**STATE OF NEW JERSEY**

| In the Matter of Michael Palinczar, Trenton, Police Department<br><br>CSC Docket No. 2019-3130<br>OAL Docket No. CSR 06311-19 | **FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION** |
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**ISSUED: MAY 3, 2023**

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The appeal of Michael Palinczar, Police Officer, Trenton, Police Department, removal, effective April 18, 2019, on charges, was heard by Administrative Law Judge Jeffrey N. Rabin (ALJ), who rendered his initial decision on March 6, 2023. Exceptions were filed on behalf of the appellant.

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, the Civil Service Commission (Commission), at its meeting on May 3, 2023, adopted the ALJ's Findings of Facts and Conclusion and his recommendation to uphold the removal.

Upon its *de novo* review of the ALJ's thorough and well-reasoned initial decision as well as the entire record, including the exceptions filed by the appellant, the Commission agrees with the ALJ's determinations regarding the charges, which were substantially based on his assessment of the credibility of the witnesses. In this regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See also, In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra).* The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by

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. Specifically, the ALJ found the appellant's testimony not credible, finding he offered "rehearsed, prepared answers." For each of the proffered charges that were upheld, the ALJ provided his reasoning as to why the credible testimony and evidence in the record established those charges. The Commission finds nothing in the record or the appellant's exceptions to question those determinations or the findings and conclusions made therefrom.

Similar to its review of the underlying charges, the Commission's review of the penalty is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also 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* (CSV) 463. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007).

In this matter, the Commission agrees with the ALJ's recommendation to uphold the removal. Given the nature of the infractions, and give the appellant's status as a Police Officer, the Commission finds the penalty of removal neither disproportionate nor shocking to the conscious.

## ORDER

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

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 3RD DAY OF MAY, 2023

Allison Chris Myers

Allison Chris Myers
Acting Chairperson
Civil Service Commission

Inquiries
and
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Attachment

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

**INITIAL DECISION**

OAL DKT. NO. CSR 06311-19

AGENCY DKT. NO. N/A
2019-3130

**IN THE MATTER OF MICHAEL PALINCZAR, TRENTON POLICE DEPARTMENT.**

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**Nicholas P. Milewski**, Esq., for appellant (Mets Schiro McGovern, LLP, attorneys)

**Charles R.G. Simmons,** Esq., for respondent (Simmons Law L.L.C., attorneys)

Record closed: May 12, 2021 Decided: March 6, 2023

BEFORE **JEFFREY N. RABIN**, ALJ:

## STATEMENT OF THE CASE

Appellant, Michael Palinczar, is appealing the termination of his position as a Trenton Police Officer, by respondent, Trenton Police Department. Respondent has charged appellant with fifty-eight charges, including providing false or incomplete information to first responders, including with regard to his own alleged drug intoxication at that time; taking prescribed opioids while on duty; failing to inform his department that

he had travelled out-of-state for drug abuse rehabilitation, and; providing false information to the Trenton Police Internal Affairs (IA) department.

## PROCEDURAL HISTORY

On or about May 8, 2019, appellant filed an appeal with the Civil Service Commission, claiming appellant was wrongfully terminated from his position as a Trenton Police Officer on April 18, 2019. The petition was transmitted to the Office of Administrative Law (OAL), where it was filed on May 22, 2019, for determination as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Telephone conferences were held on June 5, 2019, August 6, 2019, September 16, 2019, and November 13, 2019.

On or about December 30, 2019, appellant filed a motion to be reinstated to paid status. A telephone conference was held on May 13, 2020, and the record on the motion was closed on June 15, 2020. On July 10, 2020, appellant's motion was denied.

Hearings were conducted by Zoom due to ongoing Covid-19 protocols, on October 19, October 20, October 21, October 29, November 10, and November 23, 2020, and the record closed on November 23, 2020. After delays, the record was reopened on or about August 16, 2022, for resubmission of summation briefs, which were received shortly thereafter. After review the record was closed on May 12, 2021.

## FACTUAL DISCUSSION AND FINDINGS OF FACT

Based upon the testimony at the Zoom hearings, and the parties' briefs and evidence, I **FIND** the following to be the facts of the case:

1. On July 21, 2018, an acquaintance of appellant, T.L., suffered a drug overdose at appellant's home (the Incident). Appellant was off-duty at the time of the Incident.

2. On April 11, 2019, appellant was served with a Preliminary Notice of Disciplinary Action (PNDA) charging him with fifty-eight violations of internal regulations, allegedly stemming from the Incident. These included providing false or incomplete information to the first responders, including with regard to his own alleged drug intoxication at that time; taking prescribed opioids while on duty; failing to inform his department that he had travelled out-of-state for drug abuse rehabilitation, and; providing false information to Internal Affairs. The PNDA suspended appellant with pay. Appellant did not file a timely written request for an internal hearing.

3. A Final Notice of Disciplinary Action (FNDA) was issued on April 18, 2019, terminating appellant's position effective April 18, 2019. Appellant was never arrested or charged with a crime.

**Testimony:**

For respondent:

Detective **Jason Snyder** conducted the investigation into the Incident. A woman, T.L., suffered a drug overdose on July 21, 2018, at appellant's home in Ewing, New Jersey. EMTs and Officer Fornarotto were dispatched to the property in response to a 911 call stating a woman was having trouble breathing. Fornarotto found T.L. having trouble breathing. Fornarotto suspected a drug overdose. Appellant asked for the "stuff" to revive her, and Fornarotto applied Narcan (common name for Naloxone HCl), which did not initially work, and she was ultimately taken to the emergency room. Fornarotto asked appellant what the woman had taken; he first said she was drunk, then said T.L. took something, then said she took oxycodone. Appellant later stated in an interview that he was merely using process of elimination to figure out what T.L. had taken. Fornarotto reported that appellant appeared to be under the influence; he noticed sweating, pinpointed

eyes and impaired speech. Appellant appeared jumpy. Fornarotto asked if appellant had taken drugs and he said, "No, I'm on the job." But appellant was off-duty at the time. Appellant had a duty to report this Incident to his supervisors, per department rules and regulations, specifically Rules 3:1.5, 1.4 and 1.7. Trenton rules of discipline, Rule 4:8.7, require reporting such incidences, whether the officer was on or off-duty. (Exhibit R-33.)

Appellant responded in an interview that he had to decide between calling 911 or driving T.L. to the hospital (which would require him to report this Incident to work). As T.L. had taken oxycodone, this was a red flag that appellant was not being "on the level." Appellant then suggested that T.L. had previously experimented with street drugs. He did not report this during the Incident because he was afraid to get into trouble at work or to label T.L. as a drug user, although it did not make sense that appellant was worrying about being embarrassed at work when it was necessary to save a person's life. While there was no evidence that appellant had possessed or was using opioids in his home that night, he gave inconsistent information to the responding officer and EMTs that could have affected T.L.'s well-being.

Snyder also investigated an incident from October 12, 2014, regarding unwanted houseguests refusing to leave appellant's property, and an investigation report of a crash in Ewing, New Jersey on October 13, 2014, where the driver had a suspended license and was driving a vehicle registered to appellant.

Snyder also investigated a report of a motor vehicle stop on May 2, 2018, where a woman driving on a suspended license was pulled over in a vehicle nregistered to appellant. In the car was a controlled dangerous substance (CDS), marijuana, and a blank prescription for OxyContin, an opioid, which was made out to appellant. Appellant never reported this incident or that he had a prescription for OxyContin. Rule 4:6.8 required an officer to report to his commanding officer use of any medications that might impair his performance. (Exhibit R-15.) During an

investigative interview, appellant said he did not advise his superiors about his prescription but had listed it on a form accompanying a drug test in 2015 or 2016, but Snyder found no record of any such disclosure. Regardless of if he had completed that drug test form, an officer must advise his superior of all their medications. After signing a HIPAA authorization form, Snyder discovered that appellant was obtaining OxyContin and/or oxycodone from Barnert Pharmacy in Paterson, New Jersey; a CVS in Ewing, New Jersey; a CVS in Fairless Hills, Pennsylvania; from a Dr. Aznani in Wayne, New Jersey; from West Trenton Pharmacy, in Ewing, New Jersey; and from a store in Hamilton Square, New Jersey. Dr. Goswami, whose prescription was filled at Barnert Pharmacy, was under a Drug Enforcement Agency (DEA) investigation. But Snyder had no direct evidence that appellant abused prescriptions.

Snyder investigated a crash investigation report by Ewing police for an incident on January 25, 2015, where the driver had a suspended license and had been driving a vehicle registered to appellant. Appellant still had an obligation to report this; he was a target of the investigation because it was his vehicle.

Snyder also investigated an April 19, 2018, incident where people were arrested after being stopped in a vehicle registered to appellant, which car had marijuana and crushed pills, thought to be Percocet, a painkiller. Snyder interviewed D.L., who has a child with appellant. She was not aware if appellant took opioids, but she admitted having a problem with Percocets.

Exhibit R-23 was a report of M.W. who had driven a vehicle registered to appellant while on a learner's permit, and the adult in the car had only a suspended license.

After these incidences, Snyder and appellant's partner, Officer Mandello, removed appellant from his desk and took him to IA. Appellant was upset; when asked, he stated he had a handgun at home. They stopped at appellant's home on

the way to a Functional Capacity Evaluation (FCE), and had appellant turn over that weapon. Appellant was placed on "stress leave."

As seen in Exhibit R-19, the Capital Health, Corporate Health Center recommendation, respondent was advised on September 1, 2018, that appellant had been prescribed too high a dosage of opioids and that he should not be working while on such a high dosage.

Per Trenton General Order #74, amended sick leave policy, effective September 29, 2015, appellant was to have sought written consent to leave his home while on sick leave, from his police director. Appellant did not seek consent before leaving home during his paid sick/stress leave. Appellant had gone to Miami for drug detoxification without his department knowing about it or approving it. Those dates coincided with dates appellant had given for sinus surgery. Guy Ponticiello advised appellant to come into the office on November 30, 2018, but appellant said he was in Florida; he later told Ponticiello that he would turn around and come in on November 30, but Ponticiello told him to come in on December 3.

These matters were forwarded to the Mercer County Prosecutor, who did not bring criminal charges against appellant.

Appellant had a conflict with a Trenton councilman, resulting in a Facebook dispute, from April 2018.

