



STATE OF NEW JERSEY

In the Matter of Michael Johnson,
Elmwood Park, Police Department

CSC DKT. NO. 2020-1749, *et al.*
OAL DKT. NO. CSR 00342-20

(Consolidated)

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 27, 2022

The appeal of Michael Johnson, Police Officer, Elmwood Park, Police Department, of his removal, effective December 19, 2019, on charges, was heard by Administrative Law Judge Thomas R. Betancourt (ALJ), who rendered his initial decision on March 15, 2022. 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 ALJ's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and reply, the Civil Service Commission (Commission), at its meeting of April 27, 2022, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision.

As indicated above, the Commission thoroughly reviewed the exceptions filed by the appellant and, based on the thorough, comprehensive and well-reasoned findings of the ALJ, finds them unpersuasive and not requiring extensive comment.¹ The Commission makes only the following comments. The ALJ's initial decision was predominately based on his assessment of the credibility of the witnesses. In this regard, upon its *de novo* review of the record, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J. W.D.*, 149 N.J. 108 (1997). “[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record.” *See also, In re Taylor*, 158 N.J. 644 (1999) (quoting

¹ Much of the exceptions seek to have the Commission overturn the ALJ's decision on procedural grounds. However, the Commission finds none of the appellant's procedural arguments persuasive.

State v. Locurto, 157 N.J. 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. See N.J.S.A. 52:14B-10(c); *Cavalieri u. Public Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004). In this matter, the exceptions filed by the appellant are not persuasive in demonstrating that the ALJ's credibility determinations, or his findings and conclusions based on those determinations, were arbitrary, capricious or unreasonable. As such, the Commission has no reason to question those determinations or the findings and conclusions made therefrom. Moreover, the Commission wholeheartedly agrees with the ALJ's determination that the appellant's egregious misconduct as a Police Officer was deserving of removal from employment.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Michael Johnson.

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 27TH DAY OF APRIL, 2022

Deirdre' L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Allison Chris 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. CSR 00342-20

**IN THE MATTER OF MICHAEL JOHNSON,
ELMWOOD PARK (POLICE DEPARTMENT).**

Stuart J. Alterman, Esq., for appellant (Alterman & Associates, LLC, attorney)

Kyle Trent, Esq., and **Arthur Thibault, Jr., Esq.**, for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: February 16, 2022

Decided: March 15, 2022

BEFORE THOMAS R. BETANCOURT, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Michael Johnson appeals three Final Notices of Disciplinary Action (FNDA), all dated December 24, 2019, providing for a penalty of removal with the Office of Administrative Law (OAL) and the Civil Service Commission (Commission). The appeal was received by the OAL on January 6, 2019, pursuant to N.J.S.A. 52:14B-1 to -15, N.J.S.A. 52:14F-1 to -13, and N.J.S.A. 40A:14-200 et seq., and it was perfected on January 6, 2020.

The matter was initially assigned to the Honorable Danielle Pasquale, ALJ, who recused herself. The matter was then reassigned to the undersigned.

The hearing commenced on February 11, 2021, and continued on March 23, 2021.

Respondent filed a motion, dated March 17, 2021, to bar Appellant's proposed expert from testifying at the hearing. Appellant filed his response thereto by brief dated April 9, 2021. Respondent filed a reply brief dated April 13, 2021. Respondent's motion to bar Appellant's proposed expert from testifying was granted by Order dated April 29, 2021.

Appellant filed a motion to compel discovery, dated April 9, 2021. Respondent filed their reply thereto on April 14, 2021. Appellant's motion to compel discovery was denied by Order dated April 29, 2021.

Respondent filed a motion seeking sanctions, dated June 14, 2021, for the non-appearance by Appellant and his counsel for the hearing date of May 27, 2021. Appellant filed a response thereto dated June 22, 2021. Appellant also filed a cross motion seeking the recusal of the undersigned. Respondent replied thereto on June 28, 2021. Appellant filed a sur-reply on July 6, 2021. Both Respondent's motion for sanctions, and Appellant's motion for recusal were denied by Order dated July 13, 2021.

The hearing continued on May 27, 2021 and July 16, 2021. The record remained open for the parties to obtain transcripts of the proceedings and to file closing briefs. Appellant filed his closing brief dated January 31, 2022, which was filed at the OAL on February 7, 2022. Respondent filed their closing brief dated February 14, 2022, which was filed at the OAL on February 16, 2022. Whereupon the record closed on February 16, 2022.

ISSUES

Whether there is sufficient credible evidence to sustain the charges in the three Final Notices of Disciplinary Action; and, if sustained, whether a penalty of removal is warranted.

SUMMARY OF TESTIMONY

Respondent's Case

Jennifer Romero testified as follows:

She is a resident of Elmwood Park. She was aware that Appellant was a police officer in the borough. She was also aware that Francesca Rodriguez was a police officer in the borough.

In March of 2017 she made a report to Internal Affairs regarding an incident with Appellant. Ms. Romero had just dropped her child off at school when she was pulled over by Appellant. Appellant used his police lights and she pulled over. Appellant exited his police vehicle and approached her vehicle. At no point during her encounter with Appellant did she feel she was free to leave. She inquired as to why she was pulled over and Appellant replied that he was delivering a message from Francesca Rodriguez, who wanted Ms. Romero to call her. She felt intimidated and uncomfortable by the encounter.

After the motor vehicle stop she returned home. She telephoned her father, a retired police officer, who advised her to report it. Shortly thereafter she went to police headquarters and reported the encounter. She wrote a statement about the encounter. She also made a video statement. After she was finished she left via a side door as she was concerned that Appellant might see her at police headquarters.

Later on the same day she had a second encounter with Appellant. She was at the school to pick up her son. She was circling the block in search of a parking spot. Appellant was in his vehicle and when he passed her he motioned with his fingers to his eyes. It seemed as if Appellant was following her. She interpreted the hand gesture as "I am watching you." She felt panicked and called police headquarters to advise as to what had happened. She does not recall which detective she spoke with. It was either D'Amore or Kassai. She again provided a statement, but this time she met Detectives D'Amore and Kassai at the American Legion. She was afraid to return to police

headquarters. At this point she agreed to telephone Francesca Rodriguez. She made the telephone call from her home using her cellular phone. D'Amore and Kassai were present for the call. She had D'Amore and Kassai come in an unmarked car and park it in her garage. She was concerned that they would be seen at her house. When she spoke with Rodriguez Ms. Romero was asked why she had sent a friend request to her husband on social media. Ms. Romero had no idea the friend request was sent to Rodriguez' husband. She does this to everyone as it's a chance for a business opportunity. Ms. Romero is a realtor.

