

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 appointing authority are not persuasive in demonstrating that the ALJ’s credibility determinations, or his findings and conclusions based on those determinations, were arbitrary, capricious or unreasonable. As such, the Commission has no reason to question those determinations or the findings and conclusions made therefrom.

Noteworthy in this regard was the ALJ’s assessment of the underlying investigation into this matter. Specifically, the ALJ stated:

Before reaching my conclusions, I would note that throughout this case, there always seemed to be something “missing”, with no real interest demonstrated by NSP in discovering what actually occurred, as opposed to coming to a pre-determined conclusion.

The investigation was sloppy, disjointed, superficial and ultimately unconvincing. From the very beginning, it was obvious that there was confusion concerning the anger management issues. The investigators, rather than actually attempting to determine the truth, instead relied on computer databases, authored “cut-and-paste” reports, conducted a sophomoric taped interview during which the most informed party seemed to be the union representative and never followed up in any meaningful way with the Wayne Municipal Court, Mr. Weiss or Ms. Peguero. The primary impression projected during the hearing was that the investigation was a *pro forma* exercise and that Officer Santiago was lying.

In fact, from the onset, NSP’s administration seemed more interested in terminating Officer Santiago than in following an unbiased disciplinary procedure (footnote omitted).

Many of the ALJ’s subsequent findings were based on what he indicated was confusion regarding exactly what the appellant was required to complete/submit to. While some of that confusion could be attributed to the appellant, it does not appear that any such actions would be worthy of discipline as the ALJ found that the appellant attempted, in good faith to comply with what was required, and reported accurately to the best of his ability what treatments, *etc.*, he completed. Further, the exceptions do not persuasively demonstrate that the ALJ’s findings regarding the

appellant's testimony or the other testimony or evidence regarding the underlying investigation were arbitrary, capricious, unreasonable or otherwise in error.

Since the removal has been reversed, the appellant is entitled to be reinstated with mitigated back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10 from the first date of separation until the date of reinstatement. Moreover, as the removal has been reversed, the appellant is entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay or counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Sergio Santiago. The Commission further orders that the appellant be granted back pay, benefits, and seniority from the first date of separation until the date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned, and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for the appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to R. 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

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
Correspondence

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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 02274-22

AGENCY DKT. NO. N/A

**IN THE MATTER OF SERGIO SANTIAGO,
NORTHERN STATE PRISON,**

Robert R. Cannan, Esq., for petitioner (Markman & Cannan, LLC, attorneys)

Gary W. Baldwin, Deputy Attorney General, for respondent (Matthew J. Platkin,
Attorney General of New Jersey, attorney)

Record Closed: January 23, 2023

Decided: March 6, 2023

BEFORE: MATTHEW G. MILLER, ALJ

STATEMENT OF THE CASE

Petitioner, Sergio Santiago, was employed as a Senior Correctional Police Officer ("SCPO") at Northern State Prison ("NSP"). Following the issuance of a Preliminary Notice of Disciplinary Action ("PNDA") on May 7, 2020, Officer Santiago waived a hearing and a Final Notice of Disciplinary Action ("FNDA") was issued on March 14, 2022 during which charges of conduct unbecoming an employee, insubordination, inability to perform duties and other sufficient cause were sustained. As a result of those findings, he was removed from his position on March 14, 2022.

PROCEDURAL HISTORY

On May 8, 2020, respondent served the May 7, 2020 PNDA to Officer Santiago. That was followed by the service of a FNDA on or about March 14, 2022, terminating his employment with respondent effective immediately.¹

The following day (March 15, 2022), petitioner mailed a Petition for Appeal to the Civil Service Commission and the Office of Administrative Law ("OAL"). That appeal was perfected on March 22, 2022 as a contested case. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

An initial conference was held on April 6, 2022, which was followed by additional conferences on May 11, 2022 and July 6, 2022. Hearing dates were originally scheduled for July 12, July 13, and July 16, 2022, but were ultimately adjourned following the filing of a Motion for Summary Decision by respondent on June 8, 2022. Following the filing of an opposition brief by petitioner and a reply brief by respondent, the Motion was denied in full by Order dated August 31, 2022. Following additional conferences on September 16, 2022 and October 3, 2022, a hearing was held on October 24, 2022 and November 4, 2022.² Please also note that an Order was entered on November 4, 2022 returning Officer Santiago to pay status effective September 23, 2022. (Exhibit C-1).

The record remained open until January 23, 2023 for the submission of post-hearing arguments and closed that day.

CHARGES, SPECIFICATIONS AND WORK HISTORY

After Officer Santiago waived a departmental hearing, respondent sustained the following charges listed in both the PNDA (Exhibit J-1) and the FNDA (Exhibit J-2);

¹ Please note that a PNDA dated November 9, 2021 was also issued to Officer Santiago, in which he is charged with various offenses concerning his alleged falsification of a July 27, 2021 "re-instatement application". No FNDA has been issued to date concerning these charges and this hearing does not address those allegations.

² An interim conference call also took place on November 3, 2022.

- a. N.J.A.C. 4A:2-2.3(a)(2), insubordination;
- b. N.J.A.C. 4A:2-2.3(a)(3), inability to perform duties;
- c. N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee and
- d. N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause.

Officer Santiago was also found guilty of violating multiple sections of HRB³ 84-17 (as amended):

- a. B-10 – incapacity to discharge one’s duty due to mental or physical disability;
- b. C-8 – falsification – intentional misstatement of material fact in connection with work, employment;
- c. C-9 – insubordination: intentional disobedience or refusal to accept order and
- d. C-11 – conduct unbecoming an employee.
- e. E-1 – violation of a rule, regulation, policy, procedure or order

(Exhibit J-27)

In the FNDA, the incident was described thusly;

An investigation by the Special Division Investigation case #2020-02-24-003-NSP disclosed that on multiple occasions during a SID investigation, you intentionally misstated material fact to SID investigators regarding your completion of court mandated sessions for anger management, and failed to follow direct orders from Major B. Kerner to produce and provide related documents for the anger management sessions to SID investigators. Your failure to provide the documentation prevented SID investigators from completing their investigation with your involvement in two Domestic Violence incidents, and determining whether you were truthful during your psychological evaluation with the psychologist you were required to see, per NJDOC Human Resources.

Following your psychological evaluation, the examiner did not believe that you would exercise appropriate judgment if

³ Human Resources Bulletin

allowed to have access to an on-duty weapon. The examiner recommended that you do not have access to on or off duty weapons. As part of the job requirement for a Senior Correction Police Office (sic), you are required to have the ability to carry a weapon while on duty. Based on the examiners (sic) psychological assessment you are currently unable to perform your duties as a Senior Correctional Police Officer.

Your failure to follow Major Kerner's orders, shows a pattern of your disregard for administrative rules and policies, having previously received disciplinary charges of the past year for conduct unbecoming an employee, violating rules and procedure, and sleeping while on duty.

Your continuing violation of policies is counterproductive to the orderly running of the institution, and unbecoming a law enforcement officer.

(Exhibit J-2)

WORK HISTORY:

Officer Santiago's work and disciplinary history is undisputed.

- On February 23, 2019, Officer Santiago failed to show up for work, did not request or schedule leave, making his absence unauthorized. Consequently, on March 14, 2019, he received an official reprimand. He did not appeal.
- During an interview by an SID⁴ investigator on May 3, 2019, Officer Santiago failed to disclose that his driving privileges in New Jersey had been suspended from August 7, 2018 – May 3, 2019 due to a lack of liability insurance on his personal vehicle. This was determined to be conduct unbecoming a law enforcement officer and on May 16, 2019, he received a five-day suspension.
- On June 21, 2019, Officer Santiago received a twenty-day suspension for multiple violations that occurred on May 10, 2019, including sleeping on duty, failing to secure a utility closet and food ports and failing to ensure that inmates were not blocking their windows.

(Exhibit J-16)

⁴ Special Investigations Division

In summary, from the time he was hired on or about March 15, 2018 through his removal for the acts that are the subject of this hearing and received one reprimand, one incidence of minor discipline and one incidence of major discipline.

TESTIMONY

FOR RESPONDENT:

Richard DeMartino, Senior Investigator, New Jersey Department of Corrections (“NJDOC”). Officer DeMartino testified that he has been employed at the Garden State Youth Correctional Facility (“GSYCF”) for the past four or five weeks. He has been an investigator for about five years and before that he was an SCPO for nine years. He has no personal relationship with Officer Santiago and never supervised him.

Officer DeMartino's involvement in this case began when he received a telephone call from the Bloomfield Police Department advising that an officer had been involved in an incident and he ultimately obtained the police report from them on September 21, 2018.

Officer DeMartino testified that during his investigations, he reviews databases to clarify the events, including the Domestic Violence Registry (“DVR”) and the Criminal Case History (“CCH”). The DVR will show whether a final restraining order (“FRO”) had been granted, which would then disqualify an SCPO from possessing a weapon.

Officer DeMartino then proceeded to review his October 23, 2020 investigative report, (Exhibit R-5), which detailed the Bloomfield incident of September 19, 2018.⁵ He was able to confirm that both the Bloomfield criminal charge and a TRO that had been filed had been dismissed. He noted that Officer Santiago was to be sent for a “fit-for duty”

⁵ As a reminder, there are two incidents involved in this case; one in Wayne that occurred on April 27, 2018 and a second that took place in Bloomfield on September 19, 2018.

exam and that he received a memo from the New Jersey Attorney General's Office that barred Officer Santiago from carrying a weapon pending the exam.

When questioned about "several requests" (later estimated to have been at least five) having been made from March 8, 2019 through November 15, 2019 through Northern State Prison's Major's Office⁶ for "copies of (his) court paperwork", Officer DeMartino was unable to explain what paperwork he was seeking or what he had not received. He could not ask Officer Santiago directly for the paperwork, since he was not in his chain of command, but rather would have to go through Major Kerner. He was unaware of how the major's office requested the paperwork from Officer Santiago.

Officer DeMartino then forwarded his report, absent the paperwork, to Dr. Cevasco. He received Dr. Cevasco's initial report on January 31, 2020 and proceeded to review its findings, including the "false statements" concerning the anger management paperwork. He later reviewed Dr. Cevasco's updated May 6, 2020 report and testified that he had not supplied any additional information to him. For him, the key was Dr. Cevasco revising his opinion; and at that point, Officer DeMartino felt that his job was complete. He authored his October 23, 2020 report (Exhibit R-5) and concluded that Officer Santiago had supplied false statements to Dr. Cevasco. He claimed to have attempted to obtain the anger management paperwork, but not recall when that was.