**Dr. Matthew Guller** evaluated Law Enforcement Officers (LEOs) as a clinical psychologist. He performed a Fitness For Duty (FFD) examination of appellant and issued a report dated November 28, 2018. (Exhibit R-40.) Institute for Forensic Psychology (IFP) reports from September 10, 2012, March 13, 2015, and March 31, 2016, showed appellant suffering from substance abuse, that being heavy drinking. Appellant underwent alcohol rehabilitation five times. In 2018, appellant completed rehabilitation in Florida for narcotics.

Appellant discussed Ms. N., who had been arrested in his car for drug possession.

Guller found appellant not fit for duty, finding his opioid abuse to be an extension of his alcohol abuse. Appellant was taking very high dosages of opioids three times per day, although opioids should only be used “as needed.” Taking opioids three times daily must mean appellant was in constant pain, but appellant was not in pain when examined by Guller. Appellant told Guller he was only minimally using oxycodone; such a high dosage of opioids would then indicate appellant was sharing his prescription drugs, which might explain a woman at his house overdosing. Appellant’s claim that he only minimally used opioids did not jibe with appellant checking himself into drug rehabilitation.

One cannot work safely as a LEO when taking opioids three times daily. Police and firefighters should not be on active duty when taking opioids. Opioids are highly addictive. Opioid use should end thirty to sixty days after it starts. Dr. Goswami should have been suspicious about appellant using more than one kind of opioid, and about appellant travelling great distances to obtain drugs; this appeared to be appellant “doctor shopping.” Guller had recommended a Last Chance Agreement for appellant, saying he should lose his job if he continued his substance abuse. He also recommended intensive outpatient substance rehabilitation, and that appellant join Narcotics Anonymous and Alcoholics Anonymous. Guller did not believe appellant was giving true answers during his examination.

Sergeant **Guy Ponticiello** worked for the Trenton Police for twenty-three years. He had worked as the head of IA since 2018. He issued the charges against appellant, resulting in the 31-A/PNDA, based on Snyder’s investigation. Nobody told him whether or not to issue charges. Appellant requested a hearing after the required five calendar day period and, therefore, the discipline decided by

Doyle was issued. The FNDA issued April 18, 2019, contained the same charges as the PNDA, calling for appellant's removal.

On the evening of November 29, 2018, Ponticiello spoke with appellant regarding his FFD examination. At that time, appellant was on sick/stress time leave. Ponticiello told him to come in, but appellant said he was in Florida. Ponticiello then told him to come in four days later, on Monday December 3, 2018. Early on November 30, appellant texted Ponticiello and said he could come in today, that he was not in Florida, but that he had been on his way to Florida but turned around. Ponticiello told him to just come in on December 3. Ponticiello felt appellant was trying to deceive him with his responses.

Ponticiello prepared the charges regarding the motor vehicle issues with unlicensed/suspended drivers. Title 39 made it impermissible to allow unlicensed drivers to operate your vehicle. Per R:8-7 (R-Exhibit 34), any motor vehicle incident must be reported to the officer's superior, especially if a summons was issued on a personal offense. Appellant should have reported these incidences. Any legal issues incurred by an officer, whether on or off duty, must be reported to one's commanding officer. Another officer unsuccessfully attempted to contact appellant regarding one of the incidences, but it was appellant's duty to notify someone at the department. Trenton Rules and Regulations R.3:1.7 said that a LEO must be above reproach, meaning appellant should not have allowed unlicensed persons to drive his car. (Exhibit R-33.) Appellant was responsible to find out if the people he let drive his vehicle had valid licenses. There was a pattern of this happening, as three times appellant allowed unlicensed drivers to use his car.

As appellant failed to request a hearing in a timely manner, no Loudermill Hearing was required to determine if a potential suspension was with or without pay; without a hearing, the FNDA was issued terminating appellant's employment.

Detective **Peter Szpakowski** worked for the Trenton Police for twenty-seven years, currently in Human Resources. He testified as to Trenton sick leave policies, as covered in Trenton Police General Orders 74-2, effective September 29, 2015. For stress leave, the officer must get a psychological evaluation and FFD examination. (Exhibit R-55.) These were performed by Guller at IFP. A stress leave employee could not return to work without IFP, per 74-2, section C. When you are on sick leave, you must remain at home, unless get you consent from you administrative desk superior to waive the residency restriction, per 74-2, section D. If you are not taking your sick time at home and do not have consent to be elsewhere, it is an unauthorized absence. If you return to work then go on sick leave again, you will need a new administrative letter in order to be excused again. Trenton policies do not refer to "systemic" versus "non-systemic."

Exhibits R-31 and R-32 contained appellant's sick leave history. New rules and regulations were issued on September 18, 2018, and were executed and accepted by appellant on November 13, 2018.

Appellant provided no notice to the department regarding his medications. Appellant had not been excused from his residency requirement during the time of his sinus surgery. Appellant had been treated several times for drugs and alcohol. Szpakowski was aware of Guller's recommendations for appellant to address his substance abuse issues but did not know if appellant complied with Guller's recommendations.

**Dr. Hari Brundavanam** was subpoenaed to testify. He did contract work for Capital Health, in the critical care/intensive care unit ICU. He had dealt with overdoses. He was in the ICU on July 21, 2018, when T.L. was admitted.

T.L. told him she had been drinking a pint of vodka per day for a couple of years. A friend had recommended taking two pills with the alcohol that evening. She mentioned Percocets, which were oxycodone plus acetaminophen (Tylenol).

She had been found unresponsive, and when she was brought to the emergency room she was covered in Narcan. Narcan was used for opioid overdoses but not for alcohol. The admitting doctor administered T.L. a Narcan drip. Only marijuana appeared in T.L.'s drug analysis (Exhibit R-8.) Brundavanam did not know why neither opioids nor alcohol showed up in the analysis, although T.L. admitted to drinking that evening; synthetic opioids do not get picked up in blood screenings, but Percocet should, even though she took a small dose that evening. Tylenol did show up in the drug analysis, in a normal amount. Extremely heavy doses of alcohol could cause heavy breathing, but not marijuana.

While Percocets came in different doses, two Percocets should not have been enough to cause an overdose. However, Brundavanam was not an expert in narcotics (nor in marijuana).

Officer **Corey Fornarotto** was with the Ewing Township Police Department. He responded to calls for service and had experience with people under the influence of intoxicating substances. He prepared a Narcan report from the Incident.

Dispatch had sent him to appellant's address due to a person having trouble breathing, a common call which did not necessitate sirens and lights. Appellant ran up to Fornarotto when he arrived and asked for "the stuff to revive her." Fornarotto grabbed his Narcan and walked towards the house, where he found an unresponsive female on the ground. There was also a young boy there, possibly appellant's son. Based on his experience, it appeared that T.L. had overdosed on drugs, although Fornarotto was not an official drug recognition expert (DRE). Fornarotto asked if she took anything; at first appellant was uncooperative and evasive in answering questions, but then said, "No, we'd been drinking." The woman, T.L., did not smell of alcohol, although there was a beer bottle nearby. Fornarotto would not use Narcan for alcohol poisoning because it would be ineffective. After a few minutes, appellant said the woman might have taken

oxycodone. There was no sign of narcotics or paraphernalia nearby; the room looked like it had just been cleaned. Fornarotto did not inspect the house and did not use his body camera because it was recharging in his vehicle.

T.L. did not respond to the initial use of Narcan. An EMT then arrived, said it appeared to be a drug overdose, and recommended a second dose of Narcan. Officer Bannister arrived, and he administered the second dose of Narcan, five to ten minutes after the first dose was administered, and T.L. began to revive. Fornarotto spoke with appellant, who then revealed he was a LEO. Appellant said he was "on the job" for the Trenton Police, which seemed odd because he had an unresponsive person on his floor. Appellant told Fornarotto that he did not want to get into trouble and wanted to keep this incident "down low." Appellant's eyes were pinpointed, he was sweating heavily and behaving manically, with slurred speech and unfocused behavior, suggesting he was under the influence of narcotics.

T.L. revived, then threw up. The EMT took her to the hospital.

**For appellant:**

Appellant **Michael Palinczar** was an eighteen-year veteran of the Trenton Police Department, spending most of his career as a patrolman. He had been hit by a driver in June 2014; despite physical therapy and orthopedic care, the injuries suffered from that accident continued to affect him. Friends recommended Dr. Goswami, in Wayne, New Jersey, for pain management. He was also seeing a doctor in Philadelphia regarding sinus issues. Dr. Goswami suggested low doses of Percocet, but they gave him stomach pain so Goswami prescribed OxyContin and oxycodone. He was seeing Goswami once per month; Goswami knew he was a LEO. He continued seeing Goswami until September 2018. He stopped seeing him when he returned to work, because his FFD doctor told him to stop taking oxycodone. Appellant never took pills while on-duty, although the oxycodone never

impaired him. His drug use did not affect his ability to work. Oxy drugs did not make him feel drowsy.

Appellant went for alcohol rehabilitation. Alcoholism ran in his family. He went on his own; work never told him to get alcohol treatment. He had been sober for five years. His friends and co-workers knew not to drink alcohol around him.

He had not been "doctor shopping." Dr. Chung had been his regular physician for twenty-four years. Chung had only prescribed him oxycodone one time, when Goswami was not around. Appellant could not remember all the pharmacies he received medications from. On September 5, 2015, he was chosen for a random drug test at work, and on an accompanying form he listed all his medications, including OxyContin and oxycodone. He was not aware he was to advise the Trenton Police Department of his medications.

T.L. had been a good friend for five or six years. They went to the movies and to dinner and she helped him with his son. The night of the Incident, he had picked T.L. up at her home, fifteen or twenty minutes from his home, between 10:30 and 11:00 p.m. They picked up food at a Burger King, then got to his house around 11:30 or 11:40 p.m. They watched crime/detective programs on television. Fifteen or twenty minutes into their programs, T.L. went outside to smoke a cigarette. She was outside for ten or fifteen minutes; appellant went to check on her, and she said she would be right back. When T.L. returned, she had trouble standing, and returned to the couch and to watching television. Next, appellant checked to see if she had fallen asleep, so he could change the channel, but she was beyond regular sleep. He called her name and tried to shake her awake, but she did not respond. It was a tough decision having to call 911, because there would be gossip. He called 911, then started administering CPR and mouth-to-mouth resuscitation, and she started to revive. Appellant testified that he did not smell alcohol on her breath, and that T.L. was a drinker, but not a drunk. But later he testified that he did smell alcohol on her when he started CPR. T.L. indicated on the night of the Incident that

she drank a pint of alcohol per day, but appellant was unaware of the extent of her drinking, and she never appeared intoxicated around him. However, on cross-examination, appellant testified that on the night of the Incident he tasted alcohol on her breath and saw an empty bottle of alcohol in her purse when they went into her purse to find identification; he had never mentioned that in his IA interview.

