



## STATE OF NEW JERSEY

 FINAL ADMINISTRATIVE ACTION  
 OF THE  
 CIVIL SERVICE COMMISSION

 In the Matter of Paul Dzialo,  
 Camden County Police Department

 CSC Docket No. 2016-4333  
 OAL Docket No. CSV 09072-16

ISSUED: April 20, 2018 (WR)

The appeal of Paul Dzialo, a County Police Officer, Camden County Police Department, of his 20 working day suspension, on charges, was heard by Administrative Law Judge Kathleen M. Calemme (ALJ), who rendered her initial decision on December 21, 2017. Exceptions were filed on behalf of the appellant, and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on March 27, 2018, did not adopt the ALJ's recommendation to uphold the 20 working day suspension. Rather, the Commission modified the penalty to a 10 working day suspension.

## DISCUSSION

The appellant was charged with conduct unbecoming a public employee; incompetency, inefficiency or failure to perform duties; insubordination; neglect of duty; other sufficient cause; and violation of various departmental rules and regulations. Specifically, the appointing authority asserted that on November 12, 2015, the appellant failed to follow its canine policy, which resulted in the appellant firing a shotgun without regard to his residential surroundings. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law as a contested case.

In the initial decision, the ALJ found that, on November 12, 2015, the appellant was called to aid an officer searching for a loose dog which was reported as aggressive. The officer and the appellant located the dog rummaging through trash, but soon lost sight of it. The officers searched for the dog with their weapons drawn; the appellant was armed with a shotgun. Thereafter, the dog charged at the officers through a partially-opened gate and the officers killed the dog with their firearms. The appellant fired his shotgun at least three times. Curtis May, a Detective with the Internal Affairs Unit of the Camden County Police Department, testified that he investigated the November 12, 2015 incident and obtained a video recording of the incident recorded from private cameras. His investigation revealed that the dog that was killed was known to residents and shot in its own backyard. The investigation also revealed that a shotgun pellet marking on the top of a fence indicated that the appellant "was not staying down on the target when firing," in contradiction to departmental policy, which requires that the shotgun be pointed in a downward direction when fired to prevent the gun from recoiling upward when discharged. He also testified that a pellet fired from the appellant's shotgun had struck the window of a residence, but did not penetrate it. May further testified that the appointing authority's canine policy mandates deadly force as a last resort if a hostile dog is encountered and concluded that the appellant violated the policy because he did not use other options to control the dog other than deadly force.

Lieutenant Kevin Lutz, the commander of the appointing authority's training bureau testified that the appellant required training after the internal affairs' investigation concluded. After completing the training, Lutz testified that the appellant was reluctant to acknowledge any wrongdoing or mistakes on his part and was not receptive to the training. He also testified that the appellant had better options to counter the dog's threat other than deadly force. The appellant testified that the dog was aggressive towards him. The appellant indicated that he believed that he was in danger despite having distance between himself and the dog. When the dog lunged at him, he tried to retreat but the dog approached him so quickly that he had no choice but to shoot it. He felt that the training was more akin to an internal affairs investigation than remedial action. Given the circumstances as they existed at the time of the incident, the appellant testified that he made the correct choice to use deadly force.

As set forth in detail in her determination, the ALJ found all three witnesses credible. The appellant's arming of the shotgun made him less capable of employing non-lethal means of dealing with the dog. The ALJ also found that the appellant searched for the dog with his weapon drawn when there were no alarms or signs of an emergent situation. The dog lunged at the officers, which gave them no choice but to discharge their weapons. One pellet fired from the appellant's shotgun struck the window of an occupied house. The appellant was not receptive to the mandatory training.

Based on her findings, the ALJ upheld the charges of conduct unbecoming a public employee; incompetency, inefficiency or failure to perform duties; neglect of duty; and other sufficient cause. However, the ALJ dismissed the insubordination charge, finding that there was no testimony to support the charge. The ALJ similarly dismissed departmental charges relating to code of ethics, standards of conduct, general responsibilities, work expectations, prohibited activity on duty, use of force and all other conduct because there was no testimony that supported the charges. In consideration of the possible consequences of discharging a shotgun in a residential neighborhood and the appellant's disregard for his training, the ALJ concluded that the imposition of a 20 working day suspension was an appropriate penalty.

In his exceptions, the appellant argues that he exercised due care during the incident and his conduct did not violate any rule or regulations. He contends that his use of a shotgun during the incident was justified and he operated the weapon properly. The appellant reiterates that his possession of the shotgun, which must be held with two hands, limited the non-lethal options he could have employed. He also argues that he followed the departmental canine policy as best as the circumstances permitted. Furthermore, the appellant asserts that a 20 working day suspension is unreasonable and not commensurate with the circumstances of the incident. The appellant states that he believed that his actions during the incident were justified and he should not be punished "for standing up for what he believed." Accordingly, the appellant requests that the charges against him be dismissed and the penalty disregarded.<sup>1</sup>

In its reply, the appointing authority argues that the ALJ correctly concluded that the appellant violated its canine policy. Moreover, the appointing authority states that the appellant fired his shotgun, which "hit occupied houses and a fence" and contends that it was the appellant's responsibility to keep the public safe. Thus, the appointing authority argues that the charges against the appellant were appropriate. Finally, the appointing authority contends that the ALJ correctly upheld the 20 working day suspension.

