



STATE OF NEW JERSEY

In the Matter of Luis Fermin
City of Paterson, Police Department

CSC DKT. NO. 2016-3075
OAL DKT. NO. CSV 4028-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 20, 2018 BW

The appeal of Luis Fermin, Police Officer, City of Paterson, Police Department, 180 calendar day suspension, on charges, was heard by Administrative Law Judge Gail M. Gookson, who rendered her initial decision on March 15, 2018. Exceptions were filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on April 18, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Luis Fermin.

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 18TH DAY OF APRIL, 2018



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 4028-16

AGENCY REF. NO. 2016-3075

**IN THE MATTER OF LUIS FERMIN,
CITY OF PATERSON,
POLICE DEPARTMENT.**

Sebastian B. Ionno, Esq., for appellant Luis Fermin (Ionno & Higbee, attorneys)

Steven S. Glickman, Esq., for respondent City of Paterson (Steven S. Glickman, LLC, attorneys)

Record Closed: January 29, 2018

Decided: March 15, 2018

BEFORE GAIL M. COOKSON, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Luis Fermin (appellant) appeals from the decision of the Police Department of the City of Paterson (City) to suspend him from his position as a Police Officer for 180 days on charges of conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); misuse of public property in violation of N.J.A.C. 4A:2-2.3(a)(8); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11). These charges arise as a result of a high-speed pursuit undertaken by appellant and his partner on June 17, 2014. Appellant denies the charges and claims that he reported the pursuit appropriately and completed accurate reports thereafter.

On January 22, 2015, a Preliminary Notice of Disciplinary Action was filed seeking to suspend appellant from his position. The departmental hearing was conducted on January 13, 2016. Thereafter, a Final Notice of Disciplinary Action was issued on February 24, 2016, sustaining the disciplinary charges and suspending appellant for 180 days beginning March 1, 2016 and ending September 6, 2016. Appellant appealed that disciplinary action on or about February 26, 2016. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on March 14, 2016, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The matter was assigned to the undersigned on March 16, 2016. I convened a telephonic case management conference on April 13, 2016, and at that time hearing dates and discovery were discussed. The case was originally scheduled to be heard on September 29, 2016, but then adjourned at my request. After several other adjourned hearing dates, the plenary hearing was held on December 8, 2017. Post-hearing briefs were permitted and, after an extension, the last one was submitted on January 29, 2018, on which date the record closed.

FACTUAL DISCUSSION

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

By way of background, appellant Luis Fermin has been a Police Officer with the City since 2005. On June 17, 2014, he and his partner – Police Officer Daniel Findlay – were assigned to patrol together. Officer Findlay was the driver. A motorcyclist who had violated multiple motor vehicle regulations was observed by the two officers at approximately 11:12 p.m. to be driving westbound on Governor Street but on the sidewalk with pedestrians present. Once they began their pursuit of him, speeds in excess of eighty miles per hour were reached. After the motorcyclist crashed, Officer Findlay called 9-1-1. Two Sergeants also came to the scene.

The issue herein is whether appellant called into headquarters on their radio to report the high-speed chase in accordance with proper procedures. There is also an issue as to the truthfulness of appellant's written report and statement on the incident.

Detective Sergeant Richard Botbyl testified on behalf of the City. At the time of this hot pursuit or high-speed chase incident, Sergeant Botbyl was an investigator with Internal Affairs. He has been in the Paterson Police Department for over twenty-two years, and was promoted to Sergeant and assigned to Internal Affairs for over six years. His current duties are now in Traffic.

Sergeant Botbyl reviewed the reports submitted by both officers following the conclusion of the incident. Each officer submitted one joint and one individual statement to Internal Affairs. Because there had been no communications from the officers during the incident, they were both asked why they had not called it into headquarters. Appellant stated at the time that he had called into the department, he was unaware that his partner had turned the vehicle radio off because the mic clip was broken and it kept falling to the floor of the car.

As part of his investigation, Sergeant Botbyl canvassed the area and interviewed available witnesses. He also reviewed a GPS report from the vehicle. In addition, Sergeant Botbyl reviewed any work orders that concerned the car radio in appellant's vehicle. On July 1, 2014, PageCom, a communications vendor the City used, checked the vehicle's radio for all functions, and adjusted the narrow bands on all channels and all levels. Later in December 2014, PageCom serviced that car radio again, checked all alignments, but this time "secured hang up button on mic." [R-9.]

