STATE OF NEW JERSEY

In the Matter of Thomas Riordan,
Vineland, Police Department

CSC Docket No. 2023-979
OAL Docket No. CSR 10142-22

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUNE 14, 2024

The appeal of Thomas Riordan, Police Lieutenant, Vineland, Police Department, removal, effective November 15, 2021, on charges, was heard by Administrative Law Judge Tama B. Hughes (ALJ), who rendered her initial decision on May 17, 2024. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and reply, the Civil Service Commission (Commission), at its meeting on June 12, 2024, adopted the ALJ's Findings of Facts and Conclusions of Law and her recommendation to reverse the removal.

Upon its *de novo* review of the ALJ's thorough and well-reasoned initial decision as well as the entire record, including the exceptions and reply filed, which do not require extensive comment, the Commission agrees with the ALJ's determinations regarding the charges. In this regard, the ALJ properly dismissed such charges on either procedural bases or based on her assessment of the credibility of the witnesses and documentary evidence in the record. While the appointing authority, in its exceptions, attempts to argue that it was justified to take disciplinary action based on the facts in the record, and that the ALJ improperly dismissed the charges finding that it had not met its burden of proof, it has not demonstrated in any way that the ALJ's eminently detailed findings and conclusions were arbitrary, capricious, unreasonable or not based on the credible evidence in the record. In this regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.,* 149 *N.J.* 108 (1997). "[T]rial

courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See also, In re Taylor,* 158 *N.J.* 644 (1999) (quoting *State v. Locurto,* 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra).* The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri u. Public Employees Retirement System,* 368 *N.J. Super.* 527 (App. Div. 2004). In this matter, the exceptions filed are not persuasive in demonstrating that the ALJ's credibility determinations, or her 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.

Since the removal has been reversed, the appellant is entitled to be reinstated. Normally, the appellant would also be entitled to mitigated back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10 from the initial date of separation without pay until the date of actual reinstatement. However, there is information in the record indicating that the appellant was reinstated to pay status pursuant to *N.J.S.A.* 40A:14-201. As such, it is not clear from the record as to the date of that action. Assuming the accuracy of this information, the appellant, therefore, will have already received any pay that he would be entitled to from the date of that action forward until his reinstatement, and, as he was in pay status, he should also receive any concomitant benefits and seniority for that timeframe. *See also, N.J.A.C.* 4A:2-2.10(d)5. For any period from the date of first separation that he was not in pay status, he is entitled to mitigated back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10. Additionally, as he has prevailed in this matter, he is entitled to reasonable counsel fees per *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,* upon receipt of this decision, the appointing authority shall immediately reinstate the appellant.

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 appellant's appeal.

The Commission orders that the appellant be immediately reinstated to his permanent position and receive back pay, benefits, and seniority from the first date of separation for any period he was not in pay status pursuant to *N.J.S.A.* 40A:14-201. 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 for any period he was not in pay status 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 12TH DAY OF JUNE, 2024

Allison Chris Myers

Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

CORRECTED
INITIAL DECISION
OAL DKT. NO. CSR 10142-22
AGENCY DKT. NO. N/A
2023-979

IN THE MATTER OF THOMAS RIORDAN,
CITY OF VINELAND.

Christopher St. John, Esq., for appellant, Thomas Riordan (Agre & St. John, attorneys)

William F. Cook, Esq., for the respondent, City of Vineland (Brown & Connery, LLP, attorneys)

Record Closed: April 19, 2024 Decided: May 17, 2024

BEFORE **TAMA B. HUGHES**, ALJ:

STATEMENT OF THE CASE

Thomas Riordan (Riordan or appellant), a lieutenant with the City of Vineland (City) Police Department (VPD or respondent), challenges the sustained charges identified in the October 21, 2022, Final Notice of Disciplinary Action (FNDA) and the discipline imposed of removal.

PROCEDURAL HISTORY

On November 1, 2021, appellant appealed the respondent's FNDA with the Civil Service Commission (CSC) and the Office of Administrative Law (OAL) pursuant to N.J.S.A. 40A:14-202(d). The appeal was perfected on November 9, 2022, and thereafter assigned to the Honorable Elaine B. Frick, ALJ to be scheduled for a hearing. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. An initial call was held on December 16, 2022, at which time hearing dates were set for January 26, 2023, January 31, 2023, March 13, 2023, and March 20, 2023. See January 17, 2023, Prehearing Order.