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<sup>1</sup> In the initial decision, the ALJ dismissed the appellant's argument that alleged violation of the appointing authority's internal rules and regulations violated the 45 day rule. See *N.J.S.A. 40A:14-147*. The ALJ found that because the November 12, 2015 incident involved a firearm, it was automatically forwarded to the Camden County Prosecutor's Office for review, which remanded it back to the appointing authority on December 28, 2015. Due to the appellant's unavailability, the appointing authority's internal affairs bureau was not able to interview the appellant until February 10, 2017. The ALJ found that the appointing authority did not have sufficient information to charge the appellant until after his interview. As noted above, the PNDA was issued on March 10, 2017, which was within the 45 day limit. The appellant raises the same objection in his exceptions. However, the Commission finds that the appointing authority did not violate the 45 day rule for the reasons set forth by the ALJ in the initial decision.

Upon its *de novo* review of the record, the Commission agrees with the ALJ's determination of the charges. In this case, there is nothing in the record or in the parties' exceptions which convinces the Commission that the ALJ's factual findings regarding the incident and the appellant's subsequent training were not based on the evidence or were otherwise in error.

With regard to the penalty, the Commission's review is also *de novo*. In addition to considering the seriousness of the underlying incident, 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 appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 N.J.A.R. 2d 463, 465 (CSV) 1996. Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway*, 81 N.J. 571, 580 (1980). It is settled that the principle of progressive discipline is not "a fixed and immutable rule to be followed without question." In the instant matter, the record reflects that the appellant has no prior discipline. However, the appellant is a law enforcement officer, and as such, is held to a higher standard of public duty. This standard includes upholding an image of utmost confidence and trust, since county Police Officers hold highly visible and sensitive positions within the community. The public expects and demands Police Officers to follow orders and exhibit a respect for rules, regulations, procedures, and policies. 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). Thus, the appellant's conduct in public with a deadly weapon should be beyond reproach. Moreover, it is particularly worrisome that the appellant failed to see any wrongdoing with his conduct. However, based on the dismissal of the charge of insubordination and many of the departmental charges as well as the appellant's lack of a prior disciplinary record, the Commission finds that a 10 working day suspension is appropriate under the circumstances. This major discipline should serve as a sufficient reminder that any future infractions may lead to further disciplinary action, up to and including removal.

Since the penalty has been reduced, the appellant is entitled to 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. March 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, while the penalty was modified, the Commission has sustained charges and imposed major discipline. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. See *In the Matter of Bazyt Bergus* (MSB, decided December 19, 2000), *aff'd*, *Bazyt Bergus v. City of Newark*, Docekt No. A-3382-00T5 (App. Div. June 3, 2002); *In the Matter of Mario Simmons* (MSB, decided October 26, 1999). See also, *In the Matter of Mario Simmons* (MSB, decided October 26, 1999). See also, *In the Matter of Kathleen Rhoads* (MSB, decided September 10, 2002) (Counsel fees denied where removal on charges of insubordination, inability to perform duties, conduct unbecoming a public employee and neglect of duty was modified to a 15-day suspension on the charge of neglect of duty).

### ORDER

The Commission finds that the appointing authority's action in suspending Paul Dzialo for 20 working days was not justified. Therefore, the Commission modifies the 20 working day suspension to a 10 working day suspension. The Commission further orders that the appellant be granted 10 days of back pay, benefits, and seniority. 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.

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

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 27<sup>th</sup> DAY OF MARCH, 2018



Deirdre L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Christopher Myers  
Director  
Division of Appeals  
and Regulatory Affairs  
Civil Service Commission  
P.O. Box 312  
Trenton, New Jersey 08625-0312

Attachment



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. CSV 09072-16

AGENCY DKT. NO. 2016-4333

**IN THE MATTER OF  
PAUL DZIALO, CAMDEN COUNTY  
POLICE DEPARTMENT.**

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**Jeffrey S. Ziegelheim, Esq.**, for appellant Paul Dzialo (Alterman & Associates, LLC, attorneys)

**Emeshe Arzon, Esq.**, for respondent Camden County Police Department (Office of Camden County Counsel, attorneys)

**Howard L. Goldberg, Esq.**, for respondent Camden County Police Department (Office of Camden County Counsel, attorneys)

Record Closed: November 6, 2017

Decided: December 21, 2017

**BEFORE KATHLEEN M. CALEMMO, ALJ:**

**STATEMENT OF THE CASE**

Appellant, Paul S. Dzialo, Jr. (Dzialo), a Police Officer with the Camden County Police Department (Department), appeals a twenty-day suspension he received as major discipline for his failure to follow the canine policy that resulted in the use of

deadly force; for firing a shotgun without regard to the residential background and the potential for ricochet; and the subsequent Internal Affairs investigation surrounding same. The Department sustained the following charges: Incompetency, inefficiency or failure to perform duties, N.J.A.C. 4A:2-2.3(a)(1); Insubordination, N.J.A.C. 4A:2-2.3(a)(2); Conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); Neglect of duty, N.J.A.C. 4A:2-2.3(a)(7); and Other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12). The Department also determined that Dzialo violated the following Rules and Regulations: 1:5 code of ethics; 3:1.1 standards of conduct; 3:1.5(f) general responsibilities; 3:1.6 neglect of duty; 3:1.10 obedience to rules and regulations; 3:1.32 work expectation; 3.2.1(k) prohibited activity on duty; 3.2.20 use of force; and 3.2.21 all other conduct. Dzialo maintained that his use of deadly force comported with the Department's regulations; specifically, the use of force policy because an officer may use a firearm to destroy an animal when the animal poses an imminent threat of significant bodily harm to human life. Dzialo believed that lethal force against the pit bull was his only alternative to protect his life, Officer Levy's life, and the lives of those around him.