Appellant knew about overdoses. He checked T.L. for syringe marks; he checked for any signs of a suicide attempt; he was trying to eliminate all possibilities. There were no medications in her purse. He did not see T.L. take any drugs, nor did she say she had taken drugs. When the police arrived, he was a nervous wreck. He ran to the police car with a flashlight and spoke with Officer Fornarotto. Appellant did not ask for "stuff"; he specifically requested Narcan. He had figured out through process of elimination that they needed to use Narcan, although he told Fornarotto that he did not know what T.L. had taken. He then told Fornarotto that T.L. might have taken oxycodone, because she previously admitted using marijuana and pills. T.L. could not have used drugs at his house. Narcan would have revived T.L. from a large dose of marijuana.

It was the EMTs, not Bannister, who administered the second dose of Narcan. A minute or two later, T.L. revived, then threw up.

Appellant had not given T.L. any pills. He regretted calling 911 because it cost him his job, but he had to save T.L.'s life. He had not been uncooperative with Fornarotto. Despite Fornarotto saying he had pinpoint eyes on the night of the Incident, the results of his next drug test were negative. Because the police call was a medical call, not a criminal call, there was no reason for him to advise his superiors about the Incident. Much later, appellant was discussing T.L.'s urine test from the Incident with her; she still did not know what she had taken.

IA told appellant they were opening an investigation into a major rule infraction. Appellant had to take a urine test and advised Doyle about his

prescription from Dr. Goswami. Doyle said that was too high a dosage, and appellant told him he did not take medications when he was working. IA subsequently came to his home and took his service weapon; appellant voluntarily turned over his personal gun. He never received back his service weapon or a personal weapon, even though his drug test came back negative. He stopped taking pills in 2018.

On July 30, 2018, after taking vacation time, appellant returned to work and was reassigned to the public front window. Then appellant's fiancée showed him an article that came out in the Trentonian on August 31, 2018, regarding the Incident and unlicensed people using his car. This (and having to work the front desk, aka the "Bubble") caused him humiliation at work and enough stress that work ordered him to take a FFD examination. The FFD doctor told him to stop using oxy and go to rehabilitation, and to have Dr. Goswami explain why he prescribed such a high dosage of oxycodone. There had been an officer who committed suicide after a newspaper article about him came out, which was why Trenton had taken away appellant's service and personal revolvers.

Appellant loved his job and continued coming in to work for his light duty in the Bubble. On September 11, 2018, appellant had a third sinus surgery; the first surgeries were in 2014, and 2016. He had formally signed up for sick leaves for his 2014 and 2016 sinus surgeries, but did not take sick leave specifically for the 2018 sinus surgery because he was already on stress leave from September through October. He went to Florida for the third sinus operation. He never requested permission to leave his home while on sick leave nor advised the department that he was going to Florida. While in Florida, since he was already out on leave, appellant entered a substance detoxification program meant specifically for LEOs; there he was able to address his substance use as well as his work-related stress. He did not advise work that he had entered a rehabilitation clinic because it was the fourth time he went to rehab, and it was embarrassing. He finished in Florida in late November 2018. He met with Dr. Guller when he returned; they discussed people

driving his car and the Incident, but did not discuss stress or the results of his drug test. Guller accused him of trading pills for oral sex, which caused appellant enough additional stress that he had to go out on stress leave again. Guller recommended an intensive outpatient rehabilitation program (IOP), Alcoholics Anonymous (AA) attendance and urine tests for appellant. He did IOP at Princeton House and went to AA daily, and still attends AA meetings.

There was an incident when appellant posted on social media, in response to new job openings in Trenton, that "most Trentonians are lazy, don't want to work, and just want their welfare checks." Appellant later testified that he wrote "'some' Trentonians." He did not identify himself as a LEO, but as an "overseer." A councilman accused appellant of posting a racist comment, this social media incident was reported in the Trentonian newspaper, and the mayor went on the radio and called for appellant to be fired, particularly embarrassing because appellant had two mixed-race children. Appellant received minor discipline for his social media post. Appellant believes he was fired from his job due to his Facebook post.

Regarding the vehicle incidences, he had lent his car to M.W. He referred to her as a family friend, although he had previously told IA that he hardly knew her and could not remember her name. He asked if she had a driver's license, and she showed it to him. It turned out that her license had been suspended. She had his car for two days and was stopped for blocking traffic. Appellant did not feel the need to report this to the department because they are busy enough. At first, he testified that he always checked to see if someone had a driver's license before lending them his vehicle, but later stated that if he knew a person well, he would not ask to see their license.

He allowed D.L., the mother of his son, to borrow his car so she could spend time with their son. D.L. never picked up their son at school, and when she was

pulled over, it was her boyfriend who was behind the wheel. Appellant did not report this to the department.

He allowed Ms. N., D.L.'s sister, to borrow his vehicle for her to come visit for the holidays. She was to use the car to go out for more ice, but she never returned to the holiday cookout. She was pulled over and arrested for outstanding warrants and for having a suspended license and was jailed for two weeks. He did not feel the rules and regulations required him to report this, although he stated that if he had known she had outstanding warrants he would have arrested her himself. Appellant subsequently testified that he had given Ms. N. a prescription of his to be dropped off at CVS Pharmacy. Appellant was issued a summons from the stop of Ms. N., which was dismissed by Ewing Municipal Court. In the car the police found a blank prescription for oxycodone in appellant's name. Appellant testified that the prescription was dropped off at CVS but was never filled, despite the prescription being found in his car after Ms. N.'s arrest.

Appellant said on his job application that he had previously had two driver's license suspensions, but he actually had four license suspensions. He also failed to mention a temporary restraining order granted against him in 1999.

Dr. Goswami provided appellant with a letter (Exhibit R-65). He prescribed pills and injections. He never suggested non-opioid options with appellant. He did not explain why he prescribed high dosages of opioids. He prescribed pills three times daily, which appellant took between 2015 and 2018, only occasionally going without pills. The dosage prescribed by Goswami never went up or down. Appellant did not advise his superiors of his opioid prescription in 2015, but he did list his opioid prescription on a form as part of a September 2015 random drug test. Appellant told IA he had not seen Goswami in 2015, but he had prescriptions for opioids from Goswami in 2015.

Appellant went to alcohol detoxification in May through August 2012, prior to his 2014 accident and first starting to see Dr. Goswami. (Exhibit R-27.) He went to a second alcohol treatment in January through March 2015, prior to seeing Dr. Goswami. (Exhibit R-28.) When he first saw Goswami he advised him of his two stints in alcohol rehabilitation, which is why Goswami started him on a smaller dose of opioids. When he went for his third stint of alcohol rehabilitation, he told the counselor he was taking opioids, which concerned the counselor. Appellant told her that "I take them as prescribed" despite testifying earlier that he took his pills "as needed." On cross-examination, appellant said he took all three pills every day but only after his work shift ended. Taking opioids did not impede his faculties, and he never came to work impaired.

Appellant was not familiar with every rule and regulation. Rule 4:6.7 prohibited officers from being under the influence on-duty and stated one could not take medications that "may diminish" one's faculties. The opioid bottles only said "may cause drowsiness." Rules 4:6.8 required officers to advise their supervisors if they were taking medications that "may" diminish or impair them. This rule said nothing about using a drug test form as a means of advising his superiors about medications. Appellant admitted that if the current rules were in effect in March 2015 when he began using opioids, he should have advised his supervisor of his medications.

Dr. Goswami prescribed appellant oxycodone, both 15 and 30 milligram (mg) pills, and 30 mg OxyContin pills. Dr. Chung prescribed promethazine codeine syrup, for a chest cold/lung infection appellant had, that being a twelve-day prescription on January 31, 2018, a twelve-day prescription on February 8, 2018, and a twelve-day prescription on February 19, 2018. (Exhibit R-5.) Appellant could not recall if he advised his supervisor about the codeine. As of April 25, 2018, appellant was still taking promethazine codeine, for his acute asthma. Appellant's dentist, Dr. Palionras, prescribed hydrocodone for him on August 1, 2018.

On March 1, 2018, Dr. Goswami prescribed forty-five oxycodone pills to be taken three times per day for fifteen days. The next day, March 2, 2018, Goswami prescribed forty-five OxyContin pills to be taken three times per day for fifteen days. On March 4, 2018, Dr. Chung prescribed ten oxycodone pills for appellant, even though he had just gotten prescriptions from Goswami. Dr. Chung knew that appellant had been in substance rehabilitation.

Credibility:

In evaluating evidence, it is necessary to assess the credibility of the witnesses. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness' story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950).

A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, at pages 521–22; See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may also reject testimony as "inherently incredible" when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Further, "[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the

credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), cert. denied., 10 N.J. 316 (1952). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

For respondent:

**Jason Snyder** was a very direct, unemotional witness, providing short but thorough answers and answering only what he knew. He appeared knowledgeable. He used his report to refresh his memory. He remained calm on cross-examination. I found him to be a credible witness.

**Dr. Matthew Guller** was a knowledgeable witness. He testified in a straightforward manner. Although somewhat disorganized and unprepared, he was able to use documentary materials to refresh his memory. Despite the attorneys having him flipping through many pages of documents, he did his best to keep up with the questioning. He corrected himself on the occasional times when he had previously stated something incorrectly. He appeared to be an honest witness, who never became defensive on cross-examination. He convincingly made his case that he remained impartial in his evaluations. He did not display any of the prejudice claimed by appellant in its summation brief, and I found him to be a persuasive witness.

**Guy Ponticiello** testified in a knowledgeable manner, exhibiting a great deal of experience. He remained stoic, unemotional and organized throughout his testimony. He was calm and thorough during cross-examination. He was a credible witness.

**Peter Szpakowski** appeared to be very knowledgeable, very prepared, and extremely clear in his testimony. He did his best to testify from memory, as neither attorney referred him to documentation to have to refresh his memory. Although this

meant he occasionally could not recall specific details from certain past conversations, I found him to be credible.

**Dr. Hari Brundavanam** testified pursuant to a subpoena. He appeared knowledgeable and was clear about what he knew and what he did not know, for instance, explaining that he was not an expert in Percocet dosages. He was very fluent in discussing medicine and good at explaining medical concepts. He often relied on documentation to refresh his memory. He was a persuasive witness.