On cross-examination, Officer DeMartino characterized his move to GSYCF as a lateral one made at his request. He had been at NSP through the "middle of COVID". He began his career in 2008 as a corrections officer and remained in that position through 2017. In the summer of 2017, he became an investigator and then became a senior investigator in 2020 and that was his position when he signed off on the report. Officer DeMartino believed that he began his duties at the NSP Special Investigations Division in the summer of 2018, having initially worked as an investigator at Trenton State Prison. He was unaware if he did anything substantive on this case from May 6, 2020 through

⁶ The person holding this position at the time of the incidents was Bruce W. Kerner. He is now retired and did not testify during the hearing.

October 23, 2020 and he did not participate in any interview of Officer Santiago “for my specific case”.

Officer DeMartino did not have any difficulty obtaining the paperwork from Bloomfield or the databases. He did not receive any additional information from Bloomfield and the narrative portion of the report (which describes the incident) came directly from the police report.

Officer DeMartino noted that Officer Santiago authored a Special Custody Report at their request through the Major’s office. Officer DeMartino reiterated that his request for paperwork from Officer Santiago went through Major Kerner’s office and that he had no documentation about when he was asked for it or how often. He also could not answer what else he wanted over and above what he had already obtained. He interpreted Dr. Cevalasco’s report as mandating anger management but was unaware of what that would consist of or how much therapy would be involved. He did not believe that he ever spoke with Dr. Cevalasco or provided additional information to him and did not know if Officer Santiago ever attended any additional anger management classes. His belief that the anger management classes were “mandated” came solely from Dr. Cevalasco’s report and he had no independent information to that effect.

The “false statement” declaration in his May 6, 2020 report was based solely on the Cevalasco report and not any independent investigation and he had no further knowledge of any additional evaluations. Referring back to his own report, he did not know the author of the March 26, 2020 report that was noted, nor did he know what supplemental information Dr. Cevalasco had received before authoring his May 6, 2020 report.

Officer DeMartino did not know if SCPOs who do not have access to weapons can continue to work and was unaware of any regulations to that effect. He was further unaware of any other evaluations undergone by Officer Santiago, and he did not author any other reports.

On re-direct examination, Officer DeMartino testified that receiving court paperwork was important to “clarify” and for “(c)ontinuity and verification” but was not needed to complete his investigation. He relied on Dr. Cevasco’s report to be accurate.

Paul Fiore, Senior Investigator, NJDOC. Officer Fiore was initially an SCPO for over seven years, before becoming an investigator about five years ago, conducting both administrative and criminal investigations. He authored a February 8, 2019 report concerning the April 27, 2018 incident. (Exhibit R-3). The investigation started upon receipt of communication from the shift commander that Officer Santiago had been arrested in Wayne. In performing the investigation, he reviewed multiple databases and tried to contact the alleged victim, but she did not respond. He forwarded this report to the administration to schedule a psychological evaluation for Officer Santiago.

Officer Fiore confirmed that Officer Santiago provided the dismissal information from the Wayne Municipal Court to him. He knew that Dr. Tscherne⁷ performed the evaluation, although he never contacted him, but merely adopted his findings.

Officer Fiore authored another report on March 25, 2020, having interviewed both Officer Santiago and having spoken to Dr. Cevasco concerning the anger management issue. (Exhibit R-4) There had been a few e-mails between him and Major Kerner concerning the production of records concerning this treatment and Officer Santiago’s failure to do so. As far as he knew, those records were never received. The prevailing question concerned whether the “proper” number of sessions were completed.

Officer Fiore also noted that he and Officer DeMartino conducted an audio interview of Officer Santiago on February 18, 2020 and that this was audio and video recorded. He did not recall if there was a problem with video aspect of the interview.⁸ The policy is to do both, and they are both permitted.

⁷ James Tscherne, Ph.D.

⁸ This issue will be discussed in full below.

After the interview was complete, Officer Fiore called Dr. Cevasco on February 27, 2020 and Cevasco affirmed that the required number of sessions were different than what he was told. He then e-mailed Major Kerner and ultimately sent the report to the administration on March 25, 2020.

Officer Fiore admitted that he had received records from the Center for Revitalizing Psychiatry by January 31, 2020, but that it was not his role to believe or not believe what Officer Santiago was saying, but rather the greater challenge was to contrast his credibility versus the doctor's.

On cross-examination, the focus was on the recorded interview with Officer Santiago. He did not recall the exact conversation with Dr. Cevasco, nor any issues with the video aspect of the interview. It was his responsibility to log both the audio and video, but he has not listened to it since it was performed.

Concerning the issue of whether the anger management sessions were "mandated" and/or "completed", he agreed that Officer Santiago said that the sessions were "recommended" by the judge. He recalled calling the Wayne Municipal Court to ascertain whether the charges had been dismissed but did not request any other information such as a certified disposition or transcripts of the proceedings.

Officer Fiore testified that the focus of his investigation was not the incident itself, but rather whether Officer Santiago had lied or not. He received Dr. Cevasco's report concerning the Bloomfield incident, but never reviewed Officer DeMartino's report, although DeMartino was present during the interview and asked questions during it. Officer Santiago's "Weingarten rep." was also present during the interview.⁹

Richard Cevasco, Ed.D., Dr. Cevasco, who was qualified as an expert in psychology, is a per diem psychologist affiliated with Rutgers University and also maintains a private practice. His c.v., (Exhibit J-14), is accurate except that one of his

⁹ For an explanation of what a "Weingarten rep." is, see, <https://www.nlr.gov/about-nlr/rights-we-protect/your-rights/weingarten-rights> (last accessed March 6, 2023).

businesses stopped operating in 2022. He has never been disciplined and he first started performing psychological evaluations in 1982. He worked for the Department of Corrections (DOC) from 1982-1996 before they privatized evaluations and when Rutgers took over in 2004, he started working for them. He performs about fifty (50) evaluations a year for the City of Elizabeth.

Dr. Cevalasco recalls Officer Santiago and reviewing Dr. Tscherne's evaluation, the most significant portions of which were the completion/non-completion of the anger management counseling and that he had recommended that Officer Santiago not possess a weapon until it was complete.

During his January 30, 2020 evaluation of Officer Santiago, Dr. Cevalasco administered the Personality Assessment Inventory ("PAI") test, which is designed to give insight into law enforcement officers and how different situations would impact their ability to do the job. Dr. Tscherne had performed a PAI, but the results were not supplied. In his report, Dr. Tscherne had noted that Officer Santiago had "invalidated the PAI" with his responses. The test has a validity scale that Officer Santiago had failed, but since the data was not supplied, he could not truly assess the results.

In his report, the line "court ordered 20 sessions of anger management" came from Dr. Tscherne's report. He made Officer Santiago aware that this was an evaluation, not treatment. (Exhibit R-6)

He noted that a temporary restraining order ("TRO") can provide substantive/important information about the event and he found the "pushing" aspect of the Bloomfield incident to be significant, along with the injuries allegedly sustained by the victim.

Dr. Cevalasco then asked Officer Santiago about the treatment himself. He felt that Officer Santiago was a confused young man who gave conflicting answers and it was hard to get a straight answer from him. He did not find him to be devious or purposeful in his actions and he did not score very high on the likelihood of hire questions. Dr.

Cevasco was concerned about Officer Santiago's judgment and about his access to a weapon and was specifically more concerned about access to an off-duty weapon.

The anger management paragraph was included because there was so much confusion on this issue. Dr. Cevasco used it to give the officer one more "out" to be truthful and is the reason for the inclusion of the "reserve the right" to amend his opinion paragraph. When completed, the report is sent to the DOC, which sends it to the Attorney General's office. He was not told to edit or amend the report.

Dr. Cevasco authored his supplemental report on May 6, 2020, after receiving Officer Fiore's March 25, 2020 report. (Exhibit R-7) He wrote the supplemental because he felt that Officer Santiago had lied and that he had to change his conclusions. Dr. Cevasco did not have contact with anyone about Officer Santiago after submitting that report.

On cross-examination, Dr. Cevasco noted that he reviewed the reports of Drs. Tscherne, Trapold and Safran, although the first time he saw the Safran¹⁰ and Trapold¹¹ reports was the week before his testimony. He did not review his notes and probably has not maintained them. He acknowledged that Dr. Trapold saw many of the same issues that he did, but simply came to a different conclusion. He is aware that the DOC had commissioned Dr. Trapold's report.

Dr. Cevasco also admitted that his report did not offer an opinion on fitness for duty and he was never asked to render such an opinion; this was solely a "weapons" exam. As for the PAI, it can be used to evaluate current status, although it is not specifically designed to do so. Dr. Cevasco noted that Dr. Safran had concluded that Officer Santiago was "fit for duty" and did not recall the weapon being addressed. He does not know her and assumed that Officer Santiago had requested that assessment.

¹⁰ Rachel S. Safran, Ph.D.

¹¹ James Trapold, Psy.D..

Officer Santiago had wanted both on and off-duty weapons privileges. For anger management, he has recommended that treatment on behalf of the DOC in the past, but those are made after a formal evaluation, which this was not.

His primary issue here was “did he complete the course”, not “how many sessions”. Dr. Cevasco conceded that Officer Santiago had told Dr. Tscheme that he had not completed the sessions. He felt that the number to be completed was twenty and that they had been mandated by the court.

Counting intake, he was aware that Officer Santiago had attended eight sessions, while Dr. Safran claimed that he had completed twelve. His opinion was based on the assumption that the sessions had been mandated by the court, but now says that the lynchpin is not whether they were mandated, but whether he lied about them.

Dr. Trapold’s report did not alter his opinions and he felt that Dr. Safran’s report actually supported his conclusions. He conceded however, that while the Center for Revitalizing Psychiatry records had been received by NSP on January 31, 2020, he had not been provided with them until he was preparing for the hearing.