### PROCEDURAL HISTORY

On March 9, 2016, the Department issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications made against Dzialo. (J-1.) Following the departmental hearing held on May 4, 2016, the Department issued a Final Notice of Disciplinary Action (FNDA) on June 7, 2016, sustaining the charges in the Preliminary Notice and suspending Dzialo from employment for twenty working days. (J-2.) Appellant appealed on June 9, 2016. The matter was transmitted by the Civil Service Commission Division of Appeals and Regulatory Affairs to the Office of Administrative Law (OAL) where it was filed on June 17, 2016 for hearing as a contested case. N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52: 14F-1 to 13. The hearing scheduled for December 12, 2016 was adjourned at the request of the appellant with the consent of the Department. The hearings were held on May 2, 2017 and July 19, 2017. The record remained open to allow the parties to submit post-hearing submissions. The record closed on November 6, 2017.



## FACTUAL DISCUSSIONS AND FINDINGS

The following facts are not disputed. At approximately 7:00 a.m. on November 12, 2015, Officer Levy was stationed at Yorkship Square in Camden. He was approached by a mother walking with her child who said that a pit bull was loose. Levy radioed for animal control to be dispatched to the location because the dog was reported as aggressive. Levy also contacted the command center, Real Time Tactical Information Operations Center, (RT-TIOC) to determine whether surveillance cameras could be positioned in the courtyard where the dog was seen. He then radioed for assistance from an officer with a shotgun.

Dzialo, who was patrolling in the vicinity and assigned to carry a shotgun, responded to Levy's call for assistance. Dzialo parked his patrol car, retrieved his shotgun, and walked over towards Levy. Levy showed Dzialo where the dog was rummaging through trash next to a sidewalk where pedestrians were walking. The officers kept the dog in their line of vision and maintained a safe distance. While the dog rummaged in the trash, it did not make any aggressive moves. After approximately six minutes, the dog lost interest in the trash, and noticed Dzialo. Dzialo backed up away from the dog, whom he described as snarling and menacing. The dog wandered off and the officers lost sight of him. As they searched for the dog, the officers had their weapons drawn and ready. Dzialo was holding his shotgun with both hands. The dog darted out from behind a fence with a partially opened gate towards the two officers, who immediately discharged their weapons. The dog was killed. The initial investigation showed that Dzialo was carrying a department issued shotgun and Levy was armed with a department issued handgun. Dzialo discharged his shotgun at least three times and Levy discharged his handgun nine times.

## TESTIMONY

**Detective Curtis A. May** (May) is assigned to the Internal Affairs Unit of the Camden County Police Department. As part of standard operating procedures, Internal Affairs was assigned to investigate the November 12, 2015, incident because the officers involved discharged their weapons. May was assigned to investigate. His

investigation was summarized in an Investigation Summary dated November 17, 2015. (R-1.) Although the memorandum was dated November 17, 2015, the report was not fully completed until March 17, 2016, as noted by the dates of entry for subsequent events. At 7:45 a.m. on the morning of the incident, May was informed by the RT-TOIC Commander that Dzialo and Levy discharged their weapons while responding to a complaint about a loose canine. May arrived at the scene approximately ten minutes after the canine had been killed; the area had been cordoned off and secured. With his team of investigators, May canvassed the area of the shooting, and conducted interviews with nearby residents. From the interviews, May learned that the pit bull was known to the residents and that it was shot in its own backyard. The Department had no cameras in this area, but the detectives found private cameras in the secured area. One video was obtained from the building manager for 1201 and 1185 Yorkship Square apartments, who had installed cameras on the outside of the buildings facing the area where the incident occurred. (R-2.) The other video was retrieved by May from a home owner whose home was equipped with a camera connected to his laptop. He allowed May to copy his video for any relevant footage. (R-3.)

As the video from the Yorkship Square apartments was played at the hearing, May offered testimony. (R-2.) The video opened with the dog rummaging through some trash at approximately 7:00 a.m. Levy is shown to arrive on the scene. The dog remained within the sight of Levy. The video showed Levy as he approached Dzialo, who arrived with his shotgun. The dog remained occupied with the trash until approximately 7:30 a.m. when the dog started to run down the alley. In the next scene both officers appear to be looking down around the corner of the building. On cross-examination, it was established that 1185 Yorkship is an apartment building that has an archway cut through to Yorkship Square.

