherein I ruled to re-open the record, and to allow respondent to amend their written summation to address the appellant's argument that the complaint should be dismissed under the 45-day rule (N.J.S.A. 40A:14-147). [5]

Consistent with my ruling on September 26, 2018, the 180 calendar days shall be calculated as follows:

- Appeal filed with OAL on March 27, 2018;
- Original 180 calendar days was September 23, 2018;
- Hearing adjournment June 2018- thirty-five calendar days accrued June 20 - July 25;
- Adjournment amended summation-eleven calendar days accrued to October 9, 2018;
- Revised 180th calendar day under N.J.S.A. 40A:14-201(a)- November 8, 2018.

ISSUES

The issues to be determined in this matter are the following:

The issue in this case is whether the Department's determination that sustained charges in the Final Notice of Disciplinary Action dated March 20, 2018, was proper, and if properly sustained, whether the charges warrant termination?

[4] If the officer and the agency or the firefighter and the department agree to any postponement or delay of a hearing before the 181st calendar day, the calendar days that accrue during that postponement or delay shall not be used in calculating the date upon which that officer or firefighter is entitled, pursuant to subsection a. of this section, to receive his base salary pending a final determination on his appeal . . . . (emphasis added) N.J.S.A. 40A:14-201b(4).

[5] Appellant included an argument in his written summation that was not raised in the hearing asserting that this case must be dismissed under N.J.S.A. 40A:14-147, also known as the "45-day rule". Respondent did not address this issue in its summation, as summations were submitted simultaneously.

FACTUAL DISCUSSION AND FINDINGS

Summary of Testimony

At the hearing, Irvington presented testimony from Officer Darryl Ewell, Officer Ajah Dobson, Officer Jose Zepeda, Lt. Mark Green, Capt. Kenneth Price, Det. Maurice Taylor, Lt. Clinton Franks, and Public Safety Director Tracy Bowers. Sgt. Velez called Carl Hamer, Det. William Gatling to testify, as well testifying himself on his behalf. Below is a brief description of the testimony provided.

Officer Darryl Ewell

Officer Darryl Ewell (Ewell) testified on direct that on October 12, 2017, he responded to a call at 558 Chancellor Avenue, which is a gas station/convenient market. Ewell stated that the call had originally been broadcast as a "robbery" and that, after he arrived at the scene he notified the dispatcher Officer Ajah Dobson that the "assault" call was actually a robbery. Ewell stated that he never heard the word "robbery" uttered by Officer Dobson over the radio. Ewell testified that he was aware that the rules required him to report a robbery to his supervisors working his shift. Ewell admitted that he never notified his supervisors, Lt. Mark Green or Sgt. Velez, that he had arrived at robbery call. Ewell agreed that he and Officer Dobson failed to follow the rules when they failed to notify their supervisors of the robbery. Officer Ewell accepted a one-day suspension for failing to notify his supervisors of the robbery call.

Officer Ajah Dobson

Officer Ajah Dobson (Dobson) testified that she was the radio dispatcher on October 12, 2017. Dobson testified that she initially received a call regarding a "fight" at 558 Chancellor Avenue, as the victim called stating that someone hit him. Dobson testified that she initially called for Ewell, but since he did not respond, she called Sgt. Velez on the radio and later by telephone, asking for Ewell and to inquire if Ewell was available. Sgt. Velez responded that Ewell was not with him and was available.

Dobson testified that when she spoke with Sgt. Velez, she did not mention a robbery call, as the call had come in as an assault. It was when the victim called again that he stated he had been "hit", that Dobson broadcast over the radio that the call to 558 Chancellor Avenue was now an "assault". Dobson stated that she knew Sgt. Velez was in headquarters processing an arrest when she called him and when she dispatched Ewell to the robbery call.

Dobson testified that when she broadcast the call as a robbery and Ewell responded to the scene, she did not contact Sgt. Velez as she knew he was on an arrest. Dobson stated that she accepted a one-day suspension for failing to notify her supervisors of the robbery.

Officer Jose Zepeda

Officer Jose Zepeda (Zepeda), testified that he was assisting Sgt. Velez in processing a prisoner when he heard Dobson say the word "robbery" over the radio. Zepeda could not recall where he was when he heard the word "robbery." Zepeda stated that was wearing a shoulder microphone which sits about six inches from his ear, instead of wearing the radio on his hip. Zepeda testified that sometimes he has difficulty hearing the radio and by wearing the shoulder microphone makes it easier for him to hear his radio call. Zepeda stated that he did not mention the radio call of a robbery to Sgt. Velez or Lt. Green. Zepeda stated that Velez is a "good officer" and "a good boss."

Lt. Mark Green

Lt. Mark Green (Green) was the desk lieutenant on October 12, 2017. Green testified that his duties "keeping charge of the police department...and just being aware of what's going on in the field." Green stated that he did not hear the initial dispatch from Dobson when she used the word "robbery." Green testified that he saw the call on his computer as a "fight call." Green testified that he did not have a shoulder radio but rather his radio was "to the side." Green testified that had he heard the robbery call, he and Sgt. Velez would have figured out what to do with Velez's prisoner and Sgt. Velez would have responded to the robbery call "to assess the situation."

Green acknowledged that a superior officer is required to respond to a robbery call as per the Irvington Police Department's Rules and Regulations. Green also stated that although an officer may be distracted, it does not excuse an officer to hear a dispatch call. Green accepted a three-day suspension for his role in this event in failing to respond to the robbery call. Green testified that he considers Velez to be a diligent officer and supervisor.