**Corey Fornarotto** was a cooperative witness who was clear about what he knew and what he did not know. He often could not recall specific details, such as how many DWIs he had handled or whether it was many or not. He could not remember asking how much oxycodone T.L. had taken. He seemed to guess at many answers. He was not a particularly credible witness.

For appellant:

**Michael Palinczar**, appellant, offered what appeared to rehearsed, prepared answers. He often began his answers telling stories about other, unrelated people, often proffering third-hand hearsay, before addressing the question itself.

It was troubling that appellant left so many unanswered questions regarding Dr. Goswami, that could have been addressed if Goswami had testified. For example, appellant was not clear on whether he advised Goswami that he was an alcoholic, yet Goswami prescribed heavy doses of an opioid to a patient who had been through several alcohol rehabilitations. On cross-examination appellant stated that he told Goswami that he had been in alcohol rehab two times and that Goswami then lowered his dosage; however, appellant had earlier testified that Goswami never changed the dosage or number of daily pills during that three-year period. It was also questionable why Goswami would continue the opioid prescriptions for three years without another

examination to see if that original prescription was warranted or to see if appellant was still suffering pain.

Similarly, appellant was not clear as to Dr. Chung's role in his medical care, which could have been clarified if Chung had been called to testify. For instance, appellant stated that Chung only prescribed opioids when Goswami was not available, but in actuality Chung had prescribed oxycodone and promethazine codeine syrup at the same time appellant had received a prescription for both oxycodone and OxyContin from Goswami; Goswami prescribed forty-five oxycodone pills for appellant on March 1, 2018, and forty-five OxyContin pills on March 2, 2018, and then Chung prescribed ten oxycodone pills and codeine syrup on March 4, 2018. Additionally, appellant lied about his need for codeine: at first he testified that Chung prescribed codeine syrup for a bad chest cold; later he testified it was for a lung infection, and finally he testified that the codeine syrup prescription was for acute asthma. No evidence had been presented to show that appellant suffered from any of those three ailments.

It did not jibe that appellant stated that he kept all his prescription blanks, but not the form he allegedly completed as part of his September 5, 2015, drug test, when he purportedly listed all his medications. Several times appellant testified that he took all his OxyContin and oxycodone pills "as prescribed," stating that he took three pills per day every day; but other times he testified he took them "as needed." He testified that OxyContin and oxycodone did not make him feel drowsy and that it would not have impaired his ability to perform his job duties, but that statement carried no weight when some days he might have only taken one pill and other days he took two or three pills. This medical conclusion about the effects of his opioid use would also be an irrelevant statement because he also testified that he never took opioids when he was on duty. Appellant never explained what times each day he took his pills, but said he took his daily pills when he was off duty; but his statement that he never took opioids when he was on-duty appeared disingenuous because if he took three opioid pills per day plus codeine syrup he most likely had narcotics in his system while he was on duty.

Appellant was a trained LEO, but his behavior on the night of the Incident did not comport with what might be expected from a police officer. First, he failed to identify himself as a LEO to the responding Ewing Township police officers. Next, although he testified that T.L. had claimed to use marijuana and pills previously, he testified that when she passed out his first response was to shake her and throw water on her, instead of immediately driving her to the hospital or calling 911 for an overdose. In fact, he testified that he had a difficult decision to make, as to whether to call 911 or not, fearing he would get in trouble. Saving a person's life should not be a difficult decision to make, for any person but particularly a police officer. It was also of concern that T.L. admitted at the hospital that she drank a pint of liquor every day, yet appellant at first claimed he had no idea she was a regular alcohol user, stating he knew she "was a drinker but not a drunk." Appellant testified that T.L. was a close friend, and it seems unlikely that she drank alcohol every day yet had never showed signs of intoxication around appellant. At first appellant testified that he did not detect any alcohol on her breath during the Incident. This became further problematic when he backstepped on his testimony, later testifying that he did in fact detect alcohol on her breath during the Incident. He failed to report to the responding officers that there were any signs of alcohol abuse that evening, but later in interview appellant stated that he saw a bottle of vodka in T.L.'s purse, and one responding officer testified that he saw an empty beer bottle in the room where he found T.L.

Appellant at first testified that he did not see any sign of opioid use by T.L., and that he had no idea what she might have taken, yet he ran up to the responding police car and yelled for the officer to bring Narcan (or "the stuff"). Appellant's inability to identify opioid intoxication and relay that information to the responding police officers and EMT did not make sense in light of the fact that appellant had been a regular user of opioids for years, in addition to being a trained police officer.

During the Incident, when Officer Fornarotto asked if appellant had taken drugs himself, appellant responded, "No, I'm on the job." However, this was not true; appellant was off-duty at the time. Further, appellant's statement to Fornarotto could

not have been true because appellant testified that he took three opioid pills per day during his off-duty hours, therefore it was most likely that he had taken drugs that evening. Appellant testified that T.L. could not have done any drugs at his house, yet he also testified that T.L. had gone into his backyard for ten to fifteen minutes to smoke a cigarette, which would have given her an opportunity to use drugs. Further, appellant admitted to having prescriptions for opioids and being a daily opioid user, so there had to be opioid pills in his house on the night of the Incident, giving T.L. an opportunity to use appellant's drugs that evening.

Appellant testified that he went to Florida in September 2018 for a third sinus surgery, without providing any other proof of the surgery. He was untruthful to his department by failing to request sick time for this alleged sinus surgery, believing he had no duty to so advise his superior because he was already on sick/stress leave. He further lied to his employer by later continuing to claim he was in Florida for surgery when in fact he went there for opioid detoxification. He said he decided to go to detox because his employer would have made him do that anyway, but it would be arguable whether his employer would require drug rehab when, as appellant testified, he had tested negative for drugs in his previous drug test. He also lied to Officer Ponticiello on November 29, 2018, when he said he could not come into the office for questioning because he was in Florida, when in fact he was not in Florida at that time.

Finally, regarding the vehicle incidences, appellant testified that M.W. was a family friend, despite having told IA in his interview that he hardly knew M.W. and "couldn't remember her name." This did not jibe with appellant lending his car to a person he hardly knew, especially after two other incidences of him lending his car to people who had suspended drivers' licenses. Despite at one point testifying that he always checked peoples' drivers' licenses before lending him his car, he later testified that he did not always check for valid licenses, but simply took their word that they had a valid driver's license.

Accordingly, I found appellant's testimony to be self-serving and lacking credibility.

Therefore, after reviewing the testimony and the evidence presented, and the summary briefs of the parties, I **FIND,** by a preponderance of credible evidence, the following additional **FACTS**:

On July 21, 2018, appellant called 911 to report that a woman at his address in Ewing, New Jersey, was having trouble breathing; EMTs and Officer Fornarotto were dispatched to the property, and appellant asked Fornarotto for the "stuff" to revive her; Fornarotto believed he meant Narcan (common name for Naloxone HCl), which was used to counteract a narcotic/opioid overdoses but was not used for alcohol poisoning; Fornarotto found T.L. unresponsive and having trouble breathing, displaying signs of a drug overdose; Fornarotto dispensed Narcan to T.L., which did not initially work; after a second dose of Narcan, T.L. was revived and taken to the emergency room; there is a reporting form and logbook for reporting whenever a LEO dispenses Narcan.

Fornarotto asked appellant what the woman had taken; appellant first said she was drunk, later said T.L. took something, then said T.L. had previously admitted using marijuana and pills, and thereafter said she took oxycodone, an opioid; appellant appeared to be under the influence of intoxicating substances during the Incident, having displayed sweating, pinpointed eyes, impaired speech and nervous, jumpy behavior; Fornarotto asked if appellant had taken drugs and he said, "No, I'm on the job," although he was off-duty at the time.

T.L. told the hospital emergency room doctor that she had been drinking a pint of vodka per day for a couple of years; an unnamed acquaintance had recommended that T.L. try taking two pills with the alcohol; T.L. had made a reference to Percocets (oxycodone plus acetaminophen/Tylenol); marijuana appeared in T.L.'s drug analysis, not opioids or alcohol, despite T.L. admitting to drinking that evening; synthetic opioids did not get picked up in blood screenings, but Percocet should even though T.L.

admitted taking only a small dose (two Percocets) that evening; a standard amount of Tylenol showed up in T.L.'s drug analysis; extremely heavy doses of alcohol could cause heavy breathing, but marijuana would not.

Appellant had previously been investigated due to an incident from October 12, 2014, regarding unwanted houseguests refusing to leave appellant's property; appellant had previously been investigated due to a motor vehicle crash in Ewing Township on October 13, 2014, where the driver had a suspended license and was driving a vehicle registered to appellant; appellant had previously been investigated for an incident on January 25, 2015, where a driver was pulled over who had a suspended license and had been driving a vehicle registered to appellant; on April 19, 2018, the mother of appellant's son was riding in a vehicle registered to appellant, driven by her male companion; after being pulled over, the two occupants were found to be in possession of Percocet and marijuana (both controlled dangerous substances), and the male companion did not have a valid drivers license; appellant had been investigated for a May 2, 2018, incident, where a woman, T.N., driving on a suspended license, was arrested after being stopped in a vehicle registered to appellant, which car was found to have contained controlled dangerous substances, that being marijuana and crushed pills, thought to be Percocet, and a blank prescription for OxyContin made out to appellant; T.N. had an outstanding warrant for forgery and the arresting officer suspected that the prescription had been forged; appellant had been investigated for an incident on November 29, 2018, when M.W. was stopped while driving appellant's vehicle, having only a learner's driving permit, and the only licensed adult driver in the car had a suspended license; appellant never reported these incidences or that he had a prescription for OxyContin or oxycodone.

Appellant, a resident of Ewing, New Jersey, had been obtaining OxyContin and/or oxycodone from Barnert Pharmacy in Paterson, New Jersey, a CVS in Ewing, New Jersey, a CVS in Fairless Hills, Pennsylvania, from West Trenton Pharmacy, in Ewing, New Jersey, from a store in Hamilton Square, New Jersey, and from doctors Goswami, Chung, Aznani in Wayne, New Jersey, and a dentist, Dr. Palionras, who

prescribed hydrocodone for appellant on August 1, 2018; the Capital Health, Corporate Health Center advised appellant on September 1, 2018, that he had been prescribed too high a dosage of opioids and that he should not be working at his job while on such a high dosage; Institute for Forensic Psychology (IFP) reports from September 10, 2012, March 13, 2015, and March 31, 2016, showed appellant suffering from substance abuse, that being heavy alcohol consumption; appellant underwent alcohol rehabilitation five times, and drug rehabilitation for narcotics abuse in 2018.