The second video viewed at the hearing was secured from a private resident who lived close to where the dog resided. (R-3.) The video's angle was directed towards fencing that was later determined to be the dog's backyard. The video depicted the dog walking down the right side of a truck then disappearing behind a fence at 7:27 a.m. May learned by canvassing the neighborhood after the shooting that the dog had entered the back yard of its residence. At 7:28 a.m., Levy and Dzialo appear on the

video to be checking under a vehicle and then moving towards the fence. The dog suddenly emerged from a partially open gate and the officers step backward and simultaneously discharged their weapons. Levy appeared to be making a radio transmission as the officers walked toward the fence when the dog charged again and the officers discharged their weapons for a second time. After the shooting, the video showed that the officers stayed on the scene until the investigative unit arrived.

As part of the investigation, the Crime Scene Unit photographed the area where the incident occurred. (R. 6.) The photographs showed green markers that were placed by the investigating officers marking where the shell casings from the handgun and shotgun wadding from the shotgun had fallen. (R -6 at 20-55, 94-100, and 103-108.) The picture of a wooden fence is marked where the shotgun rounds struck the fence. (R-6 at 56, 68, 69, 72-83, 90-93.) May testified that the shotgun marking on the top of the fence indicated that Dzialo was not staying down on the target when firing. To explain his testimony, May demonstrated how to properly hold a shotgun. He explained that a shotgun when fired discharges twelve pellets that spread, protocol requires that the shotgun be pointed in a downward direction. The downward trajectory is also important because it allows the shooter to use his weight to balance the "kick" from the shotgun and prevent the gun from popping upward when discharged. The pictures of the deceased canine were taken in his yard where he died. (R-6 at 57-66.) A picture of a residence located behind the fence showed taping where a shotgun pellet had struck the window but did not go through into the residence. (R-6 at 67, 73-82.)

May testified about his familiarity with the Department's canine policy. (R-7.) If a hostile dog is encountered, the policy is as follows:

1. Remain still and face the animal if it advances;
2. Use voice commands;
3. Spray the department-authorized oleoresin capsicum (OC) spray in the dog's face;
4. Utilize the department-authorized baton;
5. Strike the dog using the baton;
6. Hold the baton straight out as distraction;
7. Use a CED (Taser);
8. Kick at the dog; and
9. Deadly force.

May testified that Dzialo did not properly follow the canine encounters policy (R-7) because no verbal commands were given to the dog; no OC spray was used; and the baton was never engaged. The only option utilized was deadly force.

May further testified that Dzialo violated the specific charges enumerated on the PNDA (J-1) by not following the canine policy and the Rules and Regulations regarding the "use of force." Specifically, he did not use verbal commands, discuss less lethal options, and fired into a backdrop with occupied houses. May testified that according to what he saw on the video, the dog was not aggressive by the trash; there were no civilians in the area; and no one was seeking assistance; therefore, the officers should have waited for animal control.

When asked on cross-examination how Dzialo could have utilized the techniques of the canine policy with both his hands on the shotgun, May responded that he could still use time and distance. However, between the two officers, Levy was in a better position to use OC spray or the baton because a handgun can be operated with one hand. In responding to the questions, May stated that even after they lost sight of the dog, there was no reason for the officers to put themselves in harm's way by looking for the dog because there was no immediate emergency. It was established on cross-examination that use of force is justified when an officer reasonably believes such action is immediately necessary to protect himself against imminent danger or death or serious bodily harm. May testified that when interviewing Levy and Dzialo, both officers stated they believed their lives or the life of their partner was in imminent danger. However, May testified that the officers were responsible for the whole continuum of events, and should not have put themselves in a position where their only option was deadly force. As recorded by May in his Investigation Summary, the officers stated that they did not discuss the use of less lethal options. (R-1.)

**Lieutenant Kevin Lutz** (Lutz) is the commander of the CCPD's Training Bureau and the Deputy Director of the Camden County College Police Academy. Lutz testified that after Internal Affairs concluded its investigation, he was notified by May that Levy and Dzialo required training. Prior to the first training session, Lutz was given a

summary of the incident but had not reviewed the video recordings. He testified that from his informal conversation with both officers at the training, he was given the impression that the dog was a threat to the public. Following the training session, he watched the video and had a completely different impression about the aggressiveness of the canine.

After meeting with his superiors to discuss his concerns, the outcome was to conduct a second training session. Lutz testified that he would have conducted the first training session differently had he viewed the video first. He testified that he wanted to make sure that the officers understood what they did wrong. Lutz testified on cross-examination that he encountered hundreds of loose pit bulls in Camden over the course of his career and the goal is always containment not putting yourself in harm's way. At the second training, Lutz played the video to Levy and Dzialo in the presence of the union president. According to Lutz, Dzialo was reluctant to acknowledge any wrongdoing or mistakes. This was problematic for Lutz because he testified that he was not imposing discipline but trying to prevent an incident like this from happening again. He further testified that the training is not optional. Training is required after a determination is made that an officer violated department policy. Lutz testified that it is his job to make sure the violation is corrected.

Following the training session, Lutz prepared a Performance Notice dated March 16, 2016. (R-10.) Lutz wrote that Dzialo was not receptive to training because he did not accept that he did anything wrong. While Lutz believed that the actions of the officers caused the exigency of the circumstances that resulted in lethal force. Lutz took the greatest exception to the firing of the rounds into the backdrop of the houses. As interpreted by Lutz, the video showed that the last round fired by Dzialo was done while the shotgun was being held in an upward position towards an occupied house. (R-10.) He felt obligated to impress upon Dzialo that there was a better course of action. Namely, slow down, create a perimeter, and have less lethal options ready if they were to encounter the dog. Lutz testified that he equated the officers' action to be akin to hunting the dog so when they encountered the dog in the backyard they had no other choice but to shoot.