Capt. Kenneth Price

Captain Kenneth Price (Price) testified as to the origins of the investigation of this matter. Price stated that he generally works the 8:00AM-4:00PM shift, and did so on October 12, 2017. Price testified that at a morning crime meeting held at the beginning of the morning shift on October 12; 2017, he viewed the video of the 558 Chancellor Avenue incident, which revealed a robbery. Ewell testified that noticing only Ewell at the scene, he questioned, "Where's my Sergeant?" to which another officer in the meeting responded that Sgt. Velez was processing an arrest and was in the building.

Price testified that he then summoned Sgt. Velez to the crime meeting, and asked Sgt. Velez if he responded to the robbery to which Sgt. Velez answered "no". Price then testified that he asked Sgt. Velez why he did not respond and that Sgt. Velez answered he was processing an arrest. Price testified that after Sgt. Velez's response, Price determined that his conduct was in violation of Irvington's departmental policies, which required further investigation. Price assigned Lt. Franks to complete an investigation into the matter as to whether there was any violation with the handling of the 558 Chancellor Ave. robbery call.[6]

Cpt. Price had no involvement after he forwarded the findings to Deputy Chief Yannotti; however, Cpt. Price acknowledged that it is typical procedure to first review a

[6] Price testified that the investigation performed by Lt. Franks was not the internal affairs investigation, but rather a review of whether any violation occurred, specifically why a superior officer did not respond to the call. Price stated that the investigation by Lt. Franks was a typical preliminary investigation done within the Patrol Division to see if the matter warrants further review.

matter internally within the Patrol Division to determine if it warrants further investigation by Internal Affairs. (T1 180:9-25; 181:1-2). The matter is not sent right to internal affairs because there is a need to review if a possible violation even occurred. (T1 196:6-14).

Lt. Clinton Franks

Lt. Clinton Franks (Franks) conducted his investigation and issued a report to Price on October 13, 2017. On direct examination, Franks' testified that the report found potential violations for the officers involved (Dobson, Elwell and Green), including Sgt. Velez for "failing to monitor his radio and respond to robbery scene." Franks stated that he listened to the dispatch audio and created the chart of the various dispatch calls. Franks' stated that based on his report, Price sent an administrative report to Deputy Chief Stephen Yannotti on October 27, 2017.

On cross examination, Franks testified to the following:

- that "a supervisor should have responded, however, there are extenuating circumstances when it comes to Sergeant Velez. He was on an arrest and he was in the back processing a prisoner. It was his arrest. So, it was only dispatched once from the tape so there's a likelihood that he may have missed it."
- there are times when he [Franks] has not been able to hear radio transmissions. He also testified that it is common for officers to miss transmissions.
- "Dobson spoke to him [Sgt. Velez] on the phone because she was looking for Ewell at one point...and she never said, 'there's a robbery.'"
- that a supervisor "is supposed to be dispatched" to a robbery incident.
- that it was difficult to hear the dispatch from Dobson, and that when he reviewed the dispatch tapes, he was in an office with the ability to rewind the tape and increase the volume.

- that if Ewell had broadcast a description of the robbery suspect over the radio, that description would have been repeated by Dobson and the "repetition of the description...would trigger something in my mind that something is going on that maybe I'd want to ask further if I'm not aware of what's going on."
- that there was no evidence that Velez had his radio off or that he was not trying to listen to the radio.
- that Velez simply did not hear the transmission where Dobson stated the call was now a "robbery."
- he uncovered no evidence that Velez did not monitor his radio; he simply did not hear the transmission.
- Franks considers Velez to be a good and diligent officer.

Det. Maurice Taylor

Detective Maurice Taylor (Taylor), testified that he was assigned to investigate the events of the October 12, 2017 incident by Sgt. Gerard Malek, the Internal Affairs Supervisor for the Irvington Police Department. Taylor testified that he proceeded through his investigation from October 27 through December 15, 2017 by doing the following: (1) reviewing the administrative reports on the matter; (2) summarizing the administrative reports; (3) interviewing Franks, Dobson, Ewell, Green and Sgt. Velez. Taylor stated that he proceeded to complete his report and that his investigation found that Sgt. Velez violated the following: SOP 2016-16.IV.B.3.a, SOP 2016-16.IV.B.3.a, SOP 2017-09 IV.G.3.1.31, SOP 2017-09 IV.E.3.1.29, SOP 2016-16, SOP 2017-09.IV.H.3.1.32, General Order 2:00 IV.A. Taylor testified that his report was then reviewed by his superiors and legal department, and that on December 26, 2017, the charges were served upon Sgt. Velez.

Public Safety Director Tracy Bowers

Director Tracey Bowers (Bowers) testified that as Director of the Irvington Township Public Service, he oversees the day-to-day activities of the Irvington Police Department, and as part of his duties he determines the penalty received by officers brought up on disciplinary charges. Bowers stated that does not get involved with internal affairs investigations as they are exclusively handled by Irvington's Internal Affairs division.

Bowers testified his designee, Joseph Santiago (Santiago), serves as hearing officer on all police disciplinary charges that have been first investigated by the Internal Affairs division. Bowers testified that in October 2016, Santiago presided over a prior discipline of Velez, in which a plea agreement was reached resulting in Velez agreeing to a ninety-day suspension, when faced with termination, regarding a charge that Velez made false official statement and inefficiency and incompetency. Bowers stated that Velez' prior plea agreement was made on the record, with representation of counsel, and the terms of the plea were memorialized as an attachment to the Final Notice of Disciplinary Action, and provided for, "suspension without pay for 90 (ninety) days (9 Payrolls), effective October 20, 2016. Bowers testified that the October 2016 plea agreement called for Velez to be terminated if he were found to be guilty of any violations for sustained charges in the future. The tape of the plea agreement was played during Bowers' testimony.