In September 2018, when appellant was on sick/stress leave, he claimed to have gone to Florida to have a third sinus surgery, but during that time period had gone to Miami, Florida, for drug detoxification without his department knowing about it or approving appellant for sick leave for sinus surgery or drug detoxification, or giving approval for appellant to leave his home during sick/stress leave; appellant was advised to come into the office on November 30, 2018, but appellant said he was in Florida, but later contacted the department and said he was not in Florida but was on his way there, and that he could turn around and come in on November 30, but the department told him to come in on December 3.

Trenton Police General Orders 74-2, effective September 29, 2015, covered Trenton sick leave policies; for stress leave, the officer needed to get a psychological evaluation and an FFD examination; a stress leave employee could not return to work without IFP, per 74-2, section C; an employee on sick leave was required to remain at home, unless they received consent from their administrative desk superior to waive the residency restriction, per 74-2, section D; when an employee was not taking sick time at home and did not have consent to be elsewhere, that was considered an unauthorized absence; if an employee returned to work then went on sick leave again, they would need a new administrative letter in order to be excused again; new rules and regulations were issued on September 18, 2018, and were executed and accepted by appellant on November 13, 2018.

After a Fitness For Duty (FFD) examination, appellant was found not fit for duty, with Dr. Guller finding appellant's opioid abuse to be an extension of his alcohol abuse; appellant was taking very high dosages of opioids three times per day, although opioids should only be used "as needed"; a person taking opioids three times daily would indicate that the person was in constant pain; appellant was not in pain when examined by Dr. Guller; appellant told Dr. Guller he was only minimally using OxyContin/oxycodone; a person having prescriptions filled for high doses of opioids but not needing them or using them was an indication that the person was sharing his or her prescription drugs; a person could not work safely as a LEO when taking opioids three times daily, and police and firefighters should not be on active duty when taking opioids; opioids were highly addictive; opioid use should end thirty to sixty days after it started; Dr. Goswami should have been suspicious about appellant using more than one kind of opioid, and about appellant travelling great distances and using many pharmacies to obtain drugs, which were indications of a person "doctor shopping" in order to receive additional drugs; Dr. Guller had recommended a Last Chance Agreement for appellant, saying he would lose his job if he continued his substance abuse; Dr. Guller recommended intensive outpatient substance rehabilitation, and that appellant join Narcotics Anonymous and Alcoholics Anonymous.

Appellant had requested an internal hearing, after the expiration of the required five calendar day period; as a result, no hearing was held and the disciplinary charges against appellant were levied, meaning an FNDA was issued terminating appellant's employment; without an internal disciplinary hearing, and because appellant's employment was terminated, no Loudermill Hearing was required to determine if a potential suspension would be with or without pay.

Appellant provided no notice to the department regarding his medications; appellant had not been excused from his residency requirement during the time of his alleged third sinus surgery.

## LEGAL ARGUMENT AND CONCLUSION

The issue is whether the respondent, the Trenton Police Department, had proven by a preponderance of the credible evidence that it acted properly in terminating appellant's employment as a police officer.

An appellant's rights and duties are governed by the Civil Service Act and accompanying regulations. A civil service employee who committed 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 a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.

In a civil service disciplinary case, the employer bears the burden of providing sufficient, competent and credible evidence of facts essential to the charge. N.J.A.C. 4A:2-1.4. Thus, respondent had both the burden of persuasion and the burden of production, and was required to demonstrate by a preponderance of the competent, relevant and credible evidence that appellant committed the charged infractions listed in the Final Notice of Disciplinary Action. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). See generally Coleman v. E. Jersey State Prison, OAL Dkt. No. CSV 01571-03, Initial Decision (February 25, 2004); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550, 560 (1982); In re Darcy, 114 N.J.Super. 454, 458 (App.Div. 1971).

The Court in In re Polk, 90 N.J. 550, 560 (1982) held:

> This jurisdiction has long recognized that the usual burden of proof for establishing claims before state agencies in contested administrative adjudications is a fair preponderance of the evidence. In Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), we observed that: "In proceedings before an administrative agency, . . . it is only necessary to establish the truth of the charges by a preponderance of the believable evidence and not to prove guilt

> beyond a reasonable doubt." See In re Suspension or Revoc. License of Kerlin, 151 N.J. Super. 179, 184 n.2 (App. Div. 1977) ("Where disciplinary proceedings with respect to a profession or occupation are vested in an administrative agency in the first instance, the charges must be established by a fair preponderance of the believable evidence").

A preponderance of the evidence has been defined as that which "generates belief that the tendered hypothesis is in all human likelihood the fact." Martinez v. Jersey City Police Dept., OAL Dkt. No. CSV 7553-02, Initial Decision (October 27, 2003) (quoting Loew v. Union Beach, 56 N.J.Super. 93, 104 (App.Div. 1959)). "Fair preponderance of the evidence" means the greater weight of credible evidence in the case; it does not necessarily mean the evidence of the greater number of witnesses but means that evidence which carries the greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975) citing Model Jury Charge, Criminal, 3:180. See also, Zive v. Stanley Roberts, Inc., 182 N.J. 436, 457 (2005)(applying the standard to a wrongful termination).

The burden of proof cannot be accomplished only by introducing hearsay evidence. N.J.A.C. 1:1-15.1(b). In the Matter of Nathaniel Parker, Juvenile Justice Commission, 2009 N.J. AGEN LEXIS 250, *14-15, OAL Dkt.. No. CSV 02994-08 (April 15, 2009), the Court held, in relevant part,

> While hearsay evidence is admissible in administrative hearings, N.J.A.C. 1:1-15.5, in order to prove its case, the appointing authority must produce a residuum of competent evidence to prove any ultimate fact. Weston v. State, 60 N.J. 36 (1972). Although credible hearsay evidence may serve to buttress the foundation of credible competent evidence such as to provide a more satisfactory degree of proof of guilt, hearsay that is not otherwise admissible under the Rules

of Evidence (thus competent) cannot by itself support an ultimate finding of fact.

Appellant was charged with misconduct under N.J.S.A. 40A:14-147, incompetence, inefficiency or failure to perform duties under N.J.A.C. 4A:2-2.3(a)(1), conduct unbecoming a public employee under N.J.A.C. 4A:2-2.3(a)(6), neglect of duty under N.J.A.C. 4A:2-2.3(a)(7), and N.J.A.C. 4A:2-2.3(11) for Other Sufficient Cause representing a variety of Departmental rule violations. (Exhibit R-3). The basis for these charges were summarized in the FNDA (Exhibit R-3): Appellant, as a LEO, was required to report, and failed to report, his knowledge of or involvement in an overdose incident at his home; appellant failed to report multiple incidents of unlicensed persons being pulled over in his vehicle, which included charges against those individuals for possessing a CDS; appellant, as a LEO, should not have entrusted his vehicle to persons who were either unlicensed or driving with a suspended license on three separate occasions in 2018; appellant provided knowingly false information to police and EMTs responding to an incident at his home where a friend of his was overdosing on opioids; appellant was charged with being under the influence of a high dose opioid but did not report his opioid use or opioid prescriptions to his department, or to the responders on the night of the Incident; appellant failed to disclose to his department supervisors that he had been prescribed, and was taking, while an active LEO, prescription medication capable of impairing his abilities as a LEO; while on restricted sick leave, appellant left New Jersey without the permission of his supervisor, a violation of Department Rules; appellant knowingly provided false information to the department, in that he took sick leave for three months to recover from an unapproved surgery (sinus surgery) when he actually went to Florida to enter a drug rehabilitation program; when questioned as to his whereabouts on November 29, appellant lied and said he was in Florida, when he was still in New Jersey; appellant made false statements in his IA investigation interviews, and; appellant's opioid use was improper, and he was not forthcoming about his drug use during his IA interviews.

"Conduct unbecoming a public employee" is one of the grounds for discipline of public employees. N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" encompasses conduct that would adversely affect the morale or efficiency of a governmental unit or that had a tendency 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 NJ. Super. 136, 140 (App. Div. 1960). It was sufficient that the complained-of-conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, at 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Conduct unbecoming is a fact sensitive determination rather than one based on a legal formula. In the Matter of Craig Venson, City of Plainfield, OAL Dkt. No. CSV 07545-07, Initial Decision (June 9, 2009), aff'd, Civil Service Commission (August 6, 2009).

A law enforcement officer was held to a higher standard of conduct than other employees, and was expected to act in a responsible manner, with honesty, integrity, fidelity, and good faith. In re Phillips, 117 N.J 567, 576 (1990); Reinhardt v. E. Jersey State Prison, 97 N.J.A.R.2d (CSV) 166. This higher standard of conduct was an obligation that an officer voluntarily assumed when accepting the job. In re Emmons, at 142. 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), cert. denied, 47 N.J. 80 (1966).

Further, "[h]onesty is an essential function for every New Jersey law enforcement officer." New Jersey Attorney General, Internal Affairs Policy and Procedures (November 2017), at 43 ("A.G. Guidelines"). An officer who is "not committed to the

truth, who cannot convey facts and observations in an accurate and impartial manner and whose credibility can be impeached in court cannot advance the state's interest in criminal matters." (A.G. Guidelines.) Honesty, integrity, and truthfulness are "essential traits for a law enforcement officer." Ruroede v. Bor. of Hasbrouck Hgts., 214 N.J. 338, 362-3 (2013).

## I. The Incident of July 21, 2018

The Trenton Police Department Rules and Regulations that were in effect in 2018 stated that, "Members shall report as soon as possible to the proper command, when their attention is alerted to crime, suicide, fire, unusual emergency events, or to information of which the Department takes cognizance." (Exhibit R-33, Department Rule 3:1.5 (b).) The requirement to report was not limited to "crimes" but also to "unusual emergency events." Nowhere did the rules state that "medical calls" were not required to be reported. Trenton Rule 4:8.7, requires reporting such incidences, whether the officer was on or off-duty. (Exhibit R-33.) Additionally, Rule 3:1.6 states "While off-duty, police officers shall take appropriate action as needed in any police matter that comes to their attention within their jurisdiction as authorized by New Jersey law and department general order. While off-duty, police officers who take any police related action or any other action which may touch upon or reflect upon their position with the Trenton Police Department shall notify the highest-ranking officer on-duty as soon as possible and shall submit a written report to the Police Director or designee as soon as practicable."