FOR PETITIONER:

SCPO Sergio Santiago. Officer Santiago is a 29-year-old graduate of Bloomfield High School, Class of 2012. He has a family history of law enforcement, including a Newark police officer. He speaks English and Spanish. He took the civil service exam, passed it and was put “on the list”. He was hired and trained at the Corrections Officer Training Academy in Sea Girt and graduated on March 15, 2018. He then began a one-year working test period as a Senior Correctional Officer Recruit (“SCOR”) at Northern State Prison. After a year, he became a Senior Correctional Officer (“SCO”).¹²

At the time of first domestic violence allegation in Wayne, he was the alleged victim’s (N.R.) boyfriend and was living with her and helping her raise her daughter. He

¹² In 2020, the formal title of Officer Santiago’s position was changed to “Senior Correctional Police Officer”.

characterized her as a “great person” but testified that she had a problem with alcohol, while he was only an occasional drinker.

He was arrested in Wayne on April 27, 2018 and was the subject of court action both in Wayne Municipal Court, as well as, in Superior Court in Paterson, since a TRO¹³ had been issued against him. He testified that he attended Wayne Municipal Court twice. The first time, N.R. did not appear and Judge Katz told him that he would not dismiss the case unless he showed some proof that he had taken some steps to attend anger management classes. The judge knew that he was an SCO, but Officer Santiago did not know how he knew that. The judge seemed aware that his job would have some psychiatric requirement for him to return to work.

Officer Santiago testified that the judge told him that he needed to “check...into anger management” and while he did not care about the details, “he’s not going to dismiss any charges until I come back for the next court date and show documentation that I at least entered anger management”. He did not mandate a specific number of visits, who his provider should be or provide a time frame. He found Mr. Weiss¹⁴ locally and he recommended that he undergo a twelve session program.

When Officer Santiago returned for his second court appearance, he had undergone four sessions. That was enough for Judge Katz to dismiss the case and he did not have to follow up with the court again or provide any additional proof. Officer Santiago picked up his dismissal paperwork from the court clerk and that ended his contact with Wayne.

As for the Passaic County TRO, Officer Santiago testified that he went to Superior Court once and it was dismissed with no conditions.

¹³ There were no other references made to this TRO and it otherwise went unmentioned by either party throughout the litigation. In fact, Officer Fiore’s February 8, 2019 report reflects that no TRO was requested arising out of the Wayne incident.

¹⁴ Gershon Weiss, L.P.C. of the Center of Revitalizing Psychiatry (“CRP”).

Ultimately, he attended either seven or eight anger management group sessions with Mr. Weiss (he had attended a group session during the same day as his initial evaluation). He stopped attending because the second domestic violence incident occurred (in Bloomfield) and he was dealing with that the fact that he had to report on four occasions, over a two-week period, with a court official concerning the Essex County TRO that had been filed, as well as the work investigation, which included multiple psychological evaluations.

Officer Santiago testified that he Bloomfield Municipal Court case and the Essex County TRO were both dismissed without condition. They did not mandate that he attend additional anger management classes, nor did the prison. Notwithstanding that, Officer Santiago testified that he recommenced treatment voluntarily. However, Mr. Weiss had retired, and his new therapist advised that she could not extend another provider's treatment and that he would have to undergo a new round of twelve sessions with her.

Officer Santiago testified that he gave all treatment and court paperwork to his union representative to give to Major Kerner and confirmed with the representative that this had been done. He acknowledged undergoing multiple psychological evaluations and testified that all of them found him fit for duty. He has never owned an off-duty weapon and has no interest in doing so. He is aware of multiple SCPOs who do not have access to weapons and testified that on the job he had never handled a weapon except to qualify on the range, since they are not permitted to possess them inside the facility.

As for the evaluations, he testified that he told the doctors the same thing. He never told them that twenty sessions had been recommended or that the court had "mandated" that he undergo anger management. He was very confused by Dr. Cevasco's report and had no idea where the twenty sessions noted in it had come from. He never saw Dr. Tscherne's report until the day of his SID interview. He was not told to bring any paperwork to the evaluations and simply explained his situation to them and answered their questions. Officer Santiago testified that he never told Dr. Cevasco or tried to lead him to believe that he had completed the recommended anger management sessions. He also assumed that Dr. Cevasco had Mr. Weiss's records, because Dr. Cevasco brought that treatment up to him and not the other way around.

His union helped arrange another psychiatric evaluation and that was via ZOOM with Dr. Safran and he testified that she issued a report indicating that he was fit for duty and able to carry a weapon both on and off duty. That report was supplied to Major Kerner and the administration. He then went to Dr. Trapold, who also found that he was fit for duty.

Officer Santiago further testified that he wants a second chance at his job. While he acknowledged having “made a lot of mistakes”, he is much more focused now than he was in the past. He had never been in trouble before and these issues seemed to happen very quickly and just snowballed.

On cross-examination, Officer Santiago acknowledged receiving training at NSP in multiple areas, including having undergone two hours of domestic violence training on May 1, 2018. He acknowledged that as a law enforcement officer, he is held to a higher standard and that both his on and off-duty conduct reflects on the department.

Officer Santiago reiterated his testimony about his interactions with Judge Katz and the Wayne Municipal Court as well as about the “mystery” of the twenty sessions and acknowledged that he had been accused of assaulting N.R. He testified that this was never a number that he brought up but acknowledged that he never tried to correct Dr. Tscherne’s report. Officer Santiago stated that he never told Dr. Cevasco about twenty sessions but told him about twelve sessions and reiterated that he did not receive his report until after the SID interview.

Officer Santiago confirmed that he first saw Mr. Weiss for an evaluation on May 24, 2018 and continued attending sessions through August 8, 2018. He stopped attending because of the Bloomfield matter and the surrounding circumstances. He had to see a court officer, Kayla Figueroa to “make sure I’m not violating any rules – violating the restraining order.” He did not attend any additional sessions between August 8, 2018 and January 28, 2019.

After Dr. Tscherne's January 28, 2019 evaluation, the next evaluation was with Dr. Cevalasco on January 30, 2020 and he acknowledged that he did not attend any anger management sessions in the interim. He reiterated that he had literally no idea where the twenty sessions that were referenced by Drs. Tscherne and Cevalasco came from.

Officer Santiago testified that because of his suspension, he was not allowed on prison grounds, but that all paperwork that he was asked to provide was supplied to his union representative, who in turn supplied it to Major Kerner, SID and administration, including evidence concerning his eventual completion of the "new" set of twelve sessions.

Officer Santiago reiterated that he never told Dr. Tscherne that he had completed his anger management session because that "would have been a complete lie". He insisted that he told him that he had completed only eight of twelve recommended sessions and that both he and Dr. Cevalasco were mistaken in their reports.

On re-direct examination, he acknowledged signing a release so that Dr. Tscherne could obtain his records from Mr. Weiss. He also confirmed Dr. Tscherne's statement that he had not completed the twenty anger management sessions. Officer Santiago also corrected his prior testimony that he had completed four sessions when the Wayne case was dismissed. Per a letter from Mr. Katz, it was actually seven sessions.

Officer Santiago further confirmed that he never had any direct contact with Major Kerner and that any documentation requests would come through the chain of command. That is how he knew to provide the Wayne information, the TRO dismissal, etc. He never received any communication from anyone telling him that more information was requested.

Officer Santiago gave the PBA the information on the anger management classes that he eventually completed.

VIDEO INTERVIEW:

On February 18, 2020, Officer Santiago was interviewed in the presence of his union representative¹⁵ by Officers DeMartino and Fiore. The interview was both fascinating and frustrating for multiple reasons, with the union representative perhaps providing the most coherent explanation of what happened.¹⁶

Amongst the notable aspects of the interview was the lack of preciseness of language, particularly by Officer Santiago. As was highlighted by the union representative, Officer Santiago often failed to distinguish or seemingly failed to understand/explain the difference between mandated, recommended and completed. When combined with investigators who clearly betrayed their skepticism of respondent's version of events (particularly Officer Fiore) and who failed to comprehend what had happened in the Wayne Municipal Court, the ultimate result was an interview that ironically was ultimately more favorable to Officer Santiago than NSP.

Of note was that Officer Santiago told the investigators that he had never reviewed the doctors' reports prior to walking into their office. Dr. Cevasco's report was actually in his mailbox, and he brought it into the room with him. This is important, because he had no idea what the reports said about the number of anger management visits and seemed genuinely puzzled when he was advised of the contents.

Notably, Officer Santiago produced a signed medical authorization (dated January 28, 2019) to allow Mr. Weiss to release his records to Dr. Tscherne. There was also a discussion regarding the supplying of "paperwork".

- Q. Why didn't you send us any paperwork regarding your eight complete sessions?
- A. (confused look/tone) But...you guys have all the paperwork from the sessions I completed.

¹⁵ Per Officer Fiore's March 25, 2020 report, the union representative was Andre Godbolt. (Exhibit J-4).

¹⁶ One issue raised by respondent was that because the video camera apparently ran out of battery power and shut off during the interview, some sort of impropriety may have taken place. Having reviewed both the audio and video recordings of the interview both during the hearing and in preparation for authoring this decision, I could discern no discrepancies and **FIND** that what has been provided is an authentic reproduction of Officer Santiago's interview.

- Q. The last I had was seven...
- A. So I think it was seven, it wasn't eight, I apologize.
- Q. Was it seven or eight?
- A. If the last paper you got was seven, then it was seven. I thought it was eight.

This entire interview was unimpressive, with the questioners making at times inaccurate assumptions based on incomplete information and clearly not being aided by Officer Santiago's difficulties in articulating what actually occurred.

The following quote from (I believe) Officer Fiore during the interview is telling;

From the amount of DVs¹⁷ that we've been involved in with working here and the amount that we see, you know, evaluations are 100 percent accurate to what is said during the interview because we've never had any issues previously, you know what I'm saying, so if we got it like that, that is what had to have been said during the interview with them.

Ultimately, I found Officer Santiago to be credible, if confusing, in his responses to questions which he was clearly unprepared to answer, since he was unaware of the contents of the psychological reports. This was contrasted by the overly skeptical and presumptuous nature of the questioning by Officers Fiore and DeMartino.

TIMELINE:

A basic timeline is helpful in determining what happened when and what information was available to all stakeholders during their involvement in the incidents and subsequent events.