She has had no further interaction with Appellant.

Michael Kassai, testified as follows:

He is a captain with the Elmwood Park Police Department (EPPD). He has been a police officer for 28 years. Prior to being made captain he was a lieutenant from 2013 to 2019. While a Lieutenant in the Detective Bureau he handled day to day operations, assisted Captain D'Amore with Internal Affairs (AI), and oversaw investigations. He started doing internal affairs investigations while a sergeant dealing with officers on his shift. He has had training at both the Bergen and Essex County Police Academies. Internal affairs training was approximately 100 hours. He also has almost 2200 hours of in-service training with all types of investigations.

He has been involved in three investigations regarding Appellant. The first matter was the motor vehicle stop involving Ms. Romero; improper use of EPPD letterhead; and, using derogatory terms against superior officers. For the first two matters he assisted Captain D'Amore, who was the lead investigator.

He was assigned the derogatory comments matter in April 2019. The Chief had received a recorded conversation between the Appellant and officer Rodriguez. It was supplied as part of discovery in a lawsuit. Rodriguez had recorded the conversation. The recorded conversation took place in 2018. He prepared an AI report after he completed his investigation, dated July 8, 2019.

Initially, he listened to the recorded conversation between Appellant and Rodriguez. Thereafter he contacted the Bergen County Prosecutor's Office regarding the matter. He wanted to be sure there was no criminality found in the conversation. He was advised to handle it administratively. He then had the conversation transcribed.

If there is a criminal investigation, the officer involved may invoke his Fifth Amendment rights and refuse to answer questions. Officers involved in an administrative investigation have to answer questions posed.

During the course of the recorded conversation Appellant used the term "fag", "little fag" and "flaming fag" when referring to Captain D'Amore and Chief Foligno.

After reviewing the recorded conversation he conducted an interview with Appellant. At the interview, also in attendance was Appellant's attorney, Mr. Alterman, and Lieutenant Jeff Sudol. The interview was recorded and then transcribed. Prior to conducting the interview he advised Appellant that it was administrative and provided a form to be signed. The form, an administrative only form, advises the officer it is not a criminal investigation, and that the investigation deals only with rules, regulations, policies and procedures.

Captain Kassai asked Appellant if he ever referred to any supervisors or officers of EPPD using derogatory terms, using the terms Appellant used in the recorded conversation. Appellant thought Captain Kassai was referring to an incident between Appellant and Captain D'Amore that took place in the EPPD parking lot. He did admit to using the term "fag" and "jerkoff" during the parking lot incident. Appellant never referred to the recorded conversation during the interview. Appellant denied using those terms other than during the parking lot incident. Captain Kassai did not advise Appellant that he was referring to the recorded conversation during the course of the interview. Captain Kassai concluded that Appellant was not truthful in his responses as he denied using any such language directed at the Chief.

After the interview Captain Kassai sent Appellant, through his attorney, white sheets with several additional questions. White sheets are used to provide information

in an administrative investigation without an interview. The white sheet asked if he ever used derogatory comments, other than during the parking lot incident. Appellant did not answer, but invoked his Fifth Amendment right and invoked "Garrity".¹ Appellant's refusal to answer any further questions stopped the investigation.

He concluded that the use of the terms "fag" and "flaming fag" show a bias towards homosexuals. He also concluded that Appellant violated EPPD policies and procedures, as well as Administrative Code provisions. Appellant had received the EPPD Rules and Regulations electronically.

Captain Kassai's investigation resulted in a PNDA being filed against Appellant.

Deborah Zafonte testified as follows:

She is the Certified Municipal Court Administrator for the Elmwood Park Municipal Court and has been for over six years. She is familiar with Officer Johnson, the Appellant.

She approached the EPPD regarding a letter written by Appellant regarding a ticket he had issued, as the letter was about the validity of a ticket he issued that had already been adjudicated. The letter was presented by Ms. Hernandez to the Court. It was given to the Violations Bureau after the matter was disposed of. Ms. Hernandez had already pleaded guilty to a second cell phone offense.

The initial ticket was an e-ticket issued to Enterprise Rent A Car. Thereafter Enterprise advised that Vera Cruz-Hernandez was the driver. It appeared the ticket was issued after using a license plate reader. This auto populates the information into the e-ticket.

¹ Garrity v. New Jersey, 385 U.S. 493 (1967), a U.S. Supreme Court case which held that law enforcement officers and other public employees have the right to be free from compulsory self-incrimination.

Once the name of the driver is received from Enterprise the pedigree information is changed and a new court notice is generated. Eventually a bench warrant was issued for Ms. Hernandez due to non appearance. Ms. Hernandez was later detained in Hackensack and released on her own recognizance. She appeared in Court on June 13, 2017 and pleaded guilty. She did so through an interpreter.

Approximately one month later Ms. Hernandez returned with the letter and requested that the ticket should have been dismissed and requested that it be relisted. She was stunned. The letter said the ticket was issued in error. She contacted the Appellant and asked if he wanted the ticket dismissed. He replied he did not, he was trying to help Ms. Hernandez with her employer. She contacted Captain Thorpe to be sure Appellant was available for Court as she would have to again have an interpreter present. She also advised the Chief to let him know what had transpired.

On August 8, 2017, Ms. Hernandez appeared in Court and requested the ticket be dismissed. There was a substitute prosecutor that day and he was not comfortable dismissing the ticket. She again pleaded guilty. Again she requested the matter be relisted. She returned to Court August 22, 2017.

Ms. Zafonte again contacted the Chief as she was concerned as so many steps were taken she thought inappropriate. She again contacted Captain Thorpe so that Appellant could be in Court. She again had to request an interpreter. On August 22, 2017 Ms. Hernandez attended Court. She spoke with the prosecutor and Appellant. She again entered a guilty plea.

Appellant never asked that the ticket be dismissed. He maintained that it was properly issued.

Marc D'Amore testified as follows:

He is a captain with the EPPD since 2016. He oversees the Detective Bureau and commander of the IA team. He has over 90 hours of IA training from the Bergen

and Passaic County Prosecutor's Offices. He also has numerous hours of training in other investigative techniques.