Although it was not proven whether appellant provided the opioid pills to T.L. the night of her overdose, appellant had several prescriptions for OxyContin and oxycodone which he took three times per day at home after he completed his work shifts, and therefore there were opioids in appellant's home the night of the Incident. It was entirely possible that T.L. had taken some of appellant's pills; if so, appellant might have been guilty of a crime for sharing his prescription drugs with another person. There was a medical emergency in appellant's home that night, requiring police and EMTs to

respond to his 911 call. Despite acting as if T.L. had possibly just been drunk, appellant knew that the woman in his home had overdosed on an opioid, because as soon as the responding officer approached appellant's house, appellant called out for him to bring Narcan, which was only used for opioid overdoses. Appellant, as a veteran police officer, was obligated to be aware that there was a reporting form and logbook for reporting whenever a LEO dispensed Narcan.

Appellant had been charged with misconduct for endangering the life of a person in his care, by providing false or inconsistent information to the EMTs and officers responding to his 911 call. Appellant did not call the Incident in to 911 as a possible drug overdose; he called in a report of a person having difficulty breathing. Appellant did not initially identify himself as a LEO; he told Fornarotto he was a police officer only after the second dose of Narcan which revived T.L. Although appellant told the responders that T.L. had claimed to previously have used marijuana and pills, he testified that when she passed out his first response was to shake her and throw water on her, instead of immediately driving her to the emergency room or calling 911 to report a drug overdose. In fact, he testified that he had a difficult decision to make, as to whether to call 911 or not, fearing he would get in trouble. Again, saving a person's life should not be a difficult decision to make.

Appellant's statements were inconsistent and appeared to be given in such a manner as to protect himself from any legal liability. He did not initially identify himself as a LEO. Officer Fornarotto, the responding officer, asked appellant what the woman had taken, and appellant first said she was drunk, then later said T.L. took something, then later said T.L. had previously admitted using marijuana and pills, and finally told Fornarotto that she took oxycodone. T.L. admitted at the hospital that she drank a pint of liquor every day, yet appellant stated he had no idea that T.L. was a regular alcohol user, stating he knew she "was a drinker but not a drunk." T.L. was a close friend of appellant's and it would be unlikely that she drank alcohol every day yet had never showed signs of intoxication around appellant. Appellant failed to report to the responding officer that there were any signs of alcohol abuse that evening, although

appellant later stated in an IA interview that he saw a bottle of vodka in T.L.'s purse that evening. Appellant testified that he did not see any sign of opioid use by T.L., and he had no idea what she might have taken, yet he ran up to the responding police car and yelled for the officer to bring Narcan (or "the stuff"). Appellant knew he had opioids in the house because he took up to three pills per day and had numerous prescriptions for OxyContin and oxycodone. Appellant's purported inability to identify opioid intoxication and relay that information to the responding police officers and EMT did not make sense in light of the fact that appellant had been a regular user of opioids for years, in addition to being a trained police officer.

When Officer Fornarotto asked if appellant had taken drugs himself, appellant responded, "No, I'm on the job," even though appellant was off-duty at the time. Appellant testified that he never took opioids when on-duty but used up to three pills per day when he returned home after his shift, and therefore it was highly likely he had consumed opioids the evening of the Incident. Further, the responding officer testified that appellant appeared to be under the influence of intoxicating substances during the Incident, having displayed sweating, pinpointed eyes, impaired speech and nervous, jumpy behavior. Finally, appellant testified that T.L. could not have done any drugs at his house, yet he also testified that T.L. had gone into his backyard for ten to fifteen minutes to smoke a cigarette, which would have given her an opportunity to use drugs. Appellant's failure to give clear, prompt, and truthful information from the outset of the Incident was a prime example of misconduct by appellant, as his concerns over how this event would impact him and his job took priority over getting T.L. the proper assistance, which could have cost T.L. her life.

I **FIND** that the overdose Incident at appellant's home was both a possible crime and met the definition of "unusual emergency event," and that therefore appellant was responsible for reporting the Incident to his department. I **FIND** that appellant did not report the Incident to his department, and therefore I **CONCLUDE** that appellant violated Trenton Police Department Rules 3:1.4, 3:1.5 (b), 3:16, 3:1.7 and 4:8.7. I **CONCLUDE** that appellant committed misconduct by failing to truthfully report the facts

of T.L.'s overdose to the responding officers and EMTs. I **CONCLUDE** that appellant's inconsistent and untruthful statements to responders during the Incident and failure to accurately report the Incident to 911 constituted conduct unbecoming a public employee.

## II. Appellant's Substance Use

Trenton Rule 4:6.8 requires an officer to report to his commanding officer use of any medications that might impair his performance. (Exhibit R-15.) Appellant did not advise his superiors about his numerous and various prescriptions for OxyContin, oxycodone and codeine. He claimed he had listed his prescriptions on a form accompanying a drug test in 2015, but produced no evidence of any such disclosure, and respondent could locate no such form. Even if appellant had completed such a form, nothing in the Trenton Rules and Regulations or drug test forms allowed that forms accompanying random drug tests would serve to fulfill an officer's obligations to report all medications that could impair his ability to work to his superiors.

Appellant had been taking prescription OxyContin and oxycodone since at least 2015. Trenton Rule 4:6 required appellant to report these medications to his immediate supervisor, who would then report them to the Commanding Officer. Appellant admitted that for at least the two years immediately preceding the Incident in 2018, he had not disclosed to his chain of command his use of prescription opioids. Appellant had been prescribed and had been consuming large doses of opioids, which fact had also not been disclosed to his superiors.

Appellant was aware that the medications he had been taking had the ability to impair his senses. He often repeated that he would never take opioids when he was on-duty because he did not want people to question his sobriety and functionality. He made a point of telling Officer Fornarotto that he was not on any substances the night of the Incident because he was on-duty.

I **FIND** that Trenton Rule 4:6.8 required an officer to report to his commanding officer use of any medications that might impair his performance and **CONCLUDE** that appellant's use of high doses of opioids was a use of medications which might impair one's performance as a police officer, and that appellant failed to report these medications to his superior officers. I **CONCLUDE** that appellant's failure to report his medications was a violation of Trenton Rule 4:6.8, and constituted misconduct under N.J.S.A. 40A:14-147, and failure to perform duties under N.J.A.C. 4A:2-2.3(a)(1), and Other Sufficient Cause as violations of departmental rules.

Of equal concern was appellant's abuse of narcotics. Appellant, a resident of Ewing, New Jersey, had been obtaining OxyContin and/or oxycodone from Barnert Pharmacy in Paterson, New Jersey, a CVS in Ewing, New Jersey, a CVS in Fairless Hills, Pennsylvania, from West Trenton Pharmacy, in Ewing, New Jersey, from a store in Hamilton Square, New Jersey, and from doctors Goswami, Chung, and Aznani in Wayne, New Jersey, and a dentist, Dr. Palionras, who prescribed hydrocodone for appellant on August 1, 2018.

The IFP reports from September 10, 2012, March 13, 2015, and March 31, 2016, indicated that appellant had been suffering from substance abuse, that being heavy alcohol consumption. To address this, appellant had undergone alcohol rehabilitation five times. The Capital Health, Corporate Health Center had advised appellant on September 1, 2018, that he had been prescribed too high a dosage of opioids and that he should not be working at his job while on such a high dosage. He underwent opioid rehabilitation starting in September 2018, an acknowledgement that he had a problem with opioids.

Respondent offered compelling arguments regarding appellant's substance abuse issues. From January 8, 2018, through July 16, 2018, days before the date of the Incident, appellant filled many prescriptions for either OxyContin or oxycodone. (Exhibits R-15 and R-17.) During that period, there were a total of 789 pills filled, based on prescriptions to take pills three times daily. (Exhibits R-5 and R-17.) If appellant

had taken only the prescribed amount for those 212 days, appellant would have required 636 pills; however, appellant received 789 pills. Based on that, appellant would have had at least 153 leftover pills. Additionally, appellant had filled four prescriptions for codeine cough syrup. (Exhibits R-5 and R-17.) Respondent was correct to question that if appellant took no more than as prescribed, why would he need to continue to refill the prescriptions every two weeks? This was especially troubling because appellant told IA that he did not have leftover pills. (Exhibit R-9.)

On August 31, 2018, when appellant was experiencing stress from the Incident, he was taken to Corporate Health Centers and was evaluated by Dr. Lalitha Gumidyala. Dr. Gumidyala reported that appellant should not be in a safety-sensitive position and should be relieved of his weapon. Dr. Gumidyala questioned why appellant was on a high dose opioid instead of non-narcotic pain management. (Exhibit R-19.)

On November 7, 2018, appellant went for a FFD psychological exam. Dr. Matthew Guller found appellant's opioid abuse to be an extension of his alcohol abuse. He determined that appellant was taking very high dosages of opioids three times per day, although opioids should only be used "as needed." He indicated that a person taking opioids three times daily would be an indication that the person was in constant pain; however, appellant was not in pain when examined by Dr. Guller. Appellant told Dr. Guller he was only minimally using OxyContin and oxycodone, but Dr. Guller indicated that a person having prescriptions filled for high doses of opioids but not needing them or using them was an indication that the person was sharing his prescription drugs with other people. Dr. Guller indicated that a person could not work safely as a LEO when taking opioids three times daily, and that police and firefighters should not be on active duty when taking opioids. Dr. Guller stated that opioids were highly addictive and, for that reason, opioid use should end thirty to sixty days after the use commenced. Dr. Guller indicated that one of the prescribing doctors, Dr. Goswami, should have been suspicious about appellant using more than one kind of opioid, and about appellant travelling great distances and using many doctors and pharmacies to obtain drugs, which were indications of a person "doctor shopping" in order to receive

additional drugs. Most telling was that Dr. Guller had recommended a Last Chance Agreement for appellant, saying he should lose his job if he continued his substance abuse, and that appellant should attend intensive outpatient substance rehabilitation and join Narcotics Anonymous and Alcoholics Anonymous.

Appellant's defense of respondent's accusation of abuse of prescription drugs was based on the medications being legal and having been "properly" prescribed. Yet while Dr. Goswami prescribed medication for the pain, there was no proof appellant had been in pain at that time, and no proof three years later that he was still in pain when he was examined by Dr. Guller. It was problematic for appellant that Dr. Goswami never offered non-narcotic options for pain relief. It was also counter to the within testimony to say that three years of the same prescription, for both OxyContin and oxycodone, was proper; opioids were not meant for long-term use, but rather their use needed to be reevaluated after a certain period of time. To that end, there was testimony that opioid use should terminate after thirty to sixty days of use. There was no evidence that appellant took these medications as directed, wavering in his testimony about whether he took them "as needed" or "as prescribed."