Sergeant Botbyl testified that there were no communications into the Department from either appellant or his partner for the duration of the pursuit. Only after the chase was over did Officer Findlay call for an ambulance and notify headquarters. He went on to state that he did not find appellant's statements about the lack of communications to be credible. Appellant tried to excuse his failure to comply with pursuit policy by stating that the car radio was on the floor because of a broken mic clip and that Officer Findlay

must have turned it off unbeknownst to appellant. Sergeant Botbyl explained that the car radio would have been emitting chatter throughout the course of their shift, as would their individual portable radios. Silence during their shift would have been so odd as to have served as notice to appellant that the radio was off. When being used, a red light would so indicate on the base radio.

Sergeant Botbyl reviewed the pursuit and forcible stopping policies of the Paterson Police Department and the Attorney General. [R-22, -23.] Both guidelines set forth the mandatory requirement to notify communications and list the information that must be conveyed. He also detailed appellant's prior discipline history of a suspension for 180 days, later resolved by agreement down to 120-day suspension, for failing to maintain a New Jersey driver's license and for filing a false affidavit of residency to the State of Pennsylvania in order to obtain license, registration and insurance in that state.

On cross-examination, Sergeant Botbyl acknowledged that he only took the officers' written statements and did not interview them, but that would be normal for this type of internal investigation. He did not personally look at the police vehicle and its base radio, nor was he familiar with whether just a broken clip would have needed a work order before it could be repaired. Sergeant Botbyl also reiterated that the lack of response from headquarters to appellant's alleged attempt to communicate would have been additional notice to him that communications had failed.

The City also presented Manuel Hernandez as a witness. Sergeant Hernandez has been with the City Police Department for thirty-two years, and was assigned to Internal Affairs between June 2004 and December 2016. His testimony centered on the prior disciplinary action against appellant. That settlement, which occurred at the OAL, reduced the 180-day suspension to 120-day suspension and a 60-day leave of absence without pay.

Appellant testified on his own behalf.¹ He has been employed as a Police Officer

¹ Lieutenant Washington Griffin was also presented but his testimony was very limited in scope – the departmental hierarchy on disciplinary action decisions – and neither party relied upon it in their closing statements.

in the City since 2005, assigned to patrol. On June 17, 2014, Officer Findlay and he had begun their shift at 1:30 p.m. The incident with the motorcyclist began at approximately 11:12 p.m. He stated that he transmitted to headquarters at the beginning of the pursuit, as Officer Findlay was driving, using the vehicle radio. He could not recall whether the mic was on the floor of the vehicle or on the base, even though he said the clip was broken. Appellant also had his portable radio clipped to his duty belt. He agreed that there were no communications received back from headquarters but at the time, he did not consider that to be abnormal. He was told by Officer Findlay only after the incident was over that he had turned the radio off and he never said why. Appellant had been involved in probably only one other pursuit much earlier in his career.

On cross-examination, appellant attributed his failure to realize that headquarters had not responded to his pursuit call to the tunnel vision and adrenaline that kicks in during a chase when safety and the pursuit itself are paramount. Appellant believed that the mic was on the floor on his side of the center console. He was the one who kept hitting it with his foot. He could not recall when his partner turned the radio off during that shift. Appellant stated that he was talking to headquarters throughout the pursuit and might not have even been leaving gaps for a person on the other end to comment. Appellant also clarified that they were assigned on the subject evening to just patrol and be a presence in this particular area due to high gang and drug activity. Accordingly, they would not have been dispatched to other areas but that did not mean they would not be privy to dispatch chatter as usual.

In the reports prepared by both officers contemporaneously with the incident and the Internal Affairs investigation, Officer Findlay, who was not presented as a witness, set forth that he had not noticed that appellant was transmitting with the vehicle radio. He stated that he had turned it off because it was laying on floorboards on passenger side and appellant was inadvertently keying or transmitting it with his body. Officer Findlay then wrote that "we were utilizing our portable radios." [R-6.] Both officers reported that they could not hear the pursuit transmission from headquarters out to other units on their portable radios because the volume on those were turned down out of habit to avoid feedback with the base car radio. Engine noise and their own sirens

contributed to their inability to hear whether the Department had made a return transmission. [R-5, -6.] Officer Findlay's statement goes on to report that after they had made a U-turn and were about to call off the pursuit, he prepared to "utilize [his] portable radio to notify headquarters of the motorcycle pursuit." In fact, he states twice that he was about to utilize his portable radio. The second time he states that in the report, he adds that he saw that the motorcyclist had crashed to the ground. Accordingly, Officer Findlay used his portable radio to call for an ambulance.