He is familiar with the Appellant. When an opening occurred with EPPD he reached out to Appellant, then an officer with the Paterson Police Department. He was a sergeant at the time and worked with Appellant. He had no issues with Appellant.

He was involved in two IA investigations regarding an alleged illegal motor vehicle stop. The second was regarding the letter submitted to the Elmwood Park Municipal Court. He was the lead investigator on both.

At one point the Chief advised him to halt the investigations as there was a potential resolution. The investigation resumed after an incident regarding an assault by Appellant upon the Captain in the parking lot of EPPD.

The investigations conducted by Captain D'Amore involved EPPD rules violations. Appellant had the EPPD rules and regulations, which are provided to officers electronically. Receipt is also confirmed electronically.

He began an IA investigation after Ms. Romero came to police headquarters to complain of a motor vehicle stop by Appellant on March 1, 2017. That investigation resulted in an IA report.

Ms. Romero provided a written IA complaint form. She also provided a audio/video statement. She made the statement on March 2, 2017. Captain Kassai was also present for the interview. A transcript was prepared.

Ms. Romero advised that she was pulled over by Appellant after dropping her child off at school. She stated she felt nervous and intimidated during the stop. After the interview Ms. Romero requested to exit via a side door. She did not want Appellant to see her.

Later that day Ms. Romero contacted Captain Kassai and asked to meet. She did not want to come to police headquarters. She advised the Appellant followed her around the block in his police vehicle and made a motion towards her which she described as I'm watching you. He then contacted the prosecutor's office, as there was potential criminality involved. He wanted to intercept a telephone call between Ms. Romero and Rodriguez. He received permission from the prosecutor's office to do so. Ms. Romero agreed to this as well. Ms. Romero was concerned and did not want a police vehicle at her residence. She was in fear. He arrived with Captain Kassai in an unmarked unit, which Ms. Romero requested be parked in her garage.

A recording of the conversation between Ms. Romero and Rodriguez was made. He apprised the prosecutor's office of the conversation, and they advised him to continue the investigation as administrative. This was done verbally.

Captain D'Amore then wanted to learn of Appellant's vehicle position using GPS, referred to as DVIAR. He reviewed the DVIAR for Appellant for March 1 and March 2, 2017. He discovered a motor vehicle stop in the area described by Ms. Romero.

When an officer activates the overhead emergency lights the MVR system backs up a minute and starts recording. There is also a microphone on your duty belt for audio. Body worn cameras are turned on by a simple downward flip. Officers are required to use body cameras with any citizen contact, especially during motor vehicle stops. It is spelled out in the rules and regulations. Body cameras and the MVR need to be activated throughout the entire investigation.

Captain D'Amore searched for camera footage for March 1, 2017 around the time Ms. Romero reported the motor vehicle stop. He discovered a motor vehicle recording of the stop. He found no body camera footage. He made a copy of the footage. The footage shows Appellants police vehicle, Patrol Car 423, pull behind Ms. Romero's vehicle. You can see that the vehicle lights are on. Ms. Romero pulls her car over. He did not know at the time why the video ends at this point. It was a concern to him that the video ended. He could not locate any other video related to this stop.

EPPD policy and procedures require that officers use body worn camera from the beginning of a motor vehicle stop until the person is released. The motor vehicle recorder is also required to be on and the audio microphone attached to the officer's belt is to be activated. The recording he found of this motor vehicle stop were not consistent with the policies and procedures.

An officer is also required to document a stop using the Enforcer System. Either the officer, or the dispatcher, would generate a GC card to document the motor vehicle stop. There were no CAD (computer aided dispatch) entries regarding the stop of Ms. Romero.

Captain D'Amore reviewed a DVIAR completed by Appellant for March 2, 2017. This is the date Ms. Romero reported that he had made the eye hand gesture at her. Captain D'Amore confirmed that Appellant was in vehicle 407 on that date and was in the area at the time and date when Ms. Romero reported the hand gesture.

He scheduled an interview with Appellant. Captain Kassai was present, as was Patrick Caserta, Appellant's counsel, during the interview. The interview was recorded and transcribed. The interview occurred on October 10, 2017. Appellant admitted stopping Ms. Romero. He stated he did shut off the vehicle recorder. He confirmed he did not run the vehicle through the National Crime Information Center. He was unsure if he generated a GC card. He did not contact headquarters about the stop. This is the first step in a motor vehicle stop. Appellant confirmed he did not contact headquarters.

A second interview was conducted on December 28, 2017. This interview was also recorded and transcribed. Appellant admitted that he had no probable cause to stop Ms. Romero. Appellant was unsure why the body camera or the MVR did not record. After the second interview Captain D'Amore contacted Mr. Tani from L3MVR System to inquire as to why the DVR shut off during the stop of Ms. Romero.

At this point the Chief requested that the investigation be delayed. The investigation was renewed after the incident between Appellant and Captain D'Amore in the parking lot.

Mr. Tani was interviewed at police headquarters. Captain Kassai was present. The interview was recorded and transcribed. Mr. Tani explained there was no evidence of a malfunction. He explained that the MVR was turned on by the emergency lights and that Appellant had to categorize the stop as "other" by pressing the stop button. This is done manually. Captain D'Amore concluded that Appellant was not truthful during his interview.

He conducted a second IA investigation of Appellant regarding the letter he wrote concerning Ms. Hernandez. Lieutenant John Harris provided him with a copy of the letter, which the Lieutenant received from the Elmwood Park Court Administrator. He prepared a report regarding the letter.

After he received the letter he reviewed it. It was on the Chief's letterhead and was signed by Appellant. Normally officers do not use the Chief's letterhead. They would need his permission to do so. This is in the rules and regulations.

He also reviewed the summons issued by Appellant for using a cell phone while operating a motor vehicle. The letter states the summons was issued in error and that the driver, Ms. Hernandez, is a good driver based on her driver history. The letter contained some false information so he contacted the Bergen County Prosecutor's Office. He was advised to pursue the matter administratively.

He then reviewed Ms. Hernandez' driving history and determined that she was not a good driver. He then scheduled an interview with Ms. Zafonte, the Court Administrator. Captain Kassai was present during the interview. Ms. Zafonte advised that Ms. Hernandez had pleaded guilty and provided him with the plea form. He also interviewed Ms. Hernandez with an interpreter.