According to Lutz, Dzialo violated the Department's Rules and Regulations pertaining to the use of force in dealing with canines. He determined there was no imminent threat because the dog was not menacing the public. On cross-examination, Lutz acknowledged that the videos he watched were from stationary cameras without audio so there could have been interactions between the officers and the canine that were not captured. Dzialo told Lutz during the training that the dog acted aggressive towards him.

**Paul S. Dzialo, Jr. (Dzialo)** was a police officer, employed for two and one-half years by CCPD. On November 12, 2015, Dzialo responded to Levy's radio call for assistance. When he arrived at the scene with his shotgun, as directed, he saw Levy standing in the archway. Levy directed him to where the dog was rummaging through trash. Levy also told him that he had called animal control. Dzialo understood that for an immediate response from animal control, the policy required that the animal be kept within your line of sight. Initially, Dzialo kept distance from the dog as his barrier. After the dog lost interest in the trash, he noticed Dzialo and showed aggression by snarling and growling and its hair was sticking up in an intimidating manner. Dzialo stood his ground while the dog stared at him. It appeared that the dog lost interest in Dzialo, but he came back, snarling and growling. At this point, Dzialo had enough distance between himself and the dog, but he still felt that he was in danger. He stated that there were no civilians around, but he had kept about three people away from the area. Dzialo stated that when he left his position, people started walking through the archway. The video showed a young man walking with his backpack. Dzialo described the area where the dog went as a "U" shaped courtyard. Most of the buildings are connected but there is a section where the houses are detached. The officers lost sight of the dog as it went behind some parked vehicles in the courtyard. Dzialo bent down and looked underneath a parked vehicle. He stated he was carrying his shotgun at the "low ready" meaning that it was pointed at the ground. When they could not locate the dog, Dzialo believed the dog may have broken the perimeter and gone back out onto the street. They walked passed the fence without realizing that the dog was behind it. He testified that the dog came out from behind the fence and lunged at them. They started to back up and create distance, but the dog was rapidly approaching so they had no choice but to shoot. At the time, Dzialo discharged his shotgun, he believed he did not have the

ability to use less lethal means to protect himself or Levy. He was in fear for his life and the life of his partner.

Dzialo testified that the first training consisted of nothing more than reviewing the policies and procedures to make sure that he understood them. The next day, he was told of the need for a second training because Lutz watched the videos and wanted to go over things. The second training was completely different. Dzialo stated that this training felt like an Internal Affairs interrogation and not a training session. Dzialo testified that hindsight is "twenty-twenty," but when on the street, split second decisions are required. He felt that given the circumstances, his decision was the right one. There was no way of knowing that the dog had returned to its home. He testified that he believed the dog had left the area and posed a threat to the community. The video did not accurately portray the entire situation because it only captured a single angle. On cross-examination, Dzialo stated that he did not recall telling Lutz at the first training that it was his intention to walk through the back yard to Octagon Avenue and he did not put that information in his statements. Dzialo prepared a narrative of the event for Detective May and a Firearms Discharge Report. (R-1 and R-11.) However, the February 10, 2016, entry in Detective May's Investigation Summary, taken from a recorded interview with Dzialo, contained language that Dzialo believed the dog had walked along a path out of the court yard on to another street. (R-1.)

### **FINDINGS OF FACT**

Credibility is best described as that quality of testimony or evidence which makes it worthy of belief. The Supreme Court of New Jersey considered the issue of credibility in In Re Estate of Perrone, 5 N.J. 514 (1950). The Court pronounced:

Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.  
[ibid. at 522]

See also, Spagnuolo v. Bonnet, 16 N.J. 546, (1954), State v. Taylor, 38 N.J. Super. 6 (App. Div.1955).

In order to assess credibility, the witness' interest in the outcome, motive or bias should be considered. Furthermore, a trier-of-fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura- Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

In the present matter, the Department witnesses, May and Levy, gave detailed, concise informative testimony regarding the policies and procedures governing the situation and training of employees. Their testimony was consistent with the documentary evidence of the incident. Appellant Dzialo testified about his observations on the scene and his sense of aggression directed towards him by the canine.

In reviewing the record, and after having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I **FIND** the following to be the relevant and credible **FACTS** in this matter:

1. At approximately 7:00 a.m. in the morning on November 12, 2015, Dzialo responded to a radio call for assistance from Levy with instructions to bring a shotgun due to a loose aggressive canine.
2. Levy and Dzialo are of equal rank, but, Levy made the call for assistance, requested the shotgun, notified animal control, and reported the need for cameras.
3. Dzialo carried the shotgun which limited his options to employ less lethal force.
4. Dzialo initially used distance and sight to contain the canine.
5. Dzialo and Levy did not have any discussions about the canine policy or the use of less lethal methods.



6. There was only one complaint about an aggressive loose dog that occurred prior to Dzialo's arrival on the scene.

7. Dzialo never conducted interviews in the neighborhood or questioned any of the people in the area about information relating to the dog while he was observing the dog rummage through the trash.

8. Dzialo and Levy went searching for the canine with weapons drawn when there were no alarms or any other signs of an emergent situation.