- a. 04/26/18 – Wayne domestic violence incident
- b. 05/24/18 – Officer Santiago first visit to Weiss

¹⁷ Domestic violence cases

- c. 06/27/18 – Weiss letter to Wayne confirming that Santiago had attended four anger management treatment sessions
- d. 08/08/18 – Weiss letter to Wayne confirming that Santiago had attended seven anger management treatment sessions
- e. 08/30/18 – Wayne charges dismissed by the court
- f. 09/19/18 – Bloomfield domestic violence incident, TRO issued
- g. 09/23/18 – Essex County (Bloomfield) TRO dismissed
- h. 01/22/19 – Bloomfield charges dismissed by the court
- i. 02/04/19 – Tscherne report
- j. 01/30/20 – Cevasco report
- k. 01/31/20 – Weiss records faxed to NSP
- l. 02/18/20 – Santiago interview with DeMartino and Fiore
- m. 05/02/20 – Santiago begins anger management treatment with Elaine Peguero, L.C.A.D.C.¹⁸
- n. 05/06/20 – Cevasco supplemental report
- o. 05/07/20 – PNDA #1 issued
- p. 07/02/20 – Twelve session anger management sessions completed with Peguero
- q. 08/11/20 – Safran evaluation
- r. 06/14/21 – Trapold evaluation
- s. 11/09/21 – PNDA #2 issued
- t. 03/14/22 – FNDA #1 issued

THE REPORTS

I. Psychological

¹⁸ Ms. Peguero was, at all relevant times, also affiliated with the Center of Revitalizing Psychiatry.

Dr. Tscherne

February 4, 2019

Dr. Tscherne performed his evaluation of Officer Santiago on January 28, 2019 and that resulted in a February 4, 2019 report (Exhibit J-14). This evaluation took place in the immediate aftermath of the dismissal of the Bloomfield case, after his cessation of treatment with Mr. Weiss and well before he began seeing Ms. Peguero. Dr. Tscherne did not testify during the hearing. The major takeaways from his report are as follows;

- a. The evaluation was conducted “in order to determine if he is fit to have his weapons privileges restored so he can carry a weapon both off and on duty”.
- b. He reviewed the Wayne Police Department April 26, 2018 incident report and an October 22, 2018 SID investigation report in preparation for authoring the report.
- c. It included the following statement;

OFC Santiago stated that he was mandated by the court to attend 20 sessions of anger management. He stated that after switching to 2nd shift, attending the sessions makes him 1 hour late for work which had led to him rescheduling and postponing his treatment; he reported that he has 3 sessions remaining, but this could not be verified.

- d. As to the Bloomfield incident, Dr. Tscherne noted that “OFC Santiago was convinced that he had court documents that absolved him of the charges and insisted that he would e-mail them to the provider. However, he never sent the documents.

- e. Officer Santiago completed a medical authorization form enabling Dr. Tscherne to obtain Mr. Weiss's records. That was faxed to the provider, but the records were never received.
- f. Dr. Tscherne concluded that "OFC Santiago should NOT have his on-duty or off-duty weapons restored at the present time" and if that were to be considered, "he should return for an updated psychological evaluation...complete his anger management treatment and approach a future evaluation with honest responding".

As detailed above, a major portion of the dispute in this case concerned the number of anger management classes that Officer Santiago was "mandated" to undergo and whether they were completed. Dr. Tscherne noted that the answers provided to him by respondent were "twenty" and "no".

Dr. Cevasco

January 30, 2020

Dr. Cevasco authored two reports, the first following an evaluation on January 30, 2020. (Exhibit J-6). This took place well after his cessation of treatment with Mr. Weiss, but about six months before he began with Ms. Peguero. The evaluation was "being conducted in order to determine if he is at imminent risk for future domestic violence incidents and to determine if he is fit to have his weapons privileges restored so he can carry a weapon both on and off duty." In preparing the report, he reviewed Dr. Tscherne's report, noting that Dr. Tscherne had "requested proof of completion of SCPO Santiago's court ordered 20 sessions of anger management..."

Dr. Cevasco also reviewed Officer DeMartino's November 19, 2019 report, the September 19, 2018 Bloomfield police report and TRO and a November 20, 2019 work history report.

He then described the Bloomfield incident and wrote;

As a result of this arrest, SCPO Santiago was court mandated to 20 sessions of anger management. SCPO states that he did complete the mandated anger management counseling and has provided proof to the NJDOC. No verification was provided to this examiner.

Dr. Cevalasco noted that Officer Santiago presented in a “chaotic and confusing manner” and that “(h)is thoughts often times did not make sense and he often times contradicted prior statements”. He further wrote that “(i)t took many questions and attempts at clarifying information provided to understand the sequence of events related to the domestic violence incident.” Of great interest, he noted that;

This presentation was not viewed as a conscious attempt by him to disrupt the interview process. Rather it is viewed as a realistic presentation of who he is, a very confused young man who has difficulty organizing his thoughts.

Ultimately, he concluded that Officer Santiago did not have “the maturity necessary to” be allowed access to an off-duty weapon, but he saw “no psychological contraindications to his being allowed access to on duty weapons privileges”. However, Dr. Cevalasco added a caveat that this recommendation was made with the assumption that he “did actually complete his mandated anger management counseling” and if that was not true, he would “withdraw all recommendations because that would...mean that he lied to me during this evaluation and therefore I cannot trust anything he said during this evaluation.”

May 6, 2020

This report (Exhibit J-7) was written after receipt of Officer Fiore’s March 25, 2020 report. (Exhibit J-4). Dr. Cevalasco wrote that Officer Santiago had been “very clear that he completed the mandated anger management counseling which he reports was court ordered after a domestic violence incident...on 09/17/18.”¹⁹

¹⁹ This is clearly a reference to the Bloomfield incident, although the date is incorrect. The correct date was September 19, 2018.

He reviewed Officer Fiore's report and wrote;

With regards to the specifics of Dr. Tscherne's recommendation for completion of anger management counseling, it certainly appears that SCPO Santiago did not comply with the mandated completion of 20 sessions and more importantly was less than truthful about conveying this information to me during my interview of him on 1/30/20.

It is unclear if his trying to consciously obfuscate the information he provided or if the information provided was inconsistent because he cognitively has difficulty telling the truth under stress. Either way it indicates that SCPO Santiago has difficulty telling truth and therefore his words cannot be trusted.

He therefore altered his recommendation with regards to on-duty weapons access.

Dr. Safran - August 11, 2020

While this report was not introduced into evidence, Dr. Cevasco was questioned about it. It is undisputed that Dr. Safran concluded that while she did have concerns similar to those expressed by Drs. Tscherne and Cevasco, given his completion of anger management classes and his clean record since the Bloomfield incident, she felt that he was fit-for-duty as well as able to carry a weapon.

Dr. Trapold - June 14, 2021

While this report was also not introduced into evidence, Dr. Cevasco was questioned about it and it is undisputed that Dr. Trapold concluded that given that there had been no disciplinary issues since the Bloomfield incident and since Officer Santiago had now completed his course of anger management treatment, it was felt that his on-duty weapons privileges should be restored, but not his off-duty ones.

II. Investigative - February 8, 2019 (Fiore)

This report detailed the April 26, 2018 Wayne incident and included a review of the police report and detailed that the DOC received notice of the arrest on April 27, 2018

and was advised by the Wayne police that the alleged victim had not requested a TRO.
(Exhibit J-3)

It was specifically noted that;

On October 12, 2018, OFC. Santiago provided this Investigator with paperwork from the Wayne Township Municipal Court which revealed that his charge...was dismissed.

The September 19, 2018 Bloomfield incident was noted to have occurred, but the details were not provided.

Officer Fiore then noted that he had received Dr. Tscherne's report and recounted its findings.

March 25, 2020 (Fiore)

This report noted that Officer Santiago had undergone the evaluation with Dr. Cevasco and reproduced his conclusions. It also detailed the February 18, 2020 interview conducted by himself and Officer DeMartino and a follow-up conversation that he had with Dr. Cevasco who insisted that Officer Santiago had told him that he had completed the "mandated Anger Management sessions" and that he had supplied that documentation to the NJDOC.

He also reviewed emails from Major Kerner alleging that Officer Santiago had not provided paperwork to SID about the anger management classes despite same having been ordered to "several times".

October 23, 2020 (DeMartino)

This report reviewed the Bloomfield case, including his arrest, the charges, the issuance of a TRO and the ultimate dismissal of the TRO on October 23, 2018 and of the municipal court charges on January 22, 2019.

Officer DeMartino then reviewed Dr. Cevasco's initial report in detail as well as Officer Fiore's second report accusing Officer Santiago of lying during the evaluation and noted his failure to produce paperwork as ordered/requested by Major Kerner. He also reviewed Dr. Cevasco's May 6, 2020 report and that Officer Santiago had been served with termination paperwork.

LEGAL POSITIONS

PETITIONER:

While petitioner did not submit post-hearing argument, during the hearing, it was argued that Officer Santiago did not lie or mislead anyone concerning the anger management treatment and complied with all requests for additional information through the NSP chain of command.

It was also argued that NSP is simply ignoring Dr. Trapold's June 14, 2021 report, which it commissioned and where it was determined that Officer Santiago was eligible to carry an on-duty weapon.

It was also argued that the initial set of anger management classes which Officer Santiago attended were not mandated by the Wayne Municipal Court, but were rather suggested and that, in any event, he ultimately completed a total of twenty classes between his original provider and a subsequent provider.

With the classes completed and no current psychological opinion holding that Officer Santiago is unfit for duty or ineligible to possess a weapon while on-duty, it is argued that he is not guilty of the charges.

RESPONDENT:

Respondent argues that the charges against Officer Santiago should be sustained since there is substantial credible evidence presented that his conduct was unbecoming

of an SCPO and that the decision to terminate his employment was clearly not “arbitrary, capricious or unreasonable.”

Given his guilt of the charges, “anything less than a removal would lower the high standards that are required of custody staff members at DOC” and that the evidence shows that Santiago “will continue to exhibit conduct that endangers the safety and security of his colleagues and inmates at (NSP)”. Respondent closing brief at 30.

As to the individual charges, respondent argues that the charge of “inability to perform duties” should be upheld based upon Dr. Cevasco’s credible testimony that Officer Santiago is incapable of possessing a weapon, either on or off-duty.

Concerning the charge of the intentional misstatement of material fact, respondent argues that the evidence is clear that Officer Santiago intentionally claimed to have completed the “court mandated sessions for anger management” and deliberately misstated the number of visits that were required and that he actually attended.