Captain D'Amore interviewed Appellant with Captain Kassai present. The interview was recorded and transcribed. Appellant admitted he did not have permission to use the Chief's letterhead. He stated there was no false information in the letter. He admitted it was a mistake to place in the letter that the summons was issued in error.

Based upon his IA investigation, charges were filed against Appellant for the letter incident.

Matthew Tani testified as an expert in motor vehicle recording systems, and specifically Safe Fleet's System, as follows:

He is employed by Safe Fleet. He was a field service technician and is now a regional sales manager. Safe Fleet provides car video systems and body worn cameras for multiple police departments across the United States.

Mr. Tani described his experience and training.

He explained that the system is activated via the vehicle ignition. The system is in standby mode until activated by the officer. There are several methods to activate the system. The light bar is a common trigger. Once the trigger is activated the system goes on record. There is a prerecord event which captures video, but not audio. The length of the prerecord is set by the department.

The only way the MVR stops recording is by direct interaction by the officer. The stop button would have to be pressed to end the recording. Once stop is pressed a category list pops up. Stop is pressed to select a category on which the system classifies it for different evidentiary purposes and retention time. The categories are no citation, citation, DUI, arrest, and other. Each department can add other categories. There is no method where an officer can re-categorize a video.

Mr. Tani does not know Appellant. He was contacted by EPPD to review a video that they had a question on, and to determine why the video was stopped. He was contacted by Captain Marc D'Amore. He reviewed the video and described the term metadata. The DVR captures metadata. He reviewed the chain of custody for the video in question. He watched the video. The video is in the prerecording phase, which is why there is no audio. This is before the light trigger was activated. In Elmwood Park the prerecord is one minute. He prepared a report as to his findings. His findings were the light bar was the trigger for the MVR, and that it was turned off by direct officer

intervention by pressing the stop button. The category selected was "other". This requires the officer to press the stop button multiple times. He also reviewed the recording previous to and post this incident. The video appeared to be operating normally. He saw no evidence of malfunction. In his professional experience it appears the DVR system was recording normally and it was stopped. The stop button would need to be pressed five times. It is not possible to delete videos.

Michael Foligno testified as follows:

He is the Chief of Police of EPPD, and the Borough Administrator. He is familiar with the Appellant. Chief Foligno hired Appellant as an intergovernmental transfer from the Paterson Police Department.

He is familiar with the IA investigation in the motor vehicle stop of Ms. Romero. He reviewed the IA report on the matter. He also reviewed the transcripts of the IA interviews. He agreed with the conclusions in the report. The Chief concluded that Appellant illegally stopped Ms. Romero without reasonable suspicion or probable cause. He did so to assist another officer in a personal matter, and that Ms. Romero was placed in fear. He made a motor vehicle stop without any record, other than the initial recording. He purposely deactivated the camera and never called into dispatch, which is required. Appellant was charged based upon the IA investigation.

The Chief also learned of an issue with a letter written by Appellant. This matter resulted in an IA investigation. He received the IA report and reviewed it. He concluded that Appellant had written a letter on his departmental letterhead without permission and contained language that the summons was issued in error. The summons was not issued in error. The letter was written to assist Ms. Hernandez. The letter also stated that Ms. Hernandez' driving record was good, when it was horrendous.

The Chief also became aware of a third issue of a recorded telephone conversation between Appellant and a former officer. The audio recording was provided as part of the civil discovery process. He reviewed the audio and turned it over to IA for an investigation. A report was provided to him. He reviewed the report

and agreed with the findings. Appellant was speaking with former officer Rodriguez and was unaware he was being recorded. The recording was made a day after Appellant appeared at a Council meeting to talk publicly about his suspension. He was basically venting in the telephone conversation. He used the term "fag" and "flaming fag" toward Captain D'Amore.

As a result of the three sets of charges the Chief imposed a penalty of termination.

Appellant's Case

Michael Johnson, Appellant, testified as follows:

He began his police career in Paterson in 2005, where he started as a police officer. He became a detective for crime scene and street crimes. In 2014 he transferred to EPPD. His family is from Jamaica.

He had a friendship with former officer Francesca Rodriguez. He has known her and her family for many years. He went to school with her cousin. He came back into contact with Ms. Rodriguez when she became a police officer in Paterson. She then became a police officer with EPPD.

In 2009 or 2010, Paterson laid off about 125 police officers. He became concerned that he may also be laid off. He contacted Captain D'Amore, who was a sergeant at the time, to inquire as to any openings with EPPD. Ms. Rodriguez had already transferred to EPPD at this time.

He did not know there was an issue with Ms. Rodriguez and Ms. Romero. He was asked to relay a message for Ms. Romero to call Ms. Rodriguez. He saw her at the Gilbert school and put on his MVR and went to try and get ahead of her to get her attention by pulling her over. It was improper and he should not have done it, knowing what he knows now. He pulled her over and gave her the message.

He asked Ms. Romero about the two shields she had in her windshield. Ms. Romero asked him if he knew what this was about. He replied he did not.

He knew who Ms. Romero was as he had seen her numerous times dropping her child off at school. He also knew that she had dated another officer, Ingrasselino. He also did a report for her regarding an accident. He did a report regarding Ms. Romero and Officer Ingrasselino. He has no personal relationship with Ms. Romero.

At the time of the motor vehicle stop, the lights were on and he pulled behind her. The camera was on. "I put it on." He pulled her over to give her a message from Ms. Rodriguez. The message was for Ms. Romero to call Ms. Rodriguez. He did not know why he was asked to do this.

At the time of the stop he noticed Ms. Romero had a FOP and PBA shield. He knows you cannot be a member of the FOP and PBA at the same time he thought it a problem and asked Ms. Romero about it. She replied they were from her uncle or her father. He had no further conversation with Ms. Romero.

Either later that day, or the next afternoon, he was back at Gilbert School when a crossing guard told him about a lady double parked. He saw it was Ms. Romero's vehicle. He pulled up and told her she had to move. He made a hand gesture to move. She looked and then drove away. He has had no further interaction with Ms. Romero since.

Later that day he asked Ms. Rodriguez about why he was asked to deliver the message. Ms. Rodriguez referred to Ms. Romero as stalking her husband on Instagram. He became upset and if he had known, he would not have delivered the message.