In the present matter, Bowers' testified that he took into account Velez's October 2016 plea agreement as well as Velez's prior disciplinary record in determining that termination was the appropriate penalty in this matter. Bowers' stated that the Disciplinary Memorandum from Santiago, outlined Velez's history which included his disciplinary history of one performance notice, two counseling notices, four reprimands, four suspensions ranging from two days to ninety days, with the ninety days being the recent plea on October 20, 2016. Bowers' stated that Velez disciplinary history, and the underlying charges for inefficiency and incompetency, resulted in his decision that Velez be terminated in this matter, effective March 20, 2018.

Carl Hamer and Det. William Gatling

Carl Hammer (Hammer) and Det. William Gatling (Gatling), both testified as part of Velez's claim of Actions Against Reprisal against Irvington under N.J.S.A. 11A:2.24. Since Velez moved to dismiss the reprisal claim, their testimony is not germane to the underlying charges and will not be discussed.

Sgt. Jamie Velez

Velez testified that he grew up in Irvington, and after graduating high school, he enlisted in the Army for three years. Velez stated that upon his discharge from the Army he applied to be a police officer, was selected and graduated from the police academy on June 4, 2004. Velez stated that he has been a police officer for fourteen years and he has been a Sargent since May 2013.

Velez testified that during his time as patrolman and Sargent, he has had numerous assignments in the Irvington Police Department including the Narcotics Task Force, training officer for new officers, the Essex County Carjacking Task Force and Homicide Task Force. Velez stated that he has been honored with numerous awards and commendations during his fourteen years as an officer.

As to the underlying charges, Velez testified as follows:

- On October 12, 2017, he was nearing the end of his 7:45p.m. to 7:00 a.m. shift, when he observed a suspicious individual in a high crime area around 5:00 a.m.
- He arrested the man for possession of heroin, and after having the individual's vehicle towed, Zepeda responded to transport the him to headquarters (with Velez following in his patrol vehicle). This occurred around 5:30 a.m.

- Upon arrival at headquarters, he brought the arrestee to the desk supervisor, Green, per Irvington policy, and then walked the arrestee to the report room where the arrestee was processed.
- Zepeda and Ewell were in the report room when Velez brought the arrestee for processing.
- As a practice, Velez submits "time stamps" on the computer while processing an arrestee, as "the department is really strict on completing reports within 60 minutes and if the jobs aren't completed within 60 minutes, they want to know why the job took so long. Me knowing that a drug arrest is not going to be able to get completed within 60 minutes, I've always entered pretty much step by step everything that I do on the job."
- He recalls Dobson calling him once on the radio and once by phone while he was processing the arrestee.
- Velez checked the suspect for warrants, photographed him and fingerprinted him.
- Dobson called Velez over the radio and asked if he still needed two officers, and Velez responded that she can "have Ewell back," meaning that Ewell is available to answer calls for service.
- Velez never heard Dobson say the word "robbery."
- The first time Velez learned that there was a robbery was when Price called him into the daily crime meeting.

FINDINGS OF FACT

I FIND the testimony of all of the witnesses to be credible. It is not disputed that Velez, as supervisory officer, was not present at the robbery scene October 12, 2017, contrary to Irvington's Standard Operating Procedures. What does appear to be in dispute is whether Velez's conduct merits the discipline commensurate to the charges filed against him. Accordingly, based upon the testimonial and documentary evidence, and having had the

opportunity to observe the appearance and demeanor of the witnesses, I **FIND** as **FACT** the following:

On October 12, 2017, the following police officers were working the 8:45 p.m. to 7:00 a.m. shift (midnight shift) for the Irvington Police Department: Green, Velez, Zepeda and Ewell. (T1 37:1-10). Dobson was working as the radio dispatcher for calls to the police station (T1 86:5-7). The supervisors for this shift was Green and Velez, Lieutenant and Sargent respectively.

Dobson initially received a call from a man stating that he had been "hit" in a fight that occurred at 558 Chancellor Avenue. (T1 86:8-13; 141:10-18; R8; R24). Knowing that Velez had made an arrest earlier in the shift, Dobson called Velez asking for Ewell and inquiring if he was available to respond to the assault call. (R23; Tr1 at 111). Velez responded that Ewell was available affirmatively. (Ibid.) The victim called the Police department again inquiring when the police would arrive and now stated that someone had "robbed" him. (R24). After the second call was received, now stating that a robbery had occurred, Dobson called Ewell on five separate occasions, but Ewell did not respond. (R8; R24). Finally, at 6:10:48 Ewell responded and Dobson dispatched Ewell to "respond to 558 Chancellor Ave. on a robbery report." (Ibid.) These dispatches span over a period of approximately eight minutes. (Ibid).

Ewell acknowledged that he received a dispatch that was initially an assault at 558 Chancellor Avenue, which is a gas station/convenient market. (T1 37:13-19; 37:20-25; 38:1-3). Ewell believed the original call was for an "assault" and "later learned" from the victim that a robbery had occurred. (Tr1 at 37). After he arrived and assessed the situation, Ewell notified dispatch that the "assault" call was a "robbery". (Tr1 at 39; R-9). However, there is no recording of Ewell ever using the word "robbery" over the radio. (See Exhibits R-8 and R-26). Ewell responded alone and did not receive assistance from any officer of the Irvington Police Department during the duration of his response. (T1 38:7-12). Ewell was aware that the rules required him to report the robbery to his supervisors, Velez and/or Green. (Tr1 at 64; R-26; Tr1 at 52-53).