The fact that he received opioid prescriptions mere days apart, and then went to get codeine syrup from his regular doctor days later, evidenced that appellant was dealing with an opioid addiction and had been searching for extra drugs from various doctors to be filled at various pharmacies. On March 1, 2018, Dr. Goswami prescribed forty-five oxycodone pills to be taken three times per day for fifteen days. The next day, March 2, 2018, Goswami prescribed forty-five OxyContin pills to be taken three times per day for fifteen days. On March 4, 2018, Dr. Chung prescribed ten oxycodone pills and codeine syrup for appellant, even though he had just gotten prescriptions from Goswami.

With no proof that he ever advised his employer about these medications, and because of how the Incident unfolded, all indications were that appellant had been attempting to cover-up his opioid addiction. Moreover, it ultimately was a red herring

whether appellant actually swallowed the OxyContin or oxycodone when on-duty; he took high dosages of a strong opioid three times daily, meaning that opioids were in his system even while he was on the job.

I **FIND** that appellant's history of opioid and alcohol abuse indicated that he used poor judgment and displayed a lack of truthfulness. I **FIND** that appellant's numerous doctors, pharmacies and prescriptions, and his untruthfulness regarding his prescriptions and opioid use, indicated that appellant had been abusing prescription drugs, and in a manner that could affect his judgment and performance, while conducting his job duties as a Trenton Police Officer. I **CONCLUDE** that appellant's use and abuse of prescription drugs showed that he engaged in misconduct as a police officer under N.J.S.A. 40A:14-147, and displayed conduct unbecoming of a public employee, pursuant to N.J.A.C. 4A:2-2.3(a)(6). I **FIND** that appellant's daily use of high doses of opioids put himself at risk as well as members of the public whom appellant was sworn to protect, and **CONCLUDE** that this behavior constituted neglect of duty under N.J.A.C. 4A:2-2.3(a)(7), and Other Sufficient Cause pursuant to N.J.A.C. 4A:2-2.3(11) .

## III. Incidences with Appellant's Vehicles

N.J.S.A. 39:3-10 states, "No person shall drive a motor vehicle on a public highway in this State unless the person is under supervision while participating in a behind-the-wheel driving course pursuant to section 6 of P.L.1977, c.25 (C.39:3-13.2a) or is in possession of a validated permit, or a probationary or basic driver's license issued to that person in accordance with this article." The applicable reading of this statute would be that a person must have a valid driver's license to operate a motor vehicle. Also applicable to the within matter is Trenton Rule 8-7, wherein any motor vehicle incident must be reported to the officer's superior.

Appellant had previously been investigated due to a motor vehicle crash in Ewing Township on October 13, 2014, where the driver had a suspended license and

was driving a vehicle registered to appellant, and an incident on January 25, 2015, where a driver was pulled over who had a suspended license and had been driving a vehicle registered to appellant. The investigation into the Incident revealed three other incidents, involving appellant's motor vehicle. Like with the Incident itself, appellant failed to report these incidences.

On April 19, 2018, the mother of appellant's son was riding in a vehicle registered to appellant, driven by her male companion. After being pulled over, the two occupants were found to be in possession of Percocet and marijuana (both controlled dangerous substances), and the male companion did not have a valid driver's license. The two were arrested and appellant's vehicle was impounded. Appellant did not report this incident.

On May 2, 2018, appellant permitted his son's aunt, T.N., to operate his vehicle with a suspended license. When stopped by police, the woman was also found to be in possession of controlled dangerous substances, that being marijuana and crushed pills, thought to be Percocet (a painkiller), as well as a blank prescription for Oyxcontin made out to appellant. T.N. had an outstanding warrant for forgery and the arresting officer suspected that the prescription had been forged. T.N. had outstanding warrants and was arrested. Appellant was issued a motor vehicle summons for allowing an unlicensed person to operate his vehicle, and his car was impounded. Appellant did not report this incident, nor that he had a prescription for OxyContin.

On November 29, 2018, a twenty-one-year-old female without a valid driver's license, M.W., was pulled over in a vehicle registered to appellant, with two passengers inside. M.W. had only a learner's driving permit, and the only licensed adult driver in the car had a suspended license. Appellant did not report this incident.

I **CONCLUDE** that appellant was to report any motor vehicle incident involving his personal vehicle, including when appellant had allowed unlicensed drivers to use his vehicle. I **CONCLUDE** that appellant permitted unlicensed drivers to use his motor

vehicle, in violation of N.J.S.A. 39:3-10, and failed to report these motor vehicle incidences to his department, as required pursuant to Trenton Rule 8-7.

## IV. Sick Leave

After the Incident, appellant was placed on restrictive duty, continuing to work but being relieved of his weapon and any interaction with the public. On August 31, 2018, appellant advised the department that he was suffering mental stress. During the subsequent FFD, appellant's opioid use was discovered. Appellant remained on paid stress-related sick leave.

Pursuant to Trenton Rules and Regulations, Sick Leave Residency Order 74-2, if an officer needed to leave their residence while on sick leave, they were to first seek approval from their administrative desk supervisor. Certainly, appellant was on notice of this requirement because he had sought approval to leave home after two prior sinus surgeries in 2014 and 2016. (Exhibit R-66 and R-67.)

On or about September 11, 2018, however, appellant left New Jersey while he was on sick/stress leave, allegedly for a third sinus surgery. Appellant failed to request approval to leave his home while still on sick/stress leave and failed to inform his supervisor that he was leaving his residence or that he was having another sinus surgery. On October 17, 2018, after returning to New Jersey, appellant notified the department that he had left New Jersey for the September 11, 2018, sinus surgery, which notice was after-the-fact. Then on October 22, 2018, appellant left New Jersey again, and entered drug rehabilitation in Florida. Again, appellant neither advised his supervisor that he was leaving New Jersey during his sick/stress leave nor did he request approval to leave the state. Only during the course of the investigation into the Incident did respondent become aware that appellant had left the state to enter inpatient rehabilitation in Florida. (Exhibit R-24.)

These facts were even more troubling because on October 17, 2018, when appellant delivered a doctor's note after-the-fact to respondent regarding the alleged sinus surgery on September 11, 2018, and requested an extension of his sick leave until October 30, 2018, he also delivered a note dated October 16, 2018, requesting an extension of his recovery until November 15, 2018. This was followed by appellant supplying a doctor's note from Dr. Chung requesting that appellant remain on sick leave until November 20, 2018. (Exhibit R-20). These sick leave extensions were for appellant to continue recovering at home; yet appellant enrolled in a rehabilitation program in Florida as of October 22, 2018. Appellant neither advised nor sought approval from his supervisor to leave his home and go to Florida, nor did he advise that he was entering drug rehabilitation, leaving respondent with the understanding that he was continuing rehabilitation from a third sinus surgery.

Additionally, on November 29, 2018, IA Sergeant Guy Ponticiello called appellant and asked him to come into the department for an interview. Appellant told Ponticiello he could not come in because he was in Florida for a funeral. Yet appellant texted Ponticiello shortly thereafter and offered to come into IA the next day, November 30, explaining that he had not actually been in Florida but had merely been driving "on his way" to Florida and, after Ponticiello's telephone call, had decided to turn around and come back to New Jersey.

I **CONCLUDE** that appellant was responsible to advise and request approval from his supervisor before leaving his home while out on sick leave. I **CONCLUDE** that appellant failed to advise and request approval from his supervisor before leaving his home while out on sick leave. I **CONCLUDE** that appellant lied to Sergeant Ponticiello when he said he was in Florida, and that appellant was not in Florida at that time. I **CONCLUDE** that appellant's failures to advise and request approvals from his supervisor before leaving his home while out on sick leave constituted violations of Trenton Rules and Regulations, Sick Leave Residency Order 74-2. I **CONCLUDE** that appellant's misrepresentation as to his whereabouts throughout his sick/stress leave

period constituted conduct unbecoming, misconduct and failure to be truthful, in violation of Trenton Rules and Regulations.

## V. False Statements or Misrepresentations

As set forth throughout all the above factual discussions, appellant issued many evasive responses, lies and misrepresentations.

During the Incident, appellant greeted the responding police officer by requesting "the stuff" to revive his houseguest, taken to mean Narcan. Yet when asked what T.L. might have taken, appellant did not mention opioids. At first appellant said T.L. had been drinking. When Officer Fornarotto requested more information, he then said T.L. took something. Then he said T.L. had previously admitted using marijuana and pills. Only after those evasive responses did appellant state that T.L. took oxycodone. Appellant told IA the reason for the various responses was because he was using process of elimination. But appellant knew what T.L. took, knew that he had oxycodone in his home, and was familiar with the effects of opioids, enough so that he initially requested Narcan from Fornarotto. He also lied about T.L.'s alcohol use, and about his knowledge of her alcohol use, as well as about knowing T.L. had an empty bottle of vodka in her purse and alcohol on her breath.

Appellant also lied about being under the influence of drugs. He himself admitted taking three opioid pills per day when he was off-duty, as he was the night of the Incident, and thus would have been on opioids during the Incident. The responding officer noted that appellant displayed signs of intoxication. Appellant also lied to Fornarotto by saying he was on-duty and therefore could not have been on drugs, when he was off-duty at that time.

Appellant failed to prove that he had ever advised his superiors regarding his opioid use. He never advised the department about his numerous prescriptions or the high dosages and high pill counts he had been receiving through many doctors and

pharmacies. Appellant denied abusing opioids, yet he checked himself voluntarily into drug rehabilitation clinics in Florida. He also equivocated about his drug use; he indicated at some instances that he used oxycodone and/or OxyContin three times per day “as prescribed” but at other times said he only took opioids “as needed.” He tried to state that he did not use opioids when on-duty, but he did use all his pills on days he was scheduled to work. He claimed he did not procure opioids from Dr. Chung when he was receiving pills from Dr. Goswami, but during one time period he was receiving narcotics from both doctors. Appellant also failed to explain why he was taking both OxyContin and oxycodone.

As set forth above, appellant also gave misleading and outright false statements regarding his third sinus surgery and going to Florida. He directly lied to Officer Ponticiello about his whereabouts on November 29, 2018.

I **FIND** that appellant offered false statements, misrepresentations and evasive answers on several occasions, and **CONCLUDE** that such statements constituted conduct unbecoming a public employee under N.J.A.C. 4A:2-2.3(a)(6) and Other Sufficient Cause, as set out in detail in the FNDA.

## PENALTY

As stated above, an appellant’s rights and duties are governed by the Civil Service Act and accompanying regulations. Further, a civil service employee who committed a wrongful act related to his or her employment may be subject to discipline, and that discipline may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.