9. When Dzialo and Levy approached the fence, the dog startled them and lunged at them, giving them no choice but to discharge their weapons.

10. Dzialo discharged his shotgun at least three times at the charging canine against a backdrop of houses and one of the pellets from his shotgun struck the window of an occupied house.

11. Dzialo was not receptive to the training mandated after the November 12, 2015 incident.

### **LEGAL DISCUSSION**

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20, and N.J.A.C. 4A:2-2.2.

Appellant raises the issue that the alleged violation of the internal rules and regulations should be dismissed because the Department failed to comply with N.J.S.A. 40A:14-147. The statute provides in pertinent part that a complaint charging a violation of internal rules and regulations "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.” Id. (emphasis added.) However, the rule contains an exception when there is a concurrent criminal investigation:

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 limit shall begin on the day after the disposition of the criminal investigation.” Id.

The November 12, 2015 incident involved the discharge of a firearm, consequently, it was automatically forwarded to the Camden County Prosecutor’s Office for review. On December 28, 2015, Camden County Prosecutor’s Office remanded it back to CCPD. However, due to Dzialo’s unavailability, CCPD’s Internal Affairs was unable to interview him until February 10, 2016. Dzialo was out of work due to a back injury from January 6, 2016 through January 30, 2016. Once he returned to duty, he was interviewed on February 10, 2016. Dzialo was served with a PNDA on March 10, 2016. I **FIND** that CCPD did not have sufficient information until after the February 10, 2016 interview to file the complaint. Furthermore, since there was no appeal to the Commissioner for interim relief at the time the charges were brought pursuant to N.J.A.C. 4A:2-2.5(e), procedural irregularities are deemed waived. Therefore, I **CONCLUDE** that because CCPD did not have “sufficient information” until Dzialo’s interview on February 10, 2016, the PNDA filed on March 10, 2016 was within the forty-five-day time limit. In addition, any objections to the timeliness of the internal charges are waived.

Appellant also maintains that the mandatory training constituted a punishment so the suspension for the same violations arising from the same incident is barred by the Double Jeopardy Clause of the United States and New Jersey Constitutions. In support of his argument, appellant relies on State v. Eisenman, 153 N.J. 462, 468 (1997). In Eisenman, the New Jersey Supreme Court held that if an act is remedial and rehabilitative in both its essential purpose and its essential effect, it cannot be viewed as punishment triggering the protections against double jeopardy of the state and federal

constitutions. See, State v. Black, 153 N.J. 438, 451 (1998). After the New Jersey Supreme Court heard oral argument in Eisenman and Black, the United States Supreme Court decided Hudson v. United States, 522 U.S. 93, 99 (1997) wherein the majority "reestablished the traditional rule that whether a sanction is subject to double jeopardy restraints depends on whether that sanction essentially constitutes a criminal penalty." The mandatory training required by CCPD was not a criminal penalty. As supported by the testimony of Lutz and May, its purpose was remedial and rehabilitative. Therefore, I **CONCLUDE** that the training herein did not trigger the protections against double jeopardy.

The appointing authority bears the burden of establishing the truth of the allegations by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

In the present case, Dzialo was charged with incompetency, inefficiency or failure to perform duties, N.J.A.C. 4A:2-2.3(a)(1); insubordination, N.J.A.C. 4A:2-2.3(a)(2); conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); neglect of duty, N.J.A.C. 4A:2-2.3(a)(7); and other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12). The Department also determined that Dzialo violated Camden County Police Department Rules and Regulations as follows: 1:5 code of ethics; 3:1.1 standards of conduct; 3:1.5(f) general responsibilities; 3:1.6 neglect of duty; 3:1.10 obedience to rules and regulations; 3:1.32 work expectation; 3.2.1(k) prohibited activity on duty; 3.2.20 use of force; and 3.2.21 all other conduct. Although the same specifications support each of the charges and they are not compartmentalized, I will discuss each charge in turn.

Dzialo was charged with violating N.J.S.A. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties. There is no definition in the New Jersey Administrative Code for incompetency, inefficiency or failure to perform duties. N.J.S.A.

4A:2-2.3(a)(1) is written in the disjunctive; therefore, a finding that Dzialo failed to perform his duties would be enough to sustain the charge. As specifically prescribed, it was Dzialo's duty to observe and obey all laws and ordinances, all rules and regulations, and orders of the Department. In his Performance Notice, Lutz wrote that Dzialo violated the canine encounters and use of force directives. (R-7.) In this case, there was one civilian complaint about a loose pit bull over a period of approximately forty minutes. In assessing any situation in the field, Dzialo must be able to recognize an appropriate sense of urgency and respond accordingly. In encountering a hostile dog, the Department's witnesses both testified that containment is the favored policy until animal control arrives. Dzialo admitted to Lutz and May that he never had any discussions with Levy on the scene about employing the defensive tactics set forth in the policy. In addition, before utilizing deadly force, consideration must be given to the possibility of critically injuring an officer or bystander by a missed shot. Consideration must also be given to the background and the possibility of ricochet. In his interview with May, Dzialo stated that he considered the backdrop but did not take ricochet from the shotgun into account. (R-1.) From the testimony and the video, Dzialo's focus was fixed on finding the canine, without consideration of the above components of the canine policy. He fired his shotgun into a backdrop of residential buildings and a round struck a window of an occupied home. Therefore, I **CONCLUDE** that the Department has proven by a preponderance of the credible evidence that Dzialo violated the Canine Encounters directive dated October 9, 2015 (R-7); and Rule 3.2.20 use of force and its corresponding directive dated January 28, 2013 (R-8), and therefore, proved the charge of failure to perform duties, N.J.A.C. 4A:2-2.3(a)(1).