Zepeda is the only officer who heard Dobson say the word "robbery" over the radio. (Tr1 at 74.) At the time, Zepeda was assisting Velez in processing a prisoner, but he did not recall where he was when he heard the word "robbery." (Tr1 at 74). Zepeda was wearing a shoulder microphone which sits about six inches from his ear when he heard the dispatch call for a "robbery". (Tr1 at 76). Green did not hear the initial dispatch from Dobson in which she used the word "robbery", despite seeing the call on his computer (Tr1 at 141; 143-144; 145).

During the "morning crime meeting" following the midnight shift, Price read the incident report regarding the robbery call at 558 Chancellor Avenue, and the store surveillance video. Noticing only Ewell at the scene, Price questioned, why Velez was not at the scene and summoned him. (T1 172:14-19; 174:16-21). Velez told Price that he did not respond to the crime scene, as he was processing a prisoner (T1 174:23, 24). Price did not ask any further questions of Velez, because he determined Velez violated departmental policy in not being at the scene and assigned Franks to investigate the matter (T1 175:7-16; 176-177).

Franks reported back to Price on October 13, 2017. (Tr1 at 177; R-12). Franks' report found potential violations for the officers involved, including Velez for failing to monitor his radio and respond to robbery scene. (T2 28:7-18; R-12). Franks listened to the dispatch and created the chart of the various dispatch calls for the incident (R8). Based on that report, Price sent an administrative report to Deputy Chief Stephen Yannotti (Yannotti) on October 27, 2017. (R13). Price agreed with Franks' findings. (R13; T1 178:4-22). Specifically, the radio dispatch at 6:10:52 dispatched a robbery and Velez did not respond. (T1 180:1-8). Price forwarded the findings to Yannotti, as it is typical procedure to first review a matter internally within the Patrol Division to determine if it warrants further investigation by Internal Affairs. (T1 180:9-25; 181:1-2).

Taylor was the Internal Affairs investigator in this case and drafted a report dated December 12, 2017 (Tr1-228; R-2). Taylor reported that Velez failed to monitor his radio, failed to respond to the robbery and failed to be aware of the response and actions of his subordinate, Ewell, and that Velez violated General Order 2:00 IV.A, in failing to ensure that an adequate and complete preliminary investigation was completed at the crime

scene. (T1 237:18-25; 238:1-20; R-3). Taylor's report was approved on December 15, 2017, and a Preliminary Notice of Disciplinary Action was issued on December 25, 2017, and mailed to Velez on December 26, 2017 (R-3).

Bowers "did not hear the case" at the departmental level, although he signed the FNDA and issued a "disciplinary memo." (Tr2 at 79; R-1; R-19). Bowers did not serve as the hearing officer, but rather his designee, Santiago. (T2 79:11-25; 80:1-14). A departmental disciplinary hearing was held before Santiago on March 20, 2018, which resulted in sustaining the charges and recommending termination. (R19). On the same date, Velez was terminated. (R20). In determining if termination was appropriate, Bowers considered Santiago's recommendation which included Velez's disciplinary history and plea agreement in a previous suspension in October 2016, that any further disciplines would result in termination. (R19; T2 84:13-21). Bowers' agreed to Velez's termination in the within matter because he relied upon a prior case in which Santiago that Irvington would "move for termination" in the event. Velez was found guilty of untruthfulness or incompetency in the future. (Tr2 at 95-96; R-18; R-28).[7] Velez did not sign a settlement agreement in the October 2016 discipline case, which Irvington relied upon as a "last chance" agreement in terminating Velez herein (Tr3 at 65-67).

Although Bowers does not conduct the disciplinary hearings, he is the "ultimate authority" when it comes to disciplinary penalties. (Tr2 at 76-77). He has "sole authority" to discipline Irvington Police Officers. (Tr2 at 111). On the same date as the termination in this matter, the Township issued a 4-day suspension to Velez in a separate matter (P-43; Tr2 at 115-116).

In this case, it is undisputed that Velez, was terminated from his employment because, he did not hear Dobson say the word "robbery" in a single transmission over the radio while Velez was fingerprinting and photographing an arrestee in police

[7] During the colloquy in that prior case, Santiago states that "any further violations of Department regulations with respect to truthfulness, inefficiency, or incompetency will result in his termination." However, he was corrected by counsel for Velez, who stated, "Actually, if there is a sustained charge...for any similar truthfulness or inefficiency violation, the Township will move for termination." (Tr2 at 102; R-28). The hearing officer consented to the amended language by stating, "will move for termination, yes." (Tr2 at 102).

headquarters. On October 12, 2017, Velez was working a 7:45p.m. to 7:00 a.m. shift. Near the end of his shift, Velez arrested a man for possession of heroin. Upon arrival at headquarters, Velez brought the arrestee to the desk supervisor, Green (Tr3 at 18). Thereafter, Velez walked the prisoner to the report room where arrestees are processed. (Tr3 at 19). During this time, Zepeda and Ewell were in the report room. (Tr3 at 19). While processing the prisoner, Velez recalls Dobson calling him once on the radio and once by phone (Tr3 at 20).

Velez processed the prisoner between 6:04 to 6:13 a.m. (P-3). At 6:02 a.m., Dobson received the first 911 call from the robbery scene, but she had trouble understanding the caller and entered the call as a "fight." (R-8; R-24). At 6:04 a.m., Dobson called Velez over the radio and asked if he still needed two officers. Velez responded that she can "have Ewell back," meaning that Ewell is available to answer calls for service (R-23; Tr1 at 87-89). At 6:07 a.m., Dobson received the second 911 call from the robbery scene. This time, Dobson was able to make out that the caller stated he had been "robbed".