In assessing the propriety of a penalty in a civil disciplinary action, the primary concern is the public good; factors to be considered are the nature of the offense, the concept of progressive discipline and the employee’s prior record. George v. North Princeton Development Center, 96 N.J.A.R. 2d 465 (CSV)(1996).

Progressive discipline would be required in those cases where an employee was guilty of a series of offenses, none of which was sufficient to justify removal. Harris v. North Jersey Developmental Center, 94 N.J.A.R. 2d (CSV)(1994); West New York v. Bock, 38 N.J. 500, at 522. Although an employee's past record may not be considered for purposes of proving the present charge, past misconduct could be a factor in determining the appropriate penalty for the current misconduct. In re Herrmann, 192 N.J. 19, 29 (2007); In re Carter, 191 N.J. 474, 484 (2007); Bock, 38 N.J. at 522-23. The seriousness of appellant's infraction must also be balanced in the equation of whether removal or something less is appropriate under the circumstances. Henry v. Rahway State Prison, 81 N.J. 571 (1980).

However, it is well established that when the underlying conduct was of an egregious nature, the imposition of a penalty up to and including removal would be appropriate, regardless of the individual's disciplinary history. See Henry, 81 N.J. at 571. It is settled that the theory of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, at 484.

Courts have found the penalty of dismissal appropriate for those "infractions that went to the heart of the officer's ability to be trusted to function appropriately in his position." In re Herrmann, at 36. "Acts that subvert good order and discipline in a police department" have been deemed to constitute conduct so unbecoming a police officer as to warrant dismissal. In re Herrmann, at 35. In the context of disciplining police and correction officers, "public safety concerns may also bear upon the propriety of the dismissal sanction." In re Carter, at 485 (upholding the removal of a police officer for sleeping on-duty). Maintenance of strict discipline was 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.), cert. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967).

As stated above, a LEO was held to a higher standard of conduct than other employees, and was expected to act in a responsible manner, with honesty, integrity, fidelity, and good faith. In re Phillips, at 576. This higher standard of conduct was an obligation that an officer voluntarily assumed when accepting the job. In re Emmons, at 142. Regarding the within appellant, he failed to report a drug overdose incident in his home to his department, although he was required to, and therefore violated Trenton Police Department Rules 3:1.4, 3:1.5 (b), 3:16, 3:1.7 and 4:8.7. Appellant committed misconduct by failing to truthfully report the facts of the drug overdose to the responding officers and EMTs, actions which constituted conduct unbecoming a public employee. Appellant's failure to report his medications to his department was a violation of Trenton Rule 4:6.8, and constituted misconduct under N.J.S.A. 40A:14-147 and failure to perform duties under N.J.A.C. 4A:2-2.3(a)(1), and Other Sufficient Cause as violations of departmental rules. Appellant had been abusing prescription opioids and perpetrated untruthfulness regarding his prescriptions and opioid use, constituting misconduct as a police officer under N.J.S.A. 40A:14-147, and conduct unbecoming a public employee, pursuant to N.J.A.C. 4A:2-2.3(a)(6). Appellant's daily use of high doses of opioids put himself at risk as well as members of the public whom appellant was sworn to protect, which behavior constituted neglect of duty under N.J.A.C. 4A:2-2.3(a)(7), and Other Sufficient Cause pursuant to N.J.A.C. 4A:2-2.3(11). Appellant's allowing unlicensed drivers to use his vehicles, and his failure to report these motor vehicle incidences to his department, were violations of Trenton Rule 8-7. Appellant's failure to advise and request approval from his supervisor before leaving his home while out on sick leave constituted violations of Trenton Rules and Regulations, Sick Leave Residency Order 74-2. Appellant's misrepresentation as to his whereabouts throughout his stress sick leave period constituted conduct unbecoming, misconduct and failure to be truthful, in violation of Trenton Rules and Regulations. Finally, appellant offered false statements, misrepresentations and evasive answers on several occasions, and such statements constituted conduct unbecoming a public employee under N.J.A.C. 4A:2-2.3(a)(6) and Other Sufficient Cause, as set out in detail in the FNDA.

Appellant's claim that his termination was due to a dispute he was having with a Trenton councilman that became a social media issue was unpersuasive. Appellant claimed that the timing and circumstances of appellant's termination clearly indicated that the officers charged with carrying out the investigation, including Officer Snyder, Sergeant Ponticiello and Lieutenant Doyle, were obviously influenced by appellant's disagreement with the councilman. No evidence of such prejudice was presented at the hearing, and at no time did any of those witnesses exhibit prejudice in their testimony. The only proof offered by appellant was the timing of the termination in relation to the Facebook spat. This was pure speculation, and I found the testimony regarding the councilman and appellant, and social media posts, to be merely a smokescreen to take attention away from appellant's many violations.

Appellant also argued that his conduct in this matter "did not offend publicly accepted standards of decency or destroy public respect in the delivery of governmental services," and therefore should not constitute a valid basis for termination. However, a police officer with an opioid addiction covering up an overdose in his home, was a matter of concern that went beyond the police department. Appellant valued his own personal concerns over those of his houseguest, T.L. and, therefore, over the public at large. His obfuscation of the facts regarding the Incident could have meant a delay in getting T.L. proper care. Having a cache of various pills at his home might have given T.L. the impetus or the opportunity to take an overdose of drugs. Failing to advise his superiors as to his medications meant that the Trenton Police Department might have had an armed officer on duty while on opioids. Allowing persons without valid drivers' licenses to operate his vehicle put the general public at risk of potentially dangerous drivers being on the road when they should not have been. This also meant that appellant put his loyalty to friends and family above his duty to his job and the public welfare.

Finally, although appellant was to be commended for entering himself into drug rehabilitation, he was required to advise his superiors and ask permission to leave his home while on sick leave. His failure to tell the truth impeached all his testimony and

could work against him if ever he had to testify in a trial resulting from an arrest he might make. Appellant's lack of regard for the Trenton Police Rules and Regulations, as well as New Jersey law, and his disregard for the citizens of Trenton, met the definition of egregious actions. Further, this level of behavior failed to meet the higher standard of conduct that law enforcement officers must be held to, showing a lack of personal integrity and dependability, as laid out in Moorestown v. Armstrong, 89 N.J. Super. At 566.

I therefore **CONCLUDE** that the removal of appellant from his position as a police officer with the Trenton Police Department was warranted.

## ORDER

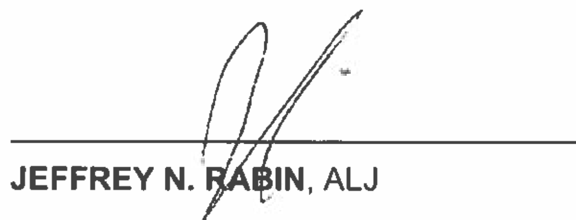
I **ORDER** that the charges filed and the disciplinary action of the respondent, Trenton Police Department, in removing appellant Palinczar from his position as a Trenton Police Officer, are **AFFIRMED**, and that the within appeal is hereby **DISMISSED**.

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** pursuant to N.J.A.C. 1:1-18.6., by which law it 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.



March 6, 2023
DATE

**JEFFREY N. RABIN**, ALJ

Date Received at Agency: March 6, 2023

Date Mailed to Parties: March 6, 2023

JNR/dw

# APPENDIX

## WITNESSES

**For appellant:**

Michael Palinczar, appellant

**For respondent:**

Jason Snyder

Dr. Matthew Guller

Guy Ponticiello

Peter Szpakowski

Dr. Hari Brundavanam

Corey Fornarotto

## EXHIBITS

**For appellant:**

A-1 Trentonian article
A-2 Trentonian article
A-3 Trentonian article
A-4 Trentonian article
A-5 NAACP memorandum to police director

**For respondent:**

R-1 Preliminary Notice of Disciplinary Action, dated April 11, 2019
R-2 Suspension With Pay documents
R-3 Final Notice of Disciplinary Action, dated April 18, 2019
R-4 Final Notice of Disciplinary Action cover sheet, dated April 18, 2019
R-5 Snyder report, dated April 8, 2019
R-6 Supplemental Snyder Report, dated April 29, 2019
R-7 Fornarotto/Ewing Investigation report, dated July 21, 2018
R-8 T.L. medical records, dated July 21, 2018
R-9 IA Interviews and recordings, dated April 2 and April 4, 2019
R-10 Complaint Notification, dated July 25, 2018
R-11 Restricted Duty Order, dated July 24, 2018
R-12 Drug Screen records, dated July 24, 2018
R-13 D.L. records, dated April 19, 2018
R-14 Appellant Work Schedule, dated August 2018
R-15 Trenton Police Department Medication Policy
R-16 HIPAA Forms for Pharmacies
R-17 Pharmacy records
R-18 Trentonian Article, dated August 31, 2018
R-19 Corporate Health Center records, dated August 31, 2018
R-20 Sinus Surgery records
R-21 Dr. Guller IFP Report, dated September 10, 2012
R-22 Appellant receipt of Guller report
R-23 Bledsoe report regarding M.W.
R-24 Florida House completion letter, dated November 12, 2018
R-27 IFP Report, dated September 10, 2012
R-28 IFP Report, dated March 13, 2015
R-29 IFP Report, dated March 31, 2016
R-31 Appellant Discipline History
R-32 Appellant Training Report

R-33 Trenton Police Rules Chapter 3
R-34 Trenton Police Rules Chapter 4
R-35 Trenton Police Rule 3:1-5 (2018)
R-36 Trenton Police Rule 3:13-5 (2018)
R-40 IFP Report, dated November 28, 2018
R-41 Counselling Form IA04-1342
R-42 Counselling Form IA07-0275
R-43 Counselling Form IA07-0281
R-44 Performance Notice IA11-0072
R-45 Final Notice of Disciplinary Action IA11-0074
R-46 Written Reprimand IA14-0105
R-47 Performance Notice VA14-0019
R-48 Written Reprimand IA15-0090
R-49 Performance Notice IA15-0090
R-55 General Order 74-2 Sick Leave
R-56 Appellant Time Off Activity Report 2018
R-57 Appellant Training Summary
R-58 Naloxine Form, dated July 21, 2018
R-59 Crash Investigation Report, dated January 25, 2015
R-60 Incident Report, dated October 12, 2014
R-61 Crash Investigation Report, dated October 13, 2014
R-62 Investigation Report, dated May 2, 2018
R-66 Notes regarding 2014 Sinus Surgery
R-67 Notes regarding 2016 Sinus Surgery
R-65 Dr. Goswami medication note