I **FIND** that appellant was not a credible witness. Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). Appellant's testimony and his earlier statements do not hang together and are incredible because they do not make sense. Appellant is an experienced officer who certainly knows when a radio is on or not through its red light, chatter and crackling. Even recognizing the fact that pursuits do not happen often and adrenaline may be pumping, that is what officers train for. Neither officer mentioned in any report that the vehicle's windows were down. I **FIND** that appellant testifying to that only at the hearing is embellishment. I **FIND** it more likely than not that appellant forgot to call into headquarters in the heat of the moment insofar as this was an unusual incident both in that it was a hot pursuit and that it was a motorcycle traveling on a sidewalk at a high rate of speed.

I **FIND** that it was Officer Findlay who made the first call to headquarters on this pursuit and only after it was essentially over. He did so using his portable radio which was the one he earlier stated was what both were utilizing. This clearly contradicts appellant's testimony and his reports that he used the base radio to transmit the pursuit to headquarters at the start of the chase but then could not hear any response on either his own portable or the vehicle radio. My finding is supported by Sergeant Botbyl's review of radio transmissions into headquarters at the time of the incident.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against her and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, the City bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

For evidence to be credible it must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). Preponderance may also be

described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

As set forth above, I found that appellant's testimony and earlier statements to Internal Affairs are not credible. Accordingly, I **CONCLUDE** that appellant provided false statements and failed to comply with the relevant policy requirements.

Having concluded that an incident occurred, I must determine the proper penalty or discipline to be assessed. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. See Bock, 38 N.J. at 523-24. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of the concept of progressive discipline is the nature, number and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential. In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

Nevertheless, law enforcement officers are held to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent "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." Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47

N.J. 80 (1966). Citizens must be able to depend on the veracity and honesty of the law enforcement officers in their community.

In this case, I **CONCLUDE** that the substantiation of this breach of the vehicular pursuit policy by appellant, and subsequent false claims asserted in appellant's reports, warrant the penalty imposed of 180 days. Appellant had a prior major disciplinary incident in 2013 that resulted in a penalty of 180 days. That disciplinary action was also premised upon false statements made to authorities and appellant's failure to abide by the City's policies on maintaining a valid New Jersey driver's license. [R-25.] Subsequent to an appeal on that incident to the OAL, appellant and the City settled those charges with a Memorandum of Agreement which reduced the 180-day suspension to 120 days. [R-26.] Accordingly, I **CONCLUDE** that the penalty of 180 days here is not excessive.

ORDER

Accordingly, it is **ORDERED** that the appeal of Luis Fermin from the disciplinary action entered in the Final Notice of Disciplinary Action of the City of Paterson Police Department is hereby **DISMISSED**. It is further **ORDERED** that major disciplinary action is **AFFIRMED** and that the penalty imposed for this disciplinary action shall remain one hundred and eighty (180) days.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 15, 2018

DATE



GAIL M. COOKSON, ALJ

Date Received at Agency:

Date Mailed to Parties:

mm

MAR 16 2018



DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

LIST OF WITNESSES

For Appellant:

Luis Fermin
Washington Griffin

For Respondent:

Richard Botbyl
Manuel Hernandez

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

A-14 Official Report, Sgt. Kevin Collins, dated June 22, 2014

For Respondent:

- R-1 Final Notice of Disciplinary Action, dated February 24, 2016
- R-2 Preliminary Notice of Disciplinary Action, dated January 22, 2015
- R-3 Internal Affairs Report, dated August 26, 2014
- R-4 Joint Report of Officers Fermin and Findlay, undated
- R-5 Official Report, Officer Fermin, dated June 23, 2014
- R-6 Official Report, Officer Findlay, dated June 23, 2014
- R-7 Fax from PageCom, dated February 20, 2015
- R-8 PageCom, Work Order No. 126783, dated July 1, 2014, with E-Mail dated July 24, 2017
- R-9 PageCom, Work Order No. 131162, dated December 11, 2014, with E-Mail dated March 16, 2015
- R-10 – R-21 [not in evidence]
- R-22 Paterson Police Dept., Pursuit & Forcible Stopping Guidelines, Standard Operating Procedure, eff. April 19, 2013

- R-23 New Jersey Attorney General Police Vehicular Pursuit Policy, dated September 17, 2009
- R-24 Preliminary Notice of Disciplinary Action, dated January 7, 2013
- R-25 Final Notice of Disciplinary Action, dated October 10, 2013
- R-26 Memorandum of Agreement, dated May 2015