He did not report the stop as it was personal. In retrospect he would not have become involved in delivering the message. He should have reported that he pulled over Ms. Romero.

Regarding the letter incident using the Chief's letterhead, Mr. Johnson stated that Ms. Hernandez asked if there was anything he could do for her. She would have her Uber privileges suspended because of the ticket. She drives for Uber and this is how she makes her living. He told her that there was nothing he could do about the summons.

He went into the Chief's office and the Chief's secretary gave him a letterhead. He wrote the letter "real quick" and gave it to Ms. Hernandez. She then went to the clerk to say the ticket should not receive the summons. He did not know she would do this. He intended the letter for Uber. He explained that his use of the word "error" was to mean the summons was not given to Ms. Hernandez in a timely manner. She did not get the summons until months later. The summons was issued in a legitimate manner. There was no error with the summons. The error was that it was not issued in a timely manner. He told the Court Clerk that he stood by the charge. In retrospect he would not have written the letter. It was a violation of the rules and regulations. He was just trying to help someone out. When he stated in the letter that Ms. Hernandez is a good driver he should have run a driver's abstract. He did not. He never spoke with the prosecutor about this.

He did not receive anything from helping Ms. Hernandez or Ms. Rodriguez.

Mr. Johnson was called in for an IA interview for certain statements made by him. That occurred on May 30, 2019. At the time he was charged criminally. The matter was in Teterboro Municipal Court. The charges were filed by Captain D'Amore. He was concerned that the IA investigation was about the assault. He asked for Garrity. It was not granted. He thought he was asked about the incident in the parking lot with Captain D'Amore. He was upset as the parking lot incident occurred in June of 2018 and the IA interview occurred in May of 2019.

He answered all questions truthfully. He thought he was being asked about June of 2018. He admitted calling Captain D'Amore inappropriate names during the parking lot incident. He did not make any such statements about the Chief during the parking lot incident. He was not asked about the conversation with Ms. Rodriguez.

Captain Kassai did not ask specifically if he had a conversation with Ms. Rodriguez where he referred to the Chief as a "flaming fag". He found out Ms. Rodriguez had recorded their conversation after the IA interview. If he was asked if he called the Chief a "flaming fag" during a conversation with Ms. Rodriguez he would have responded affirmatively.

After the IA interview he received white sheets. He answered the white sheets by invoking his Fifth Amendment rights.

Mr. Johnson insisted there was more video from the motor vehicle stop than what was shown during this hearing. He insisted he turned on the camera.

CREDIBILITY

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see Polk, *supra*, 90 N.J. 550. Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).

The finder of fact is not bound to believe the testimony of any witness, and credibility does not automatically rest astride the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of credible witnesses but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546 (1954).

There were no issues with the testimony of Respondent's witnesses.

Jennifer Romero was credible. She answered questions without hesitation in a straightforward and direct manner. Nothing about her demeanor would lead one to believe she was being untruthful.

Captain Michael Kassai was also a credible witness. He testified in a professional manner. He related the findings of his investigation without reservation.

Deborah Zafonte testified without hesitation as to her interactions with Appellant and the Municipal Court regarding the summons issued to Ms. Hernandez. I deem her credible.

Captain Marc D'Amore testified in a professional manner. He related his findings about the IA investigations he did in a straightforward manner. His demeanor was composed. I deem him credible.

Matthew Tani, Respondent's expert, was also credible. He possessed excellent knowledge about the workings of the MVR and how it worked. He testified as to his knowledge and his review of the motor vehicle stop professionally. He was most helpful in the undersigned's understanding this system and how it related to the motor vehicle stop.

Chief Michael Foligno testified in a professional and direct manner. He was knowledgeable of the events to which he testified. I deem him credible.

Michael Johnson, Appellant, was not credible. During much of cross examination he was evasive, obtuse and not believable. Regarding the motor vehicle stop he insisted he turned on the body camera. During the IA interview he was unsure. He testified that the stop was improper not unlawful. During the IA interview he called it unlawful. He tried to justify the stop by stating he could have issued a summons to Ms. Romero for having an FOP and PBA shield at the same time. This is ludicrous. He

stated on direct, and in the IA interview, that he stopped Ms. Romero to deliver a message. He admitted he had no probable cause to make the stop. As to the letter on the Chief's letterhead he stated that the word "error" was not meant to mean that the summons was issued in error, but that there was an error in serving it. This simply does not make sense. Finally, as to the use of the words "fag" and "flaming fag", Mr. Johnson testified that these terms mean a hot cigarette and a burning cigarette from his Jamaican background. In the IA interview he stated that these terms mean an idiot, dummy or fool. It is simply not believable.

FINDINGS OF FACT

I FIND the following FACTS:

Motor Vehicle Stop

1. Appellant began his police career with the Paterson Police Department in 2005.
2. He made a lateral transfer to the EPPD in 2014.
3. Appellant made an unlawful motor vehicle stop of a vehicle driven by Jennifer Romero on March 1, 2017, in the vicinity of the Gilbert School after J.R. dropped her child off for school.
4. Appellant had no probable cause to make the motor vehicle stop.
5. The reason Appellant effectuated the stop was to deliver a message to Ms. Romero from fellow officer, Francesca Rodriguez. The message was for Ms. Romero to call Rodriguez.
6. Appellant, at the time of the stop, did not know why he was asked to deliver the message, nor did he ask Rodriguez the reason.
7. Appellant put on his overhead lights to effectuate the motor vehicle stop of Ms. Romero.
8. When overhead lights are turned on the MVR automatically starts. There is a prerecording made of one minute prior to the stop.

9. Once the stop was made, Appellant manually turned off the MVR. This is contrary to the Policies and Procedures of EPPD.
10. Appellant did not activate his body camera or audio. This is contrary to the Policies and Procedures of EPPD.
11. Appellant did not call the stop into Dispatch. This is contrary to the Policies and Procedures of EPPD.
12. Appellant did not run the license plate of Ms. Romero's car. This is contrary to the Policies and Procedures of EPPD.
13. The purpose of the Policies and Procedures of EPPD is to create a record of any police interaction with citizens.
14. Appellant was aware of the Policies and Procedures of EPPD. He received a copy of the same when he was hired by EPPD. He also received training on how to conduct motor vehicle stops.
15. Appellant, during the IA interview for the motor vehicle stop, was less than honest. He was unsure if he turned on the body camera. He stated he thought the MVR was still on. The only way to turn it off is by doing so manually. Appellant had to have turned off the MVR purposely.
16. There was no malfunction with the MVR at the time of the motor vehicle stop.
17. After the motor vehicle stop Ms. Romero went to police headquarters to make an internal affairs complaint. The complaint was filed on March 2, 2017. She was interviewed, which was recorded and transcribed.
18. On the afternoon of March 1, 2017, Ms. Romero was again at the Gilbert School to pick up her child. Appellant followed her around the block in his police car and made a motion with his fingers to his eyes, and then towards Ms. Romero, to indicate he was following her. Appellant did not indicate to Ms. Romero that she was double parked and should move her car.
19. Ms. Romero reported this conduct to IA.