Regarding the charge of insubordination, respondent claims that the evidence supported a conclusion that he failed to follow direct orders from Major Kerner to produce documentation concerning his anger management sessions for several months. Because of this, the SID investigators were prevented from completing their investigation and determining whether Officer Santiago had been truthful during his psychological evaluation.

Respondent also requests, for the first time, that since Officer Santiago failed to call his union representative or his treating doctors to testify at the hearing, an adverse inference should be drawn. State v. Clawans, 38 N.J. 162 (1962).

As for the penalty, NJSP argues that given the higher standard which law enforcement officers are held and the fact that Officer’s Santiago’s “misconduct (was) so egregious...progressive discipline would not be necessary for removal to be the only appropriate remedy.” When his disciplinary history is added to the mix, given the significant issues that have arisen in such a short period of time and that his “intentional

misstatement of material fact during an SID investigation...is the exact type of offense for which (he) was previously disciplined", termination is clearly appropriate.

Ultimately, respondent argues that in light of his prior discipline;

...progressive discipline is inappropriate here. Moreover, even if Santiago had no disciplinary history, Santiago's actions here are sufficiently egregious to make him untrustworthy of his position as a senior correctional police officer. As such, the charges against Santiago should be upheld and the penalty of removal should be affirmed.

Respondent's Post-hearing brief at 45.

APPLICABLE LAW

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his duties. N.J.S.A. 11A:1-2(a).

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant, and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W.R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable

probability to exist, the evidence must be such as to “generate belief that the tendered hypothesis is in all human likelihood the fact.” Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

In appeals concerning major disciplinary actions brought against classified employees, the burden of proof is on the appointing authority. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is a preponderance of the credible evidence. In re Polk License Revocation, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958). The preponderance may also be described as the greater weight of credible evidence in a case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). On such appeals, the Civil Service Commission may increase or decrease the penalty, N.J.S.A. 11A:2-19, and the concept of progressive discipline guides that determination. In re Carter, 191 N.J. 474, 483–86 (2007).

Where facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is defined as: “The quality that makes something (as a witness or some evidence) worthy of belief.” Credibility, Black’s Law Dictionary (10th ed. 2014).

Credibility is the value that a finder of the facts gives to a witness' testimony. It requires an overall assessment of the witness' story in light of its rationality, 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).

Accordingly, credibility does not mean determining who is telling the truth, but rather requires a determination of whose testimony is “worthy of belief” based upon numerous factors. Credibility is not based on who presented the most witnesses. Instead, it is “the interest, motive, bias, or prejudice of a witness [that] 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. 1952), certif. denied, 10 N.J. 316 (1952) (citation omitted). The process entails observing the witnesses’ demeanor, evaluating their ability to recall specific details, evaluating the consistency of their testimony under direct and cross-examination, determining the significance of any inconsistent statements and otherwise gathering a sense of their candor with the court. Thus, “[c]redibility involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence.” Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963).

Further, although hearsay evidence is admissible in OAL hearings, N.J.S.A. 52:14B-10(a), it should only be accorded whatever weight the tribunal deems appropriate considering the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability. Under the residuum rule, hearsay “may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis, for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it.” Weston v. State, 60 N.J. 36, 51 (1972).

When determining the appropriate penalty to be imposed, the Board must consider an employee’s past record, including reasonably recent commendations and prior disciplinary actions. Bock, 38 N.J. 500 (1962). Depending on the conduct complained of and the employee’s disciplinary history, major discipline may be imposed. *Id.* at 522–24. Major discipline may include removal, disciplinary demotion, suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a); N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.4.

A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions evaluated by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential. See generally, In re Stallworth, 208 N.J. 182 (2011).

The concepts of progressive and major discipline have no fixed definitions and are case specific, but in Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966), the court declared that;

It must be recognized that a police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. . . . He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public

Id. at 566.

These issues were also addressed in Carter;

Even so, we have not regarded the theory of progressive discipline as a fixed and immutable rule to be followed without question. Instead, we have recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. See Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197-98, 627 A.2d 602 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense). In doing so, we have referred to analogous decisions to discern the test to be applied. See Id. at 197, 627 A.2d 602. Thus, we have noted that the question for the courts is "whether such punishment is 'so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness.'" In re Polk License Revocation, 90 N.J. 550, 578, 449 A.2d 7 (1982) (considering punishment in license revocation proceeding) (quoting Pell v. Bd. of Educ., 34 N.Y.2d 222, 313 N.E.2d 321, 327, 356 N.Y.S.2d 833 (1974)).

Id. at 484-85.

Further, in matters involving the discipline of police and corrections officers, issues of public safety should be considered. Id. at 485. Officers are also held to higher duty than a “normal” public employee given their duty to uphold and enforce the law. In re Disciplinary Procedures of Phillips, 117 N.J. 567, 576-77. See also, In re Emmons, 63 N.J. Super. at 142.

Ultimately, however, “it is the appraisal of the seriousness of the offense which lies at the heart of the matter.” Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

CHARGES

As detailed above, Officer Santiago was found to have committed four separate violations; insubordination, inability to perform duties, conduct unbecoming a public employee and other sufficient cause. N.J.A.C. 4A:2-2.3(a)(2), (3), (6) and (12).

These is in addition to the allegations of violations of NJDOC policies and procedures. As will be discussed in detail, most of the departmental violations mirror the Administrative Code charges, although the inability to perform duties charge more mirrors the administrative charge than vice versa.

INSUBORDINATION

Insubordination encompasses an employee’s failure or refusal to follow a directive, order or instruction of a supervisor. Eaddy v. Dep’t of Transp., 208 N.J. Super. 156, 158–59 (App. Div.), certif. granted, 104 N.J. 392, order vacated, appeal dismissed, 105 N.J. 569 (1986); City of Newark v. Massey, 93 N.J. Super. 317, 322 (App. Div. 1967).

This definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person.

Insubordination is always a serious matter, especially in a paramilitary context. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

INABILITY TO PERFORM DUTIES

In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Once again, the Administrative Code provides no specific definition of these terms. N.J.A.C. 4A:2-2.3(a). However;

(C)ase law has determined incompetence is a "lack of the ability or qualifications necessary to perform the duties required of an individual [and] a consistent failure by an individual to perform his/her prescribed duties in a manner that is minimally acceptable for his/her position." Sotomayer v. Plainfield Police Dep't CSV 9921-98, Initial Decision (December 6, 1999), adopted, Merit Sys. Bd. (January 24, 2000), <http://njlaw.rutgers.edu/collections/oal/final/csv09921-98.pdf> (citing, Steinel v. City of Jersey City, 7 N.J.A.R. 91 (1983); Clark v. New Jersey Dep't of Ag., 1 N.J.A.R. 315 (1980).)

In the Matter of Ciuppa, 2014 N.J. Agen LEXIS 106.

The key aspect of this charge is that Dr. Cevasco opined that Officer Santiago is incapable of possessing an on-duty weapon. Per the DOC Law Enforcement Personnel Rules and Regulations, Article V, Section 8, "(t)he ability to carry on-duty is a requirement of the job and loss of an on-duty weapons privileges will result in removal from employment. (Exhibit J-31).

CONDUCT UNBECOMING A PUBLIC EMPLOYEE

Under N.J.A.C. 4A:2-2.3(a)(6), an employee may be subject to major discipline for conduct unbecoming a public employee. Although not strictly defined by the Administrative Code, "conduct unbecoming" has been described as an "elastic" phrase

that defines conduct “which adversely affects the morale or efficiency” of the public entity or tends “to destroy public respect for . . . [public] employees and confidence in the operation of . . . [public] services.” Karins v. City of Atlantic City, 152 N.J. 532 at 554, quot. Emmons, 63 N.J. Super. 136 at 140. See also, In re Teel, 2012 N.J. Super. Unpub. LEXIS 667.

It is sufficient that the complained-of conduct and its attending circumstances “be such as to offend publicly accepted standards of decency.” Karins, 152 N.J. at 555 [quoting Zeber Appeal, 156 A.2d 821, 825 (1959)].

OTHER SUFFICIENT CAUSE

N.J.A.C. 4A:2-2.3(a)(12) does not define “other sufficient cause”, but this phrase is generally interpreted to mean violations of rules, regulations, policies and procedures. In re Calio, 2018 N.J. Super. Unpub. LEXIS 2706.

ADVERSE INFERENCE CHARGE

Respondent requests that an adverse inference be drawn due to petitioner failing to call both a union representative, Sean Sprich as well as “his other doctors” as witnesses during the hearing. Before delving into the law, we need to explore who these witnesses are.

First, Sean Sprich is a former Executive Officer of PBA Local 105 who supplied an affidavit in opposition to respondent’s Motion for Summary Decision. Concerning issues raised during the hearing, he wrote that he was instrumental in arranging and paying for Officer Santiago’s August 11, 2020 fitness for duty examination with Dr. Safran as well as arranging for him to undergo the second set of anger management classes (with Ms. Peguero). He also “personally saw to it that (Dr. Safran’s) report was delivered by me to administrator Nogan.”

Curiously, respondent does not specify who Officer Santiago's "other doctors" are, but there are only four realistic possibilities (Mr. Weiss, Ms. Peguero, Dr. Safran and Dr. Trapold).

The guidelines for the use of an adverse inference or "missing witness" charge are well-settled in New Jersey and were documented in State v. Clawans, 38 N.J. 162, 165 (1962) and expanded upon in State v. Hill, 199 N.J. 545. However, before reviewing the criteria for the issuance of an adverse inference charge, we should examine if it should even be considered. Because, while respondent's citation to Hill concerning the four-step test to be given to determine if the charge should be given is correct, the "if it should even be considered" question is reviewed literally on the same page but goes curiously unmentioned.

The Hill court wrote;

Due to the need to have a court examine carefully the basis for such a charge, or for permitting a summation reference about the jury's drawing of an adverse inference for failure to call an available witness, we set a framework requiring prior notice. *Id.* at 172, 183 A.2d 77. The party seeking the jury charge must notify the opposing party and the judge, outside of the presence of the jury, must state the name of the witness or witnesses not called, and must set forth the basis for the belief that the witness or witnesses have superior knowledge of relevant facts. *Ibid.* The procedure of prior notification is also required whenever a party wishes to mention the inference during closing argument. See State v. Carter, 91 N.J. 86, 128, 449 A.2d 1280 (1982); see also Clawans, supra, 38 N.J. at 172, 183 A.2d 77 ("Depending upon the particular circumstances ... the trial court may determine that the failure to call the witness raises no inference, or an unfavorable one, and hence whether any reference in the summation or a charge is warranted.").