Not being able to reach Ewell, Dobson called Velez in the report room by phone to ask if Ewell was with him. She did not mention anything about a robbery (R-8; R-24). Ewell answered Dobson's call, and Dobson dispatched him to the scene of the robbery report. (Ibid). At 6:13 a.m., Ewell arrived at the robbery scene (P-2) Ewell never confirmed over the radio that a robbery had taken place (Ibid.) At 6:21 a.m.; Velez completed fingerprinting and photographing the prisoner (P-3). Velez never heard Dobson say the word "robbery." (Tr3 at 24). The first time Velez learned that there was a robbery during his shift on October 12, 2017, was when Price called him into the daily crime meeting. (Tr3 at 24).

It was undisputed by the witnesses that supervisors are required to respond to a robbery call (T1 40:7-11; T2 27:10-23). Velez acknowledged and agreed that a supervisor must respond to a robbery call and that it is the policy of the Irvington Police Department. (T3 37:1-24). Further, Velez understood this to be the policy of the Irvington Police Department. (T3 37:9-16). Velez and Green both acknowledged that the robbery

call would take precedent over the processing of the prisoner (T1 146:1-13; T3 38:14-16; 39:20-25; 40:1,2; 53:5-16).

ANALYSIS AND CONCLUSIONS OF LAW

Applicable Standards

The Civil Service Act and the implementing regulations govern the rights and duties of public employees. N.J.S.A. 11A:1-1 to 12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. An employee who commits a wrongful act related to his or her duties or who gives other just cause may be subject to major discipline. N.J.S.A. 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). In a civil service disciplinary case, the employer bears the burden of sufficient, competent and credible evidence of facts essential to the charge. N.J.S.A. 11A:2-6(a)(2), -21; N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-2.1, "burden of proof"; N.J.A.C. 4A:2-1.4. That burden is to establish by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982).

An appointing authority may discipline an employee on various grounds, including conduct unbecoming a public employee, neglect of duty and other sufficient cause. N.J.A.C. 4A:2-2.3(a). Such action is subject to review by the Civil Service Commission, which after a de novo hearing makes an independent determination as to both guilt and the "propriety of the penalty imposed below." W. New York v. Bock, 38 N.J. 500, 519 (1962). In an administrative proceeding concerning a major disciplinary action, the appointing authority must prove its case by a "'fair preponderance of the believable evidence.'" Polk, 90 N.J. at 560 (citation omitted); N.J.A.C. 4A:2-1.4(a); Atkinson, supra, 37 N.J. at 149.

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

credible witness, but it must be credible in itself." In re Estate of Perrone, 5 N.J. 514, 522 (1950).

Velez is charged with having violated the following six departmental regulations in failing to respond to the robbery on October 12, 2017 and failing to appropriately supervise:

1) SOP 2016-IV.B.3a, Duties and Responsibilities of Supervisory Personnel;

2) SOP 2016-IV.B.3c, Duties and Responsibilities of Supervisory Personnel;

3) SOP 2017-09 IV.G.3.1.31 Performance Standards: Accountability of Supervisors;

4) SOP 2017-09.IV.G.3.1.29, Performance Standards: Official Inefficiency & Incompetency;

5) SOP 2017-09.IV.H.3.1.32, Performance Standards: Inefficiency or Incompetency of Supervisors and Superiors, and[8]

6) General Order 2:00 IV.A. Responsibility for Preliminary and Follow-Up Investigations (charges).

It is undisputed by Velez that the Irvington Police Department requires supervisors to respond to a robbery call. SOP 2016-16 IV.B.3.a provides that sergeants "shall...monitor all radio transmissions and personally respond to the following assignments to provide supervision and direction and control...other significant calls involving violent crimes." In addition, SOP 2016-16 IV.B.3.c provides that sergeants shall "monitor all patrol activities via the radio and via the mobile data computer."

It is undisputed that Velez did not hear Dobson say the word "robbery" in a single transmission over the radio while he was fingerprinting and photographing an arrestee in

[8] Charge #5 references SOP 2017-09. is not in the record, and therefore, **I CONCLUDE** that Irvington has not carried its burden of proving a violation of this rule by a preponderance of the credible evidence, and the same is dismissed herein.

police headquarters. Velez was listening to the radio while processing the prisoner, as he responded to Dobson minutes earlier calling for Ewell, as well as answering his phone when she called him. However, Dobson never mentioned a robbery call when she spoke with Velez because she was waiting for confirmation from Ewell that it was actually a robbery call. Ewell failed to call in and confirm that a robbery had taken place. When Dobson did state over the radio that the call was now a "robbery", Velez, Green and Ewell did not hear the transmission.

Price and Franks both testified that officers must monitor all radio dispatches at all times. **I CONCLUDE** that the evidence in this case reveals that a robbery was dispatched on October 12, 2017 and Velez did not hear his radio effectively so as to hear the dispatcher; Velez did not respond to the robbery and did not monitor the radio and MDC and the activities of Ewell responding to the robbery. The question then becomes did Velez's conduct rise to the level of a violation of Irvington's regulations by not "monitoring" his radio and that of Ewell?