20. Contrary to Appellant's statements, he purposely attempted to avoid having any record of the motor vehicle stop.

Letter

21. Appellant issued an E-Ticket, E16-006509, on August 12, 2016, for a violation of N.J.S.A. 39: 4-97.3, for use of a hand held device while driving. The summons was to EAN Holdings, Inc., which is Enterprise Rent-a-Car.

22. E-Tickets are either manually filled in, or auto populated using a license plate reader. Enterprise, upon their receipt of the summons, notified the Elmwood Park Municipal Court that the driver was a Vera Hernandez.

23. Ms. Hernandez eventually went to municipal court, but not after being subject to a bench warrant, where she pled guilty.

24. Ms. Hernandez asked Appellant if there was anything he could do for her regarding the ticket, as Uber, where she worked, suspended her for the ticket.

25. Appellant wrote a letter on the Chief's letterhead in an effort to assist Ms. Hernandez. In that letter he stated the summons was issued "in error" and that the driving record of Ms. Hernandez was "a good driver based on her driving history."

26. Both statements in the letter were false. Appellant, in both the IA interview, and during his testimony, stated that summons was correctly issued. He stated the error was the delay in service. This is not reflected in what the letter actually states. Ms. Hernandez' driving history, upon a review of her driver's abstract, indicates that she is not a good driver at all. Appellant did not review her driving abstract prior to writing the letter.

27. Writing the letter was contrary to the Policies and Procedures of EPPD.

28. Appellant did not receive prior permission to use the Chief's letterhead.

29. The letter was discovered when Ms. Hernandez presented it to the municipal court in an effort to have the summons dismissed.

30. This caused the court having to relist the summons at least twice, hire an interpreter, and asked EPPD to have Appellant available for court.

31. During the IA interview for this matter, Appellant denied that the letter contained false information. This is simply not true. It is demonstrably not true.

Derogatory Comments

32. Francesca Rodriguez recorded a private telephone conversation with Appellant, on or about June 7, 2018.

33. A recording of that conversation was provided to Elmwood Park as part of discovery in a civil matter between Ms. Rodriguez and the Borough.

34. Appellant used the terms "fag", flaming fag" and "little fag" during the course of the recorded conversation with Ms. Rodriguez while referring to Chief Foligno and Captain D'Amore.

35. It is clear that those terms were used in a derogatory fashion.

36. An IA investigation was started regarding the recorded conversation.

37. During the IA interview, Appellant admitted using the derogatory terms towards Captain D'Amore during an incident in the parking lot of police headquarters. He denied using such terms toward Chief Foligno.

38. There is not a disciplinary action currently against Appellant for the parking lot incident, as he was terminated for the disciplinary matters which are the subject of the instant matter.

39. After the IA interview, Captain Kassai, who conducted the interview, submitted White Sheets to Appellant with four additional questions.

40. Appellant did not answer the questions. Rather he invoked his Fifth Amendment rights. He also invoked Garrity.

41. Appellant had been apprised that the IA investigation was administrative only.

42. Johnson's claim as to what these terms meant was farcical.

43. Use of these terms against his superior officers, Chief Foligno and Captain D'Amore, are violative of the Policies and Procedures of EPPD.

44. Use of these terms is insubordinate.

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a civil service employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See 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). The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2 2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). 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 (1958). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). This burden of proof falls on the agency in enforcement proceedings to prove violations of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987).

This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, in accordance with a reasonable probability of truth. Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" 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). 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). The burden of proof falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The respondent must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson, supra, 37N.J. 143. The evidence needed to satisfy the standard must be decided on a case-by-case basis.

An appeal to the Merit System Board requires the Office of Administrative Law to conduct a de novo hearing and to determine appellant’s guilt or innocence as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987).

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 duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, which 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 of Newark 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).

There are three FNDA’s in the instant matter, as follows:

FNDA (motor vehicle stop), dated December 24 ,2019, with sustained charges of N.J.A.C. 4A:2-2.3(a)(1), Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(6), Conduct Unbecoming a Public Employee; N.J.A.C. 4A:2-2.3(a)(7), Neglect of Duty; and, N.J.A.C. 4A:2-2.3(a)(12), Other Sufficient Cause. The EPPD Rules and Regulations found to be violated are Rule 1:6.2, Core Values; Rule 3:1.1, Standard of Conduct; Rule 3:1.5, Performance of Duty; Rule 3:1.7, Obedience to Laws, Ordinances, Rules and Written

Dir.; Rule 3:7.4, Civil Rights; and, Rule 3:7.14(3), Conducting Private Business While on Duty.

FNDA (letter), also dated December 24, 2019, with sustained charges of N.J.A.C. 4A:2-2.3(a)(1), Conduct Unbecoming a Public Employee; and, N.J.A.C. 4A:2-2.3(a)(12), Other Sufficient Cause. The EPPD Rules and Regulations found to be violated are Rule 1:5-2, Code of Ethics; 1:6.2, Core Values; Rule 2:1.3(1, 2, 3, 5 & 8), General Duties & Responsibilities; Rule 3:1.1, Standard of Conduct; Rule 3:1.5, Performance of Duty; Rule 3:1.7, Obedience to Laws, Ordinances, Rules and Written Dir.; Rule 3:10.1(1 & 2), Communication, Correspondence (Restrictions); and, Rule 3:4.3, Reports.