Dzialo was also charged with violating N.J.A.C. 4A:2-2.3(a)(2), insubordination. Insubordination can be defined as intentional disobedience or refusal to accept reasonable orders, assaulting or resisting authority, disrespect or use of insulting or abusive language to a supervisor. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971). There was no testimony to support this charge. I **CONCLUDE** that the charge of N.J.A.C. 4A:2-2.3(a)(2) does not apply to the facts of the present case. The charge of violation of N.J.A.C. 4A:2-2.3(a)(2) is hereby **DISMISSED**.

Dzialo was charged with "conduct unbecoming a public employee," N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or tends to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). The New Jersey Supreme Court, in In re Phillips, 117 N.J. 567, 576-77 (1980), recognized that the obligation to act in a responsible manner is especially compelling in a case involving a law enforcement official:

[A] police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. He carries a service revolver on his person and is constantly called upon to exercise tact, restraint and good judgment in his relationship with the public. He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public, particularly in a small community (quoting Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966)).

Dzialo testified that there were civilians in the area, but he never questioned anyone about the dog. If Dzialo had asked a few questions, he might have learned that the dog lived in the neighborhood. The primary concern from the testimony of May and Lutz was that Dzialo did not consider a less lethal option during the entire continuum of events. The judgment of both officers to look for the dog with weapons drawn when no emergency existed showed a disregard for policy and poor judgment. Lutz testified that searching for the dog with weapons drawn was akin to hunting. Anytime an officer is carrying a weapon at "low ready" as was Dzialo, he must exercise good judgment and be conscious of his surroundings. Accordingly, I **CONCLUDE** that Dzialo's conduct rose to the level of conduct unbecoming a public employee, and that CCPD has met its burden of proof on this issue.

Dzialo was also charged with neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7). There is no definition in the New Jersey Administrative Code for neglect of duty, but the charge has been interpreted to mean that an employee failed to perform

an act required by the description of their job title. Neglect of duty can arise from an omission or failure to perform a duty and includes official misconduct or misdoing, as well as negligence. Generally, the term "negligent" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). Neglect of duty implies nonperformance of some official duty imposed upon a public employee, not merely commission of an imprudent act. Rushin v. Bd. of Child Welfare, 65 N.J. Super. 504, 515 (App. Div. 1961). The stated purpose of the canine policy was "to present officers with tactical options for dealing with a hostile animal." Dzialo was duty bound to obey the rules and regulations of CCPD. His failure to implement the policies found in the Canine Encounter directive caused a fatal encounter with the canine that could have been avoided by practicing containment, space, and time. Dzialo searched for the dog while holding a shotgun with both hands against a backdrop of occupied housing without due consideration of the consequences. Therefore, I **CONCLUDE** that CCPD has met its burden of proving by a preponderance of the credible evidence that Dzialo's conduct constituted neglect of duty.

Dzialo was also charged with violating N.J.A.C. 4A:2-2.3(a)(12), "other sufficient cause." Specifically, Dzialo is charged with the following violations of the CCPD General Rules and Regulations: 1:5 code of ethics; 3:1.1 standards of conduct; 3:1.5(f) general responsibilities; 3:1.6 neglect of duty; 3:1.10 obedience to rules and regulations; 3:1.32 work expectation; 3.2.1(k) prohibited activity on duty; 3.2.20 use of force: and 3.2.21 all other conduct.

Rule 1:5 is the code of ethics that generally states that a law enforcement officer is duty bound to serve the community and safeguard the lives and property of its people. Dzialo testified that he was motivated to find the dog and protect the lives of the people in the community. Therefore, I **CONCLUDE** that the violation of Rule 1:5 is hereby **DISMISSED**.

Rule 3:1.1 requires officer to "conduct their private and professional lives in such a manner as avoid bringing the department into disrepute." There was no testimony to support this violation; therefore, I **CONCLUDE** that the charge of violation of Rule 3:1.1 is hereby **DISMISSED**.

Rule 3:1.5(f) comprises general responsibilities consistent with the oath of office, responsiveness to lawful orders of supervisors, and responsibility for effective police action. This is a very broad rule and regulation. Based upon my findings of fact, Dzialo violated the canine encounters policy. His conduct does not fall within the parameters of this general rule. Therefore, I **CONCLUDE** that the charge of violation of Rule 3:1.5(f) is hereby **DISMISSED**.

Rule 3:1.6 states that officers shall not commit any act that would constitute neglect of duty as defined under these Rules and Regulations and recognized by New Jersey law. The same analysis set forth above for Dzialo's violation of N.J.A.C. 4A:2-2.3(a)(7) is relevant here. Therefore, I **CONCLUDE** that the Department has met its burden of proving by a preponderance of the credible evidence that Dzialo's conduct constituted a violation of R. 3:1.6

Rule 3:1.10 requires officers to obey all rules and regulations and orders of the Department. As set forth above, because it was Dzialo's responsibility to utilize the canine encounters policy when dealing with a hostile animal and exercise good judgment in accordance with that policy. Therefore, I **CONCLUDE** that the Department has met its burden of proving by a preponderance of the credible evidence that Dzialo's conduct constituted a violation of R. 3:1.10.