I CONCLUDE that Velez by his own admission that he did not "hear" Dobson's radio transmission of a robbery call, failed to monitor his radio as required by SOP 2016-16 IV.B.3.a, and I **CONCLUDE** that Irvington has demonstrated by a preponderance of the credible evidence that Velez's conduct is deemed inefficient and incompetent under SOP 2017-09.IV.G.3.1.29. In failing to respond to the robbery call, **I CONCLUDE** further that Velez failed to patrol all activities of Dobson and Ewell, via the radio and via the mobile data computer as required under SOP 2016-16 IV.B.3.c. **I CONCLUDE** that Velez's defense that not hearing the radio does not equate to failure to monitor is not persuasive. **I CONCLUDE** that the record reveals that Velez was not attentive to why Dobson was inquiring if Ewell was available, and thus he not only failed to monitor his radio, but also failed to monitor the situation, as required of supervisory officers.

SOP 2017-09 IV.G.3.1.31, concerns the accountability of supervisors for subordinate officer's conduct. Ewell's mistakes in handling the robbery would have been corrected if Velez responded to the robbery as required by Irvington's SOPs. Velez acknowledged that he is required to respond to a robbery or at the very least, ensure that a superior officer is responding to the robbery, which did not occur. For these reasons, I

CONCLUDE that Irvington has demonstrated by a preponderance of the credible evidence that Velez failed to adhere to SOP 2017-09 IV.G.3.1.31. and is accountable for Ewell's conduct at the scene in failing to ensure an adequate and complete investigation.

SOP 2017-09.IV.H.3.1.32, concerns Irvington's charge that Velez was inefficient or incompetent in failing to take corrective action against Dobson and Ewell after they did not meet departmental standards. This charge presumes that Velez was aware of Ewell and Dobson's conduct in real time, which the record reflects he was not, and therefore, I **CONCLUDE** that the evidence presented by Irvington did not demonstrate by a preponderance of the credible evidence that Velez was unwilling to take corrective action or somehow refused to do so. Rather, **I CONCLUDE** the evidence reveals that Velez was unaware that corrective action was necessary until after corrective action was already initiated by Price in ordering Franks' to conduct a preliminary investigation. For these reasons, I **CONCLUDE** that Irvington failed to demonstrate that Velez did not adhere to SOP 2017-09.IV.H.3.1.32.

The charge under General Order 2:00 IV.A. concerning responsibility for preliminary and follow-up investigations applies only to patrolmen and not supervisors. Section C (1) of this rule states that "...the preliminary investigation shall be conducted by the uniformed patrol officer assigned to the call for police service." Section C (2) states, "...The patrol officer assigned shall be responsible for initiating action to inform other appropriate bureau units of a serious crime or one requiring immediate on-the-scene follow up investigation." Therefore, I **CONCLUDE** that Irvington has failed to prove by a preponderance of the credible evidence that Velez is obligated under General Order 2:00 IV.A for the actions of the patrolman.

I CONCLUDE that Irvington has proven by a preponderance of the credible evidence that Velez violated departmental charges SOP 2016-16 IV.B.3.a, SOP 2017-09.IV.G.3.1.29, SOP 2016-16 IV.B.3.c, and SOP 2017-09 IV.G.3.1.31.

I CONCLUDE that Irvington has not proven by a preponderance of the credible evidence that Velez violated departmental charges SOP 2017-09.IV.H.3.1.32 and General Order 2:00 IV.A.

Now to address Velez's argument that Irvington did not comply with N.J.S.A. 40A:14-147, also known as the "45-day rule." Velez alleges that the 45-day period began when the Internal Affairs Department received this preliminary investigation report rather than when Internal Affairs conducted its own investigation.
The 45-day rule provides:

> 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...a failure to comply with said provisions as to the service of the complaint and the time within which a complaint is to be filed shall require a dismissal of the complaint.
>
> N.J.S.A. 40A:14-147

"The 45–day period runs from the date upon which the person responsible for the filing of the disciplinary complaint receives sufficient information upon which to base a complaint." Aristizibal v. City of Atl. City, 380 N.J. Super. 405, 427, (Law. Div. 2005). The court in Aristizibal also makes clear that "The statute contemplates that an investigation may be necessary before a decision can be made as to whether a basis exists to initiate disciplinary charges." Aristizibal, 380 N.J. Super. at 427. The "45-day rule" is "undoubtedly not designed to force an appointing authority, at the risk of being estopped, to prospectively bring ultimately valid, but unripe, disciplinary charges within 45 days of an incident without properly investigating the matter to ensure that sufficient information to bring such charges is obtained." Id. at 426 (citing In the Matter of Joseph McCormick, OAL Docket No. CSV 6319-00, 2001 WL 34609057, 3 (Dec. 4, 2001).

It is undisputed that in Irvington, the Internal Affairs Department makes charging decisions and issues Preliminary Notices of Disciplinary Action (PNDA), not the Public Safety Director. I **CONCLUDE** that Irvington has proven by a preponderance of the credible evidence that the Internal Affairs Department is responsible for making charging decisions, and that it had sufficient information upon which to base a complaint at the

conclusion of its investigation on December 8, 2017, the date its investigation was completed, and not when it received Franks' report on October 27, 2017. Therefore, I **CONCLUDE** that Irvington complied with the requirements of N.J.S.A. 40A:14-147, when its Internal Affairs Department signed off on the PNDA on December 25, 2017.

I **CONCLUDE** that Velez's argument is contrary to the decision made in Aristizibal, 380 N.J. Super. at 427, inasmuch as the Internal Affairs investigator assigned to this matter conducted interviews of the witnesses in order to uncover exactly what happened and to confirm whether Franks' preliminary report was correct, and also to determine whether there was information which may exonerate any of the officers.