FNDA (phone recording) also dated December 24, 2019, with sustained charges of N.J.A.C. 4A:2-2.3(a)(2), Insubordination; 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. The EPPD Rules and Regulations found to be violated are 1:6.2, Core Values; Rule 3:1.1, Standard of Conduct; Rule 3:1.7, Obedience to Laws, Ordinances, Rules; Rule 3:10.1(1), Insubordination; Rule 3:1.11, Conduct Toward Other Department Employees; Rule 3:3.6, Criticism of Official Acts or Orders; and, Rule 3:11.6, Impartial Attitude.

“Conduct unbecoming a public employee” encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for government employees and confidence in the operation of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998). It is sufficient that the complained-of conduct and its attending circumstances “be such as to offend publicly accepted standards of decency.” Id. at 555 (citation omitted). Such misconduct need not necessarily “be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.” Hartmann v. Police Dep’t of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (citation omitted).

Police 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." Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

There is more than ample proof that appellant's conduct was clearly unbecoming and violated the EPPD Rules and Regulations. The three FNDA allege conduct unbecoming a public employee.

As to the traffic stop Appellant clearly acted inappropriately. He effectuated a motor vehicle stop without probable cause. Indeed, his intent was not to investigate a motor vehicle or other violation. His intent was to deliver a personal message on behalf of another officer. He failed to notify headquarters of the stop. He turned off his vehicle camera. He failed to turn on his body camera.

As to the letter incident, again he acted inappropriately. He used the Chief's letterhead without permission. He wrote a letter that contained falsehoods. He stated in the letter that the summons issued was "issued in error". He further stated that Ms. Hernandez was "a good driver based on her driving history." Both statements were demonstrably false.

As to the derogatory comments incident, he used the terms "fag" and "flaming fag" in reference to two superior officers. This was done in the context of a private conversation with a former police officer. The use of such terminology towards a superior officer is certainly conduct unbecoming a public employee.

Clearly, his behavior is such that it “has a tendency to destroy public respect for government employees and confidence in the operation of governmental services” and “offend[s] publicly accepted standards of decency.” Karins, supra, 152 N.J. at 554, 555. And it violates “the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.” Hartmann, supra, 258 N.J. Super. at 40.

The Appellate Division noted in In re Torres, A-1450-06T3 (App. Div. June 4, 2008), <http://njlaw.rutgers.edu/collections/courts/>, the following:

Deliberately filing a false police report is conduct that strikes at the very heart of a police officer's responsibility and undermines public confidence in police. Cosme v. E. Newark Twp. Comm., 304 N.J. Super. 191, 206 (App. Div. 1997), certif. denied, 156 N.J. 381 (1998). If a police department maintains or retains an officer after he has falsified a police report, his credibility in criminal matters as well as in other proceedings can be attacked. Moreover, citizens who are suspected of criminal activity have a right to expect that reports filed by a police officer accurately, fairly, and honestly describe what occurred. Consequently, we have no difficulty concluding that the deliberate filing of a false police report is conduct unbecoming a public employee, especially in light of the strong need to maintain discipline within law enforcement agencies, see Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980), and the capacity of a false police report to “disrupt and destroy order and discipline” in a police organization. Id. at 580.

In the instant matter, Appellant's failure to create a record of the inappropriate motor vehicle stop is akin to filing a false police report. EPPD Rules and Regulations require that both the MVR and body camera are activated for the entirety of the motor vehicle stop. Further, the stop itself must be called into dispatch to create a record. This did not happen and Appellant knew it should have happened.

The FNDA (motor vehicle stop) has a sustained charge of Failure to Perform Duties, N.J.A.C. 4A:2-2.3(a)(1). In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or

inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980).

The fundamental concept that one should be able to perform the duties of the position is stated in Briggs v. Department of Civil Service, 64 N.J. Super. 351, 356 (App. Div. 1960), which happens to be a probationary period case involving a nurse:

Manifestly, the purpose of the probationary period is to further test a probationer's qualifications. Neither the Legislature nor the Commission has given the courts any guidance in determining the extent of assistance or orientation which a probationer must receive. Undoubtedly her duties must be explained to her and she must be given reasonable opportunity to perform the duties expected of her. But this does not mean she is entitled to on-the-job training in the manner of performing her duties. This is what she must be qualified for—the proper performance of her duties as outlined by the appointing authority.

In the present matter, the record reflects that Appellant failed to perform several of his duties specifically involving his motor vehicle stop of Ms. Romero. He should have called into Dispatch. He should have kept on the MVR, which he turned off. He should have activated his body camera. He did not, contrary to Appellant's testimony, the credible and competent evidence points to him not performing his duties.

The FNDA (motor vehicle stop) has a sustained charge of Neglect of Duty, N.J.A.C. 4A:3(a)(7). Appellant is charged with "neglect of duty," N.J.A.C. 4A:2-2.3(a)(7). "Neglect of duty" has been interpreted to mean that "an employee . . . neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009), adopted, Civil Service Commission (March 27, 2009), <http://njlaw.rutgers.edu/collections/oal/>. The term "neglect" means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" means conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531,

534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job.

Clearly, Appellant neglected to create a record of the motor vehicle stop, which should have included an MVR and body camera video and audio, as well as a call into dispatch to create a CAD record. This was not done.

All three FNDA's have a sustained charge of Other Sufficient Cause, N.J.A.C. 4A:3(a)(12). There is no definition in the New Jersey Administrative Code for other sufficient cause. Other sufficient cause is generally defined in the charges against respondent as all other offense caused and derived as a result of all other charges against appellant. There have been cases when the charge of other sufficient cause has been dismissed when "respondent has not given any substance to the allegation." Simmons v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm'r (April 26, 2006), <<http://njlaw.rutgers.edu/collections/oal/final/csv9122-99.pdf>>. In the instant case the charge of Other Sufficient Cause. I conclude that these charges should be sustained for all three FNDA's as Appellant has demonstrated a lack of candor in the three IA investigations. He failed to follow EPPD Rules and Regulations in the motor vehicle stop or the letter matter. He used foul and offensive language directed at two superior officers.

In the FNDA (phone recording case) there is a sustained charge of Insubordination, N.J.A.C. 4A:2-2.3(a)(2). Insubordination, though not defined in the New Jersey Administrative Code, has been given a more expansive definition, to include acts of disobedience, non-compliance and non-cooperation." In re Stanziale, CSV 4113-00, Final Decision (January 29, 2001), <<http://njlaw.rutgers.edu/collections/oal/>>, aff'd, No. A-3492-00 (App. Div. April 11, 2002). It thus encompasses more than a simple refusal to obey an order. EPPD Rules and Regulations, 3:1-10(2) defines insubordination as "Use any disrespectful or abuse language/action towards a specific supervisor." Clearly, Appellant used such language

directed at Captain D'Amore and Chief Foligno in his recorded telephone conversation with Ms. Rodriguez.