Rule 3:1.32 requires an officer to "perform their duties to the best of their abilities." There was no testimony to support this violation; therefore, I **CONCLUDE** that the charge of violation of Rule 3:1.32 is hereby **DISMISSED**.

Rule 3:2.1(k) refers to activity deemed inappropriate to the Chief of Police. There was no testimony to support this violation, therefore, I **CONCLUDE** that the charge of violation of Rule of Rule 3:2.1(k) is hereby **DISMISSED**.

Rule 3:2.20 refers to use of force. For the same reasons as set forth above regarding Dzialo's violation of N.J.A.C. 4A:2-2.3(a)(1), I **CONCLUDE** that the

Department has met its burden of proving by a preponderance of the credible evidence that Dzialo's conduct constituted a violation of R. 3:2.20.

Rule 3:2.21 refers to all other conduct not specifically addressed herein. This is a very broad rule and regulation. Based upon my findings of fact, Dzialo violated the canine encounters policy. His conduct does not fall within the parameters of the general rule. Therefore, I **CONCLUDE** that the charge of violation of Rule 3:2.21 is hereby **DISMISSED**.

I **CONCLUDE** that the Department has met its burden in demonstrating a violation of Camden County Police Department General Rules and Regulations: R. 3:1.6; R. 3:1.10; and R. 3:2.20. Accordingly, I **CONCLUDE** that, after consideration of the charges constituting a violation of N.J.A.C. 4A:2-2.3(a)(12) (other sufficient cause) as limited to the specific rules and regulations enumerated in the FNDA except for Rules: 1.5; 3:1.1; 3:1.5(f); 3:1.32; 3:2.1(k); and 3.2.21 that are dismissed, the Department has met its burden of proving by a preponderance of the credible evidence the charge of other sufficient cause.

### PENALTY

A civil service 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:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). The Civil Service Commission's review of penalty is de novo. N.J.S.A. 11A:2-19 and N.J.A.C. 4A:2-2.9(d) specifically grant the Commission authority to increase or decrease the penalty imposed by the appointing authority.

General principles of progressive discipline apply. Town of W. New York v. Bock, 38 N.J. 500, 523 (1962). Typically, the Board considers numerous factors, including the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. "Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, 38 N.J. 500, 523 (1962), that past record may be



considered when determining the appropriate penalty for the current offense.” In re Phillips, 117 N.J. 567, 581 (1990). Ultimately, however, “it is the appraisal of the seriousness of the offense which lies at the heart of the matter.” Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

In the present case, I was not presented with any other major disciplinary actions involving Dzialo. Progressive discipline is intended to give the employee notice and an opportunity to correct the improper behavior. I note that Dzialo was only a police officer for two and one-half years on November 12, 2015. Lutz reported that Dzialo was less than receptive to the first day of training and reluctant to answer direct questions on the second day of training. (R-10.) Dzialo was not receptive to the training as noted by his testimony that “hindsight is twenty-twenty.” He did not appear to recognize the importance of following the procedures established in the canine encounter policy or the expertise of his training officer. After having considered all the proofs offered in this matter and the possible consequences from discharging a shotgun in a residential neighborhood, and after having given due deference to the impact of and the role to be considered by and relative to progressive discipline, I **CONCLUDE** that Dzialo’s violations are significant to warrant a penalty of a twenty-day suspension. Therefore, I **CONCLUDE** that the imposition of a twenty-day suspension was an appropriate penalty.

### **ORDER**

I **CONCLUDE** that the Department has sustained its burden of proof as to the charges of violating N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, that includes the Department’s Rules and Regulations R. 3:1.6, R. 3:1.10, and R. 3:2.20.

Accordingly, I **ORDER** that the action of the Department in suspending Appellant for twenty days is **AFFIRMED**.

I hereby FILE my initial decision with the CIVIL SERVICE COMMISSION for consideration.

This recommended decision may be adopted, modified or rejected by the CIVIL SERVICE COMMISSION, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the DIRECTOR, 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.

December 21, 2017  
DATE

*Kathleen M. Calemмо*  
KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: 12/21/17

Date Mailed to Parties: 12/21/17

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**APPENDIX**

**WITNESSES**

**For Appellant:**

Officer Paul S. Dzialo, Jr.

**For Respondent:**

Detective Curtis A. May

Lieutenant Kevin Lutz

**EXHIBITS**

**For Appellant:**

None

**For Respondent:**

- R-1 Investigative Memorandum of Detective May
- R-2 Dog Video – Yorkship Square 1185
- R-3 Video of Dog Shooting
- R-4 Administrative Advisement Form
- R-5 Audio Statement of Officer Dzialo
- R-6 Photographs - #1-108
- R-7 CCPD Rules regarding Canine Encounters
- R-8 CCPD Rules and Regulations
- R-9 Audio of Training Video
- R-10 Performance Notice
- R-11 Firearm Discharge Report

**Joint:**

- J-1 Amended PNDA
- J-2 FNDA