Appropriateness of Penalty

In West New York v. Bock, 38 N.J. 500, 522 (1962), our Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Herrmann, 192 N.J. 19, 29 (2007) (citing Bock, 38 N.J. at 522). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Bock, 38 N.J. 523-24.

As the Supreme Court explained in In re Herrmann, 192 N.J. at 30, "[s]ince Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct." According to the Court:

> . . . First, principles of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct . . .
>
> The second use to which the principle of progressive discipline has been put is to mitigate the penalty for a current offense . . . for an employee who has a substantial record of employment

> that is largely or totally unblemished by significant disciplinary infractions . . .
>
> . . . [T]hat is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when . . . the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> [In re Hermann, 192 N.J. at 30-33 (citations omitted).]

It is undisputed that Velez has a lengthy disciplinary history, which includes: (1) July 7, 2005 – written reprimand; (2) June 28, 2006 – 90 day suspension for leaving town during a break and an altercation with a girlfriend; (3) December 20, 2007 – written reprimand – driving privileges suspended; (4) June 15, 2010 – 2 days for failing to secure evidence; (5) March 24, 2011 – written reprimand – vehicular pursuit out of town boundaries; (6) January 8, 2013 – performance notice – overtime entry; (7) March 6, 2014 – written reprimand – AWOL; (8) February 7, 2014 – 10 day suspension – improper arrest ; (9) January 19, 2015 – 4 day suspension; (10) October 1, 2015 – counseling; and (11) June 23, 2016 – 90 day suspension and plea agreement for future violations.

Irvington has argued that Velez agreed to a "last chance agreement", which would result in his termination in the event of a future charge, when he agreed to plead guilty in the prior disciplinary action to ninety-day suspension. Irvington admitted that the ninety-day suspension plea agreement was essentially the sole justification for termination in the within matter. As a result, I examined the audiotape of the ninety-day suspension during the within hearing. Based upon the foregoing, **I CONCLUDE** that that there is no mention of a last chance agreement in the ninety-day suspension hearing, and that the record was clear as to the same. **I CONCLUDE** that when Velez accepted the ninety-day suspension, Irvington would move for termination in the future if Velez was found guilty of another infraction, at no time did Velez waive any rights to a fair adjudication on the merits of any future disciplinary matter, including the within case.

I CONCLUDE that Irvington's decision to terminate Velez based upon a last chance agreement does not comport with the document incorporating the ninety-day suspension or it is not supported by the audiotaped rendition of that agreement, which was played twice in Court. **I CONCLUDE** that both the document and the recording make no mention of a last chance agreement, or that Velez would be automatically terminated for any future sustained disciplinary charges.

Notwithstanding the existence or non-existance of a last chance agreement, Irvington argues that termination is appropriate in this matter under the concept of "progressive discipline". It is undisputed that Velez has a lengthy disciplinary history as documented by Irvington. However, Velez has also been honored with numerous awards and commendations. In addition, there was no evidence presented by Irvington by testimony or documentation, that Velez was not a competent officer. The testimony of all the witnesses attested to the same.

I CONCLUDE that the concept of progressive discipline is not applicable herein, as I cannot ignore the mitigating factors in rendering my conclusion that Irvington has proven by a preponderance of the evidence that Velez violated departmental charges SOP 2016-16 IV.B.3.a, SOP 2017-09.IV.G.3.1.29, SOP 2016-16 IV.B.3.c, and SOP 2017-09 IV.G.3.1.31. **I CONCLUDE** that these mitigating factors was that Irvington failed to prove that Velez intentionally failed to respond to the dispathcer's call of a robbery, and the testimony of Franks that there were "extenuating circustances" that prevented Velez from hearing the transmission, and Taylor's testimony that missing a transmission doe not equate to failing to monitor.

I CONCLUDE that Irvington did not prove (or even allege) that Velez deliberately failed to monitor the radio, and that the only proofs submitted by Irvington was that Velez could not hear the dispatcher say the word "robbery" when she dispatched Ewell.[9] The record reveals that Green and Ewell did not hear it either, and they were given minor

[9] I had some difficulty hearing Dobson's radio call of a "robbery", when listening to the audio recording during the hearing, which supports my Velez's testimony and my conclusion.

discipline. The only witness who heard the word was Zepeda who was wearing a shoulder mic that rests inches from his ear. Velez did not have a shoulder mic.

I CONCLUDE that the penalty in this case was not proportionate to the punishment imposed for similar offenses. As the New Jersey Supreme Court has emphasized, "there must be fairness and generally proportionate discipline imposed for similar offenses by public employers..." In re Stallworth, 208 N.J. 182, 192 (2011). In the matter of In re Stallworth, a Camden County pump-station operator was charged with falsifying records and abusing work hours, and the ALJ imposed removal. The Civil Service Commission (Commission) modified the penalty to a four-month suspension and the appellate court reversed. The Court re-examined the principle of progressive discipline. Acknowledging that progressive discipline has been bypassed where the conduct is sufficiently egregious, the Court noted that "there must be fairness and generally proportionate discipline imposed for similar offenses." In re Stallworth, 208 N.J. at 193. Finding that the totality of an employee's work history, with emphasis on the "reasonably recent past," should be considered to assure proper progressive discipline, the Court modified and affirmed (as modified) the lower court and remanded the matter to the Commission for reconsideration.

In this case, Ewell and Dobson received one-day suspensions for directly violating the departmental regulations in failing to contact the supervisory officers of a robbery. **I CONCLUDE** that terminating Velez is clearly disproportionate when compared to similar conduct by Green who, like Velez, was guilty of nothing other than not being able to hear a word uttered during a radio transmission. Similarly, **I CONCLUDE** that Irvington's agreement to accept Green's three-day suspension for the same "conduct" as Velez, shows that the termination of Velez is disproportionate to the underlying charges.