Id. at 560-61.

Very simply, no prior notice of this argument was supplied by respondent's counsel at any time before the filing of this closing brief. Further, respondent's counsel fails to list anyone by name in his brief except for Mr. Sprich. Therefore, by the very wording of Hill,

any request for an adverse interest charge as to any witness other than Mr. Sprich would not even reach the Clawans test. Then, since no prior notice had been given concerning Mr. Sprich, the ruling in Hill would also disallow that request as well.

But even if respondent had past the Hill requirements and reached Clawans, its request would fail;

When making a determination about a Clawans charge, a court must demonstrate that it has taken into consideration all relevant circumstances by placing, on the record, findings on each of the following:

- (1) that the uncalled witness is peculiarly within the control or power of only the one party, or that there is a special relationship between the party and the witness or the party has superior knowledge of the identity of the witness or of the testimony the witness might be expected to give;
- (2) that the witness is available to that party both practically and physically;
- (3) that the testimony of the uncalled witness will elucidate relevant and critical facts in issue [;] and
- (4) that such testimony appears to be superior to that already utilized in respect to the fact to be proven.

[State v. Hickman, 204 N.J. Super. 409, 414, 499 A.2d 231 (App.Div.1985), certif. denied, 103 N.J. 495, 511 A.2d 667 (1986).]

Id. at 561-562

For the sake of completeness, as noted by respondent, these four factors are joined by the conjunctive “and” rather the disjunctive “or” meaning that all four factors must be met to satisfy the test. Torres v. Pabon, 225 N.J. 167, 184 (2016). However, the language in Torres is just a little stronger than intimated by respondent;

Because the prejudicial impact of an inappropriate adverse inference charge may be “severe,” the case-specific

assessment mandated in Hill serves an essential purpose. Id. at 562, 974 A.2d 403. As the Court observed, "it is one thing for counsel in his summation to point to the absence of particular witnesses; it is quite another when the court puts the weight of its authority behind such a summation by telling the jury it may draw an adverse inference from their absence." Ibid. (quoting Wild v. Roman, 91 N.J. Super. 410, 415, 220 A.2d 711 (App.Div.1966)). Given its potentially dispositive impact on the jury's determination, the adverse inference charge is only given when all of the Hill factors are found to warrant the charge. Id. at 561, 974 A.2d 403; Washington, supra, 219 N.J. at 356, 98 A.3d 1140.

Id. at 510-511.

When a request is made for an adverse inference charge²⁰, the Court in Hill was unequivocal that the trier of law must go on the record and make findings of fact concerning all four steps of the test. When the request is made outside the presence of the opposing party and is based on inferences and conjecture (such as this one), that initial requirement cannot be met.

With so many deficiencies in when and how this charge was requested, there is no need for me to actually apply the factors to the single witness who was mentioned by name in respondent's brief. Given the above, I **CONCLUDE** that if I were even to consider the request at this point, it would fly in the face of Clawans, Hill and Torres and I **FIND** that same shall be and is hereby **DENIED**.

FINDINGS OF FACT AND CONCLUSIONS

There is no question that Officer Santiago's credibility is the cornerstone of this case. However, for all of the issues raised by petitioner, there is clearly a single question that is by far the most important. Did he lie about the anger management classes? If he did, if he intentionally misled the doctors and investigators about those sessions ("intentionally misstated material fact"), the rest of this discussion will be rather short and the only material issue to be decided is whether his termination should be upheld or

²⁰ The court in Torres discussed this as well; "In Hill, supra, the Court set forth procedures for a trial court to follow when a party requests an adverse inference charge or states its intent to address in summation the absence of a witness. 199 N.J. at 560-62." (Emphasis added).

whether there is some way for him to have convinced me that he should only be suspended for 180 days.

Before reaching my conclusions, I would note that throughout this case, there always seemed to be something “missing”, with no real interest demonstrated by NSP in discovering what actually occurred, as opposed to coming to a pre-determined conclusion.

The investigation was sloppy, disjointed, superficial and ultimately unconvincing. From the very beginning, it was obvious that there was confusion concerning the anger management issues. The investigators, rather than actually attempting to determine the truth, instead relied on computer databases, authored “cut-and-paste” reports, conducted a sophomoric taped interview during which the most informed party seemed to be the union representative and never followed up in any meaningful way with the Wayne Municipal Court, Mr. Weiss or Ms. Peguero. The primary impression projected during the hearing was that the investigation was a *pro forma* exercise and that Officer Santiago was lying.

In fact, from the onset, NSP’s administration seemed more interested in terminating Officer Santiago than in following an unbiased disciplinary procedure.²¹ For the FNDA to utilize literally the identical language as the PNDA is practically inexcusable when;

- a. It was written twenty-two months later, and;
- b. NJSP knew that Officer Santiago had undergone two additional separate fitness for duty exams, one at its own behest, both of which found that he was fit to have on-duty weapons privileges, and;
- c. NJSP, irrespective of the issues with Mr. Weiss, knew that Officer Santiago had completed a course of twelve Anger Management sessions with a second provider.

²¹ The fact that respondent’s counsel candidly admitted that NSP was “holding” the November 9, 2021 PNDA in abeyance pending the outcome of this case is illustrative of that assertion. T1:8-9.

Not helping matters is that key facts and potential evidence that were supplied during the Motion for Summary Decision process were not presented during the hearing itself, leaving the parties to indirectly refer to much of it, without it being formally introduced. This court is being asked to make a career-making/career-breaking decision based on incomplete evidence and argument and that is disturbing.

Perhaps most illustrative of the confusion in this case is respondent's fixation on the term "mandated" to describe the anger management classes that are at the core of the dispute. There is literally no evidence that these classes were ever "mandated" by the court. In fact, it is abundantly clear they were not mandated. If the judge had "mandated" that Officer Santiago attend twelve anger management classes as a condition of the case being dismissed, he would not have done so after he had only attended seven (or eight) classes.

In his recorded interview, Officer Santiago confirmed that he did not have an attorney for the Wayne matter and that the alleged victim had not appeared in court. What happened next is not remotely surprising for anyone with even a modicum of experience with the municipal court system in New Jersey.²² Even with the alleged victim not cooperating, both prosecutors and judges are very reluctant to dismiss a domestic violence case without some showing that the accused was taking the matter seriously. When an alleged victim does appear in court, but does not want to pursue the matter, that person is sworn and testifies under oath as to the facts and circumstances of their decision not to proceed. Only then will the court contemplate dismissal of the charges. Here, where the alleged victim did not appear, the scenario relayed by Officer Santiago, while inartfully related, is eminently believable. It was Judge Katz's "suggestion", not his "order", which led to his enrolling in anger management classes.

While there is little doubt that Mr. Weiss recommended that he undergo twelve sessions, there was no "mandate" from the court that he do so and the court clearly felt comfortable enough when Officer Santiago produced proof from Mr. Weiss of his attendance at seven sessions through August 8, 2018 to dismiss the case on August 30,

²² In fact, Dr. Cevalco expressed familiarity with the common practice. (T1:165.)

2018. The documents from Wayne Municipal Court do not suggest that this was a condition of dismissal and respondent did not, nor could the investigators be bothered to, produce transcripts or recordings of the court sessions in an attempt to confirm same.

The entire “numbers issue” began with Dr. Tscherne’s February 4, 2019 report, where he wrote that Officer Santiago had told him that “he was mandated by the court to attend 20 sessions of anger management” following the Wayne incident and that “he has 3 sessions remaining”. The first that Officer Santiago was aware of the contents of this report was over a year later, when he was advised of same during the interview with Officers DeMartino and Fiore. His reaction to the twenty sessions comment was telling. He had no idea where the number had come from and while he acknowledged that he had not completed the sessions, he also knew that he had signed an authorization that permitted NSP to obtain his records. As he stated during the interview;

“No, I did not tell him I completed it because if I told him I completed them, you guys would have had the paperwork and then that would have put me more in a jam.”

While the interviewers inferred that the doctor’s report was correct because, well, he’s a doctor, respondent has yet to explain what incentive there would be for Officer Santiago to have overestimated how many visits he needed to attend to “complete” the therapy or why he would intentionally lie about whether the sessions were court ordered.

In fact, Dr. Cevasco’s report was, independent of the number of sessions, demonstrably inaccurate, in that he wrote that Officer Santiago “was court mandated to 20 sessions of anger management” as a result of the Bloomfield arrest. As has been well established at this point, the anger management classes were taken as a result of the Wayne arrest and reading this report as well as Dr. Tscherne’s report in context, I **FIND** that Dr. Cevasco simply assumed that the number of sessions reported by Dr. Tscherne was accurate and utilized that number during his encounter with Officer Santiago.

This remains an issue in Dr. Cevasco’s May 6, 2020 follow-up report, in which he insisted that his “notes from that interview indicate that SCPO R**** (sic) told me he

specifically completed 20 sessions and that proof of his completion had been forwarded to the NJDOC". These notes, which Dr. Cevasco testified he did not maintain (and therefore did not produce) despite the ongoing disciplinary matter, allegedly had Officer Santiago specifically confirm an absolutely illogical number of visits and then confused his name for the alleged victim's in the same sentence.

It must also be remembered that this report was written at the behest of Officer Fiore and was based upon his March 25, 2020 report, which, to put it in a light most favorable to Officer Fiore, included some questionable conclusions, such as;

OFC. Santiago stated in closing that the judge ordered him to Anger Management sessions however, the judge never gave him a number of sessions that he had to complete.

(Exhibit J-4).

That is not exactly true, nor are even some other basic facts. While Officer Santiago apparently did tell the investigators that he had only attended four sessions of anger management when Judge Katz dismissed the Wayne case, none of the investigators or doctors apparently could be bothered to review Mr. Weiss's August 8, 2019 letter which noted that he had completed seven sessions.²³ (Exhibit J-9). It is inaccuracies such as these which are indicative of the incomplete/sloppy nature of this investigation.