Based upon the preponderance of the credible and relevant evidence in this matter it is clear that all charges in the three FNDA's should be sustained. The next question to be addressed is what would be appropriate discipline.

Appellant argues that none of the three FNDA's should result in termination. Rather, he argues that he was truthful and forthcoming. I disagree. Appellant was less than truthful in all three IA interviews. Appellant attempts to trivialize the three FNDA's in his post hearing brief. Appellant does admit that all three were violations of the EPPD Rules and Regulations.

I view all three matters as serious, particularly the motor vehicle stop and the inappropriate use of the Chief's letterhead. In both instances Appellant placed the EPPD in a potentially serious condition. The motor vehicle stop was illegal and without probable cause. It should never have happened. Appellant made no attempt to find out why he was asked to deliver a message. He failed to document the stop.

The letter, written as if an official document of the EPPD, contained demonstrably false information. This letter caused the Borough to incur expenses for the interpreter. It was inappropriate and ill conceived.

The least troubling, though still troubling, incident was the recorded telephone call with Ms. Rodriguez. Appellant looks to downplay his use of base language as something associated with his Jamaican heritage. This is farcical. He called the Captain and the Chief words that should never be used towards anyone, including your superior officers. That Appellant did not know he was being questioned as to the telephone call, but thought it was about the parking lot incident, mitigates somewhat.

However, the motor vehicle stop and the letter, each standing alone, warrant removal, without the need to make a progressive discipline analysis.

I **CONCLUDE** that the respondent has proved by a preponderance of the credible evidence that appellant was guilty of all sustained charges in the three Final Notices of Disciplinary Action and that the FNDAs should be upheld.

I further **CONCLUDE** that the penalty of removal is appropriate.

ORDER

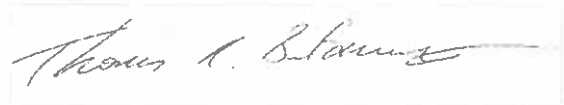
It is hereby **ORDERED** that the three Final Notices of Disciplinary Action, and the penalty of termination, is hereby **AFFIRMED**.

It is also **ORDERED** that appellant's appeal is **DENIED**, with prejudice.

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, 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, 2022

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

APPENDIX

List of Witnesses

For Appellant:

Michael Johnson, appellant

For Respondent:

Jennifer Romero

Capt. Michael Kassai

Deborah Zafonte

Capt. Marc D'Amore

Matthew Tani

Michael Foligno

List of Exhibits

For Appellant:

P-1 PNDA dated 6/6/18

P-2 Audio/Video Tape of Johnson – Internal Affairs Interview

For Respondent:

R-1 EPPD Rules and Regulations

R-2 Johnson PowerDMS Rules Receipt Printout Excerpt

R-3 PNDA (Car Stop/I.A. #2017-7 Charges), dated 7/10/19

R-4 I.A. Investigation Report (I.A. #2017-2), dated 5/15/19

R-5 I.A. Complaint Form from J.R.

R-6 Request for Consensual Intercept, dated 3/2/17

R-7 EPPD DVIAR for Officer Johnson, dated 3/1/17

R-8 Disc containing recordings for I.A. #2017-7

R-9 EPPD Policy & Procedures re Mobile/Wearable Video/Audio Recorders
Effective 4/17/15

- R-10 EPPD DVIAR for Officer Johnson, dated 3/2/17
- R-11 GPS Printout for Vehicle 407 on 3/2/17
- R-12 EPPD Dept. Incident Summary for Incident #I2019-021151
- R-13 PNDA (Letter/I.A. #2017-17 Charges) dated 7/10/19
- R-14 I.A. Investigation Report (I.A. #2017-17) dated 5/15/19
- R-15 letter from Johnson – re Summons E16-006509, undated
- R-16 E-Ticket printout for 006509, dated 8/12/16
- R-17 Ticket #006509 Disposition Sheet, dated 8/12/16
- R-18 Ticket #006509 Plea by Mail Form, undated
- R-19 Driver's Abstract for V.C.
- R-20 EPPD Dept. Incident Summary for Incident #I-2019-021153
- R-21 Email from Court Administrator to Police Chief, dated 8/8/17
- R-22 Warrant Form, dated 6/3/17
- R-23 Ticket Inquiry, dated 6/3/17
- R-24 EPPD Release Form, dated 6/3/17
- R-25 Bail Recognizance Form, dated 6/3/17
- R-26 Court Order on Finding of Guilty, dated 6/3/17
- R-27 Emails b/w Court Administrator and Police Dept. dated 8/8/17 – 8/16/17
- R-28 Subpoena to Testify on 8/22/17
- R-29 Plea Agreement Forms for 6/13/17 and 8/22/17
- R-30 PNDA (Derogatory Comments/I.A. #2019-1 Charges) dated 7/10/19
- R-31 I.A. Investigation Report (I.A. #2019-1) dated 7/8/19
- R-32 Disc containing Audio Recording of Johnson and Rodriguez Call
- R-33 Transcript of Audio Recording of Johnson and Rodriguez Call
- R-34 Administrative Investigation Advisement Form, dated 5/30/19
- R-35 White Sheets Responses from Officer Johnson dated 7/3/19
- R-36 FNDA (Car stip/I.A. #2017-7 Charges) dated 12/24/19
- R-37 FNDA (Letter/I.A. #2017-17 Charges) dated 12/24/19
- R-38 FNDA (Derogatory Comments/I.A. #2019-1 Charges) dated 12/24/19
- R-39 Expert Report of Matthew Tani, dated 2/13/20

Respondent's Transcript Binder Index

- F. Recorded Telephone Conversation with Romero & Rodriguez, dated 3/2/17 @8:12 p.m.
- G. Interview with Michael Johnson, dated 10/10/17 @4:04 p.m.
- H. Interview with Michael Johnson, dated 10/10/17 @4:24 p.m.
- I. Interview with Matthew Tani, dated 3/19/17
- K. Interview with Michael Johnson, dated 10/2/17.
- L. Interview with Michael Johnson, dated 5/30/19