Much has been said regarding Velez's ninety-day suspension. However, **I CONCLUDE** that the record is devoid of any evidence by Irvington concerning the severity of the original charges. Irvington chooses instead to argue that Velez agreed to a "last chance agreement", which I have concluded did not exist and on Velez's prior disciplinary history. However, as I have **CONCLUDED** "there must be fairness and generally proportionate discipline imposed for similar offenses by public employers..." In re Stallworth, 208 N.J.192, and therefore, **I CONCLUDE** that termination was not

appropriate in the within matter, and that Velez should be suspended, like Green, for three-days.

ORDER

Accordingly, I **ORDER** that the action of the respondent, Irvington in terminating Velez is **REVERSED,** and that the appropriate discipline is a three-day suspension.

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.

October 5, 2018
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: October 5, 2018

Date Mailed to Parties:

lr

WITNESSES AND DOCUMENTS IN EVIDENCE

Witnesses

For Appellant:

Sgt. Velez

Carl Hamer

Det. William Gatling

For Respondent:

Officer Darryl Ewell

Officer Ajah Dobson

Officer Jose Zepeda

Lt. Mark Green, Capt.

Kenneth Price

Det. Maurice Taylor

Lt. Clinton Franks

Public Safety Director Tracy Bowers

Exhibits

For Appellant:

P-1 Sgt. Velez Commendations and Notable Events

P-2 Reports for Robbery on 10/12/17

P-3 Sgt. Velez Arrest Reports 10/12/17

P-4 Same as R-8 (Incident Number I-2017-087880 Dispatch Log)

P-5 Same as R-2 (Office of Internal Affairs Investigative Report Dated December 12, 2017)

P-6 Same as R-12 (Administrative Report October 13, 2017 – Lieutenant Clinton Franks to Captain Kenneth Price)

P-7 Same as R-10 (Administrative Report Order to Submit – Lieutenant Mark Green)

P-8 Lt. Mark Green Disciplinary Documents

P-9 Same as R-9 (Administrative Report Order to Submit – Patrolman Darryl Ewell)

P-10 Officer Darryl Ewell Disciplinary Documents

P-11 Officer Ajah Dobson Disciplinary Documents

P-12 Sgt. Jaime Velez Administrative Report Dated 10/20/17

P-13 Sgt. Jaime Velez Disciplinary Documents (Termination)

P-14 Sgt. Jaime Velez Complaint dated 9/10/17 Against Police Director Bowers

P-15 Officer Simon Johnson Report dated 9/10/17

P-16 Investigative Summary (1) by Det. William Gatling dated 9/13/17

P-17 Investigative Summary (2) by Det. William Gatling dated 1/02/18

P-18 Letter Dated 11/21/17 from Prosecutor's Officer to Director Bowers (complaint not sustained)

P-19 Case Management and Activity Log Sheet by Det. Gatling

P-20 Case Checklist and Summary Sheet (IA Case #2017-150)

P-21 Memo dated 1/15/18 from Det. Gatling to Prosecutor's Office

P-22 Memo dated 1/17/18 from Prosecutor's Office to Det. Gatling

P-23 Memo dated 3/6/18 from Det. Gatling to Sgt. Velez

P-28 Memo dated 1/11/16 assigning PBA President Maurice Gattison to the Police Director's Labor Relations Office

P-43 Final Notice of Disciplinary Action 4/20/18

For Respondent:

R-1 Final Notice of Disciplinary Action March 20, 2018

R-2 Office of Internal Affairs Investigative Report Dated December 12, 2017

R-3 Case Management and Activity Log Sheet IA #2017-201 and Case Checklist and Summary Sheet IA #2017-201

R-4 omitted

R-5 Incident Report October 12, 2017 Case Number CC-2017-009336/Incident Number I-2017-087880

R-6 Supplemental Investigation Report October 13, 2017

R-7 Supplemental Investigation Report October 17, 2017

R-8 Incident Number I-2017-087880 Dispatch Log

R-9 Administrative Report Order to Submit – Patrolman Darryl Ewell

R-10 Administrative Report Order to Submit – Lieutenant Mark Green

R-11 Administrative Report Order to Submit – Sergeant Jaime Velez

R-12 Administrative Report October 13, 2017 – Lieutenant Clinton Franks to Captain Kenneth Price

R-13 Administrative Report October 27, 2017 – Captain Kenneth Price to Deputy Chief Stephen Yannotti

R-14 Relevant Portion of Standard Operating Procedure #2016-16 (Amended 9/1/16)

R-15 Relevant Portion of Irvington Police Manual

R-16 Relevant Portion of General Order 2:00

R-17 Relevant Portion of Standard Operating Procedure #2017-09

R-18 Disciplinary Memorandum October 24, 2016 IA#2016-155

R-19 Disciplinary Memorandum March 20, 2018 IA#2017-201

R-20 Personnel Classification Order March 20, 2018

R-21 Disciplinary Memorandum Dated March 20, 2018 Director Bowers to Det./Sgt. Gerard Malek and Det./Sgt. Barry Zepeda

R-22 Sgt. Jaime Velez Concise Case History

R-23 HQ Dispatch

R-24 Dispatch Recordings

R-25 Officer Dobson and Lt. Franks Audio Statements

R-26 Officer Ewell Audio Statement

R-28 Plea Agreement October 20, 2016 Audio Recording

OAL

J-1 Ordinance of the Township of Irvington 11/4/15