The other glaring and frankly embarrassing omission from the investigative and medical reports concerns the records from Mr. Weiss. Practically everyone affiliated with respondent complained that Officer Santiago never provided the records from his office. Except that they had the records on January 31, 2020. (Exhibit J-8).

Once again, the problem started with Dr. Tscherne's February 4, 2019 report, where he stated that he;

²³ In fact, the investigators showed this letter during the interview and still got the number wrong in their questioning.

wanted to verify OFC Santiago's treatment progress, but this could not be verified despite attempts to acquire the records. A Release of Information was completed and signed for a records request, or at least a brief update on treatment progress at the Center for Revitalizing Psychiatry. While the staff provided the fax number and was made aware to expect the Release of Information, no records were sent.

(Exhibit J-12)

This was, at least at this point, apparently accurate.

Dr. Cevasco then produced his January 30, 2020 report and while he obviously mentioned the anger management treatment, he did not express any real interest in obtaining the records, but merely noted that no verification had been supplied concerning Officer Santiago's attendance and completion of it. (Exhibit J-6)

Notwithstanding that, however, for some unknown reason, Mr. Weiss' office faxed over the records to NSP the next day. (Exhibit J-8) And, in fact, Officer Fiore acknowledged that in his March 25, 2020 report ("however, NSP/SID was only in receipt of documentation which indicate (sic) he (Santiago) only completed seven (7) sessions.") (Exhibit J-4). However, even after acknowledging that he had received the records, Officer Fiore still wrote;

As of this writing, this Office has not received documentation from OFC. Santiago which would indicate whether or not he (Santiago) completed his Anger Management sessions. Due to OFC. Santiago failing to provide the proper documents to this Office, this Investigator cannot validate whether or not OFC. Santiago was truthful during his PSYCH interview with Dr. Cevasco.

Additionally, OFC. Santiago was ordered several times (by Major Kerner) to produce anger management related documents, which he (Santiago) has not done. Due to OFC. Santiago failing to provide the proper documents, this Office cannot moved (sic) forward with two Domestic Violence incidents involving OFC. Santiago.

(Exhibit J-4)

Officer Fiore literally referenced the documents that he said he did not have on the same page where he concluded that he could not pursue the investigation because he did not have those documents. Officer Santiago's therapist had literally faxed the documents to the prison less than three weeks before the February 18, 2020 interview upon which this report is based and that was the conclusion reached by the investigator.

Then, in his October 23, 2020 report, Officer DeMartino simply ignores the fact that the records were received. (Exhibit J-5). This is followed, remarkably, by Dr. Cevasco also ignoring the receipt of the records in his May 6, 2020 supplemental report. (Exhibit J-6).

Respondent also ignored Dr. Safran's report, but even if one excuses potential skepticism of her conclusions given that she had been retained by the union, to ignore Officer Santiago's treatment with Ms. Peguero and then to ignore Dr. Trapold's report is damning.

While they were not offered into evidence, the contents of both Dr. Safran's and Dr. Trapold's reports were reviewed by Dr. Cevasco and addressed on cross-examination. It is no mystery as to what they said or who commissioned them. The fact is that as early as September 30, 2020, NSP had in its possession a report that had concluded that Officer Santiago was fit to possess an on-duty weapon. Then, as of June 14, 2021, it had in its possession a report that it had commissioned, which also determined that Officer Santiago was fit to possess an on-duty weapon.

Yet neither of those reports are mentioned in the FNDA and neither report was supplied to Dr. Cevasco until he was preparing to testify in this hearing. Effectively, NSP decided to ignore its own report (let alone Dr. Safran's) to rely on an older report because, seemingly, it did not agree with the conclusions of the newer one.

It should also be noted that throughout the hearing, there was discussion of whether Officer Santiago had attended seven or eight sessions with Mr. Weiss. The confusion apparently lies in whether the initial intake would "count" as a session or

whether that was simply an intake and that the group sessions would be the only ones that counted towards the recommended twelve sessions. Officer Santiago thought it was eight and even Dr. Cevalco to some degree, agreed;

Q. How many – did Santiago complete any sessions for anger management?

A. Yes.

Q. How many?

A. Counting the intake I believe it was eight.

(1T:170)

I **FIND** that the number of visits literally depends on how they were counted and that there was clearly no intent by Officer Santiago to deceive anyone as to how many sessions he had attended.

As noted above, NSP demonstrated little interest in actually determining the truth. Rather, the impression that both the evidence and the investigation conveyed was that they had a young, immature SCPO who had gotten off to rocky start on the job and had then gotten himself arrested twice on domestic violence charges. While he was not convicted of either charge, clearly, it was “time for him to go”. In fact, respondent practically conceded same in its post-hearing brief;

Santiago’s series of bad decisions led to a severely distrustful relationship between him and his employer...

Respondent’s post-hearing brief at 30.

Everything else just seemed pre-textual to enable the facility to rid itself of someone whom it considered to be a problem.

All else aside, ultimately it is Officer Santiago’s interview which saves him. He walked into that room obviously unprepared for what he was about to go through and, while he might not have been 100% accurate in what he said, I **FIND** that he did not

“intentionally misstate” anything to anybody, including the investigators. He was confused from the onset about the twenty sessions and where that number came from and candidly admitted that he had not “completed” his treatment with Mr. Weiss and noted that he was under the impression that those records had already been produced, so if he did lie about it, he would immediately get caught out and be in even more trouble.

Ironically, it is a phrase in Dr. Cevalasco’s report that best summarizes Officer Santiago’s difficulties;

SCPO Santiago tried hard to establish a meaningful relationship with this writer. He presents in a chaotic and confusing manner. His thoughts often times did not make sense and he often times contradicted prior statements. It took many questions and attempts at clarifying information provided to understand the sequence of events related to the domestic violence incident.

The presentation was not viewed as a conscious attempt by him to disrupt the interview process. Rather it is viewed as a realistic presentation of who he is, a very confused young man who has difficulty organizing his thoughts.

(Exhibit J-6)

While perhaps on the harsh side, I find it difficult to overtly disagree with that assessment.

This case is not about whether Officer Santiago is an exemplary SCPO. What this case is about is whether Officer Santiago is guilty of the charges published in the FNDA. And the primary issue as conceded by Dr. Cevalasco during his testimony, is that he felt that Officer Santiago had lied;

Q. And why did you change your recommendation?

A. Because then Officer Santiago would have lied to me during my evaluation and therefore I couldn’t trust any of the facts that he relayed to me as facts in my evaluation.

(1T:148)

Further;

Q. Well, you condemned him as a liar?

A. Absolutely.

Q. Because your belief that he was ordered by a court?

A. No, because he lied to me about what he was doing and if he lied to me about that, then there's a good chance he lied to me about the amount of violence that he exhibited with his ex-girlfriend. He clearly lied to Dr. Safon (sic) in her evaluation. So he's unreliable. That's the issue and putting a lethal weapon in somebody's hands who are unreliable is a concern.

(1T:175)

The other major issue in this case concerns the allegation that Officer Santiago failed to supply requested documents to Major Kerner despite multiple requests. Frankly, very little evidence was supplied concerning this issue and what evidence there was, was inconclusive.

The only documentary evidence that was supplied came from Major Kerner and consisted of three emails.

The first was a back and forth on February 18, 2020 between Officer Fiore and Major Kerner, with copies to two other corrections employees. The first was from Officer Fiore to Major Kerner and read;

Sir,

On February 10, 2020, this investigator contacted you regarding paperwork that we needed from the Wayne Township Municipal Court for the Anger Management sessions that OFC. Santiago was required to complete. Has OFC. Santiago provided you with any paperwork from the court?

Thank you.

(Exhibit R-11)

The reply from Major Kerner read;

Sir, SCPO Sergio Santiago was ordered to provide paperwork to SID, regarding his Anger Management sessions. SCPO Santiago has not provided any paperwork to my office.

(Exhibit R-11)

The third email was from Major Kerner to Officer Fiore and another DOC employee on March 10, 2020 and read;

Sir, SCPO Sergio Santiago was ordered several times to provide paperwork to SID, regarding his court ordered Anger Management sessions. SCPO Santiago has not provided any paperwork to my office.

(Exhibit R-10)

Obviously, the major problem with these emails is that the anger management records had been supplied before the first one had been sent. As noted above, Mr. Weiss's office had faxed the records to NSP on January 31, 2020. Further, while it is unclear when they received them, at the time of the February 18, 2020 interview with Officer Santiago, the investigators had also received the June 27, 2018 and August 8, 2018 letters from Mr. Weiss, since one was referenced during it and the other was shown on the video.

Another problem is that there is no documentation of the requests that were made to Officer Santiago. While we have the emails listed above (the language of which is problematic in and of itself), we do not know;

- a. who ordered Officer Santiago to produce the paperwork
- b. when they ordered him to produce it

- c. the manner in which he was ordered to produce it (via letter, email, in person, through the union, etc.)
- d. how many times they ordered him to produce it
- e. what they ordered him to produce
- f. when he was supposed to produce it by

The emails further do not acknowledge that NSP had already received the records from Mr. Weiss and had known months before that the Wayne charges had been dismissed.

Further complicating the matter is that the language of the emails made it technically impossible for Officer Santiago to comply with the requests, because there were no “court ordered Anger Management sessions” or sessions that he “was required to complete”. Even ignoring the semantics, Officer Santiago testified during the hearing and stated during the interview that he had provided any required paperwork to his union representative to provide to NSP administration, since he was not allowed on-site during his ongoing discipline and had to go through his chain of command.

The fact that an SCPO has to follow his chain of command is confirmed in the NJDOC Standards of Professional Conduct. (Exhibit J-31). While what that exact chain of command was is unclear, Officer Santiago’s testimony concerning this issue was persuasive and logical.

In general, he testified that he provided all requested paperwork to his “PBA rep and he handed it in because due to chain of command I can’t go straight (to Major Kerner).” 2T:130-131. He was not allowed on NJSP grounds, so “everything was either fax or email to my PBA rep and he would—eventually handed it over to SID or Kerner.” 2T:132. He emphasized that that PBA should have given the information to Major Kerner because; “It goes through the chain of command. I talk to the rep and he brings it up to Kerner.” 2T:135.

Officer Santiago also testified that he would not receive direct communication from Major Kerner, but rather, Major Kerner would communicate to the union representative who would then communicate the request to him. 2T:141-142. He further testified that he provided court information from Wayne and Bloomfield as well as the TRO dismissal in addition to the information from Mr. Weiss. 2T:144-145.

The lack of evidence regarding this aspect of the case certainly complicates matters, but as noted, other than the very basic emails and Officer Fiore's hearsay testimony that Major Kerner had ordered Officer Santiago to supply documents, NJSP has produced nothing to support its contentions that Officer Santiago had disobeyed orders to produce materials that were ultimately produced. In fact, the only real competent evidence supplied during the hearing was that, at the very least concerning the anger management records, that Major Kerner's email was inaccurate; that the records had been supplied per an authorization signed by Officer Santiago and that those records were in NSP's possession prior to the sending of the emails.

Given the evidence, I **FIND** that NSP has failed to demonstrate that Officer Santiago "failed to follow direct orders from Major Kerner to produce and provide related documents for anger management sessions to SID investigators". In fact, I **FIND** that the evidence best supports a conclusion that not only did Officer Santiago not "fail to follow orders", but that he in fact supplied the records that were requested by SID (to the extent possible, since at least some of the requested records literally did not exist).

I further **FIND** that NSP has failed to demonstrate that anything Officer Santiago did or failed to do prevented either Officer Fiore or Officer DeMartino from completing their investigation. They were in possession of all available documentation at the time of their written reports and while there were obviously events that took place subsequently (such as Officer Santiago's completion of Ms. Peguero's anger management treatment), there was nothing else that Officer Santiago could have produced which would have assisted them. Following the interview where Officer Santiago explained the "mandated" v. "recommended" conundrum, the only thing preventing them from clarifying the anger management issue was their own (admitted) failure to request the transcripts from Wayne

Municipal Court. And, in fact, Officer DeMartino even specifically testified that the purported lack of court paperwork did not prevent him from completing his investigation;

Q. ...Now, why was receiving this paperwork, this court paperwork important for your investigation from the Major's Office?

A. It was to clarify. It's something that SID has always requested and provided.

Q. Did you need this paperwork to complete your investigation?

A. No.

T1:71

The final aspect of the case concerns NSP's allegation that Officer Santiago is unable to perform his job duties because, per Dr. Cevalasco, he is incapable to possessing an on-duty weapon.

I **FIND** that there are multiple problems were this conclusion, beginning with the fact that the most current report commissioned by NSP found the exact opposite. Instead of accepting Dr. Trapold's conclusion that, after the completion of his anger management classes with Ms. Peguero, Officer Santiago was capable of possessing an on-duty weapon, NSP literally ignored that report and proceeded to discipline him based upon Dr. Cevalasco's updated, yet inaccurate report.

It is also not an exaggeration to state that NSP "literally ignored" Dr. Trapold's report. Not only was it not supplied during the pendency of the litigation (including the filing of the Motion for Summary Decision), it was not proffered during the hearing and it was only supplied to Dr. Cevalasco a week before the hearing in preparation for his testimony.

Not only did I find Dr. Cevalasco's testimony concerning his post-review conclusions to be unconvincing, the fact that his supplemental report was based upon a flawed

investigative report and a telephone call with Officer Fiore also compromised the impact and persuasiveness of his testimony.

It is vital to remember that Dr. Cevasco originally found that Officer Santiago, while clearly not the ideal SCPO, was capable of handling on on-duty weapon;

With regards to on duty weapons access my recommendation is far less definitive. His level of immaturity remains a concern with regards to on duty weapons access as well but to less of a degree. He impressed as being pretty clear about the use of an on duty weapon and the implications of lethal force.

While I do have overall reservations about his ability to adjust to a correctional environment, especially given the nature of his disciplinary history, I see no significant psychological contradictions to his being allowed access to on duty weapons privileges.

(Exhibit J-6).

Dr. Cevasco changed his opinion based upon Officer Santiago's perceived lack of truthfulness;

Q. And they are being made with the assumption that he did actually complete his mandated anger management counseling. Now, inherent in all of your review of this matter was in fact that Santiago had been court ordered to undergo anger management. Is that correct?

A. No, the lynch pin (sic) here is the truthfulness.

T1:174-175.

However, with my conclusion that Officer Santiago was being truthful in his interactions with the investigators and the doctors, the basis for Dr. Cevasco's amended conclusion disappears.

FINDINGS

In reviewing the evidence, I **FIND** that respondent has failed to prove by a preponderance of the credible evidence that Officer Santiago acted in a manner unbecoming of a public employee as alleged in the FNDA. I find that there is insufficient evidence to demonstrate that he “intentionally misstated material facts to SID investigators regarding (the) completion of court mandated sessions”.

I further **FIND** that Officer Santiago did not intentionally misstate anything concerning his anger management treatment. While he may have been unclear or imprecise in his statements, I **FIND** that at no point did he intentionally mislead either the reviewing doctors or the investigators concerning same.

I also **FIND** that respondent has failed to prove by a preponderance of the credible evidence that Officer Santiago “failed to follow direct orders from Major B. Kerner to produce and provide related documents for the anger management to SID investigators” and was therefore insubordinate. I further **FIND** that respondent has failed to document any detail about those orders and has further failed to acknowledge that it had received the information it was seeking, including the anger management treatment and the court dispositions. I further **FIND** that Officer Santiago testified credibly that all documentation was properly supplied per NSP regulations through his union representative.

I also **FIND** that respondent has failed to demonstrate by a preponderance of the credible evidence that Officer Santiago is unable to perform his job duties. Not only do I **FIND** that Dr. Cevalco’s amended opinion as demonstrated in his May 6, 2020 report to be based upon a flawed premise, but I also **FIND** that as of June 14, 2021 (the date of Dr. Trapold’s evaluation), the most recent evaluation performed on respondent’s behalf found that Officer Santiago was capable of carrying an on-duty weapon.

In all, I **FIND** that at no time since the incident has there been a credible, fact-based opinion that Officer Santiago was incapable of carrying an on-duty weapon and I therefore **FIND** that he has been and remains able to perform his duties as an SCPO.

Finally, as to the charge of other sufficient cause, this concerns the violations of Human Resources Bulletin sections, B-10 (inability to perform duties), B-8 (intentional misstatement of material facts), C-9 (insubordination), C-11 (conduct unbecoming) and E-1 (violation of a rule, regulation, policy, procedure or order). (Exhibit J-27). I **FIND** that in addition to no specific rule being cited concerning the alleged violation of section E-1, I also **FIND** that the other allegations were all covered by the allegations of insubordination, inability to perform and conduct unbecoming that are delineated in N.J.A.C. 4A:2-2.3(a)(2), N.J.A.C. 4A:2-2.3(a)(3) and N.J.A.C. 4A:2-2.3(a)(6) for which Officer Santiago has been exonerated.

Based on the above, I therefore **CONCLUDE** that Officer Santiago is not guilty of the charges brought against him as delineated in the March 14, 2022 FNDA.

CONCLUSION

In coming to my conclusion, it must be re-emphasized that this is not a “fitness for duty” hearing, nor do I have to conclude that Sergio Santiago is an exemplary SCPO. In fact, each of the examining doctors have expressed doubts about his overall competency. However, this hearing concerned a specific FNDA that made specific charges; conduct unbecoming, inability to perform, insubordination and other sufficient cause (which refers to violations of NSP policies and procedures).

Given the totality of the evidence, I **CONCLUDE** that respondent has failed to prove by a preponderance of the credible evidence that Officer Santiago is guilty of any of the charges brought against him and that its decision should be overturned.

ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent’s findings of guilt made against petitioner, Sergio Santiago, as delineated in the March 14, 2022 FNDA be and are hereby **REVERSED**.

It is further **ORDERED** that the termination of Sergio Santiago’s employment be

and is hereby **REVERSED** and that he shall be **REINSTATED** to his position as an SCPO with all requisite back pay and benefits with an effective date of March 14, 2022.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

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

March 6, 2023

DATE



MATTHEW G. MILLER, ALJ

Date Received at Agency:

March 6, 2023

Date Mailed to Parties:

March 6, 2023

MGM/sej

APPENDIX

EXHIBITS

COURT:

- C-1 November 4, 2022 Order
- C-2 November 8, 2021 PNDA

JOINT:

- J-1 May 7, 2020 PNDA
- J-2 March 14, 2020 FNDA
- J-6 January 30, 2020 report of Richard P. Cevalasco, Ed.D.
- J-7 May 6, 2020 report of Richard P. Cevalasco, Ed.D.
- J-8 Records from the Center of Revitalizing Psychiatry, P.C.
- J-9 Letters from the Center of Revitalizing Psychiatry, P.C.
- J-12 February 4, 2019 report of James Tscherne, Psy.D.
- J-13 Curriculum vitae of Richard P. Cevalasco, Psy.D.
- J-14 Senior Correctional Police Officer Job Specifications
- J-21 New Jersey Attorney General Law Enforcement Directive No. 2000-4
- J-22 Northern State Prison Internal Management Procedure (Departmentally Assigned Firearms)
- J-23 Northern State Prison Internal Management Procedure (Mandatory Firearms Qualifications)
- J-24 Northern State Prison Internal Management Procedure (Mandatory Firearms Re-qualification)

- J-25 Northern State Prison Internal Management Procedure (Use of Firearms While On-Duty)
- J-26 Department of Corrections Human Resources Bulletin 84-19
- J-27 Department of Corrections Human Resources Bulletin 84-17
- J-28 Department of Corrections Employee Handbook of Information and Rules
- J-29 Department of Corrections Code of Ethics
- J-30 Department of Corrections Standards of Professional Conduct Policy
- J-31 Department of Corrections Personnel Rules and Regulations
- J-33A Audio interview of respondent
- J-33A Video interview of respondent

FOR RESPONDENT:

- R-3 February 8, 2019 DOC Investigation Report
- R-5 October 23, 2020 DOC Investigation Report
- R-10 March 24, 2020 email from Major Kerner to Paul Fiore and David Calderon
- R-11 February 18, 2020 email from Major Kerner to Paul Fiore, David Calderon, Gary Rivera
- R-16 Petitioner work history
- R-H New Jersey Civil Service Commission job specification for a Senior Correctional Police Officer
- R-I August 2, 2019 Northern State Prison Level III Internal Management Procedure – Departmentally Assigned Firearms
- R-J August 31, 2021 Northern State Prison Level III Internal Management Procedure – Mandatory Firearms Qualifications