On December 16, 2022, an application was made to consolidate the instant matter with two other matters involving two separate appellants. See December 16, 2022, Letter by Colin G. Bell, Esq. This application was denied on January 11, 2023. See January 11, 2023, Order.

On the first hearing date of January 26, 2023, the respondent filed an application to recuse Judge Frick. The hearing was adjourned pending receipt of written submissions. Thereafter, on January 31, 2023, Judge Frick issued an Order recusing herself. See January 31, 2023, Order on Motion to Recuse.

The matter was reassigned to the Honorable Tama B. Hughes, ALJ, and a status conference was held on February 6, 2023, at which time new hearing dates were set for March 1, 2023, April 11, 2023, April 12, 2023, April 13, 2023, May 15, 2023, and May 16, 2023.

The hearing commenced on March 1, 2023, however, the April 11, 2023, and April 12, 2023, hearing dates were adjourned by the Tribunal. The next hearing dates took place on April 13, 2023, May 10, 2023, and May 11, 2023.

On May 12, 2023, counsel for the parties jointly requested an adjournment of the May 15, 2023, and May 16, 2023, hearing dates due to witness unavailability. New

hearing dates were subsequently set for July 27, 2023, August 1, 2023, and August 2, 2023.[1]

On June 13, 2023, appellant filed an application for an Order to return to paid status. By Order dated July 11, 2023, the application was granted. See July 11, 2023, Letter Order. On July 26, 2023, respondent, with the consent of the appellant, sought an adjournment of the July 2023 and August 2023 hearing dates to allow opportunity to file a motion to amend the FNDA.

On August 23, 2023, respondent filed a Motion for Leave to Amend the FNDA. The motion was denied on November 22, 2023. See November 2023 Order Denying Motion for Leave to Amend the Final Notice of Disciplinary Action. New hearing dates were subsequently set for January 9, 2024, January 10, 2024, January 25, 2024, and March 21, 2024. At the request of the appellant, with respondent's consent, the January 9, 2024, hearing date was adjourned.

On January 10, 2024, respondent rested, at which time the appellant sought leave to file a motion for a directed verdict in accordance with R. 4:37-2(b).[2] Moving papers and opposition were received on January 17, 2024, and January 24, 2024, respectively, and oral argument on the motion was heard on February 27, 2024, at which time the record closed. The matter was reopened for outstanding discovery and then subsequently closed on April 19, 2024.

LEGAL ANALYSIS

Appellant seeks to dismiss this matter pursuant to New Jersey Court Rule R. 4:37-2(b), which states in pertinent part:

> (b) At Trial—Generally. After having completed the presentation of the evidence on all matters other than the

[1] Several dates were offered to the parties for May, June, and July, however, due to both counsels' schedules, the earliest dates of availability were at the end of July 2023.

[2] In the absence of a Rule under the Uniform Administrative Procedure Rules, "a judge may proceed in accordance with the New Jersey Court Rules, provided the rules are compatible with these purposes." See N.J.A.C. 1:1-1.3(a).

> matter of damages (if that is an issue), the plaintiff shall so announce to the court, and thereupon the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal of the action or of any claim on the ground that upon the facts and upon the law the plaintiff has shown no right to relief. Whether the action is tried with or without a jury, such motion shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor.

The test, as set forth in R. 4:37-2(b), is whether:

> "the evidence, together with the legitimate inferences therefrom, could sustain a judgment in favor" of the party opposing the motion, i.e., if, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied. Bozza v. Vornado, Inc., 42 N.J. 355 (1964); Bell v. Eastern Beef Co., 42 N.J. 126 (1964); Franklin Discount Co. v. Ford, 27 N.J. 473, 490 (1958). The point is that the judicial function here is quite a mechanical one. The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion.
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> [Dolson v. Anastasia, 55 N.J. 2 (1969).]

The sustained charges in the FNDA are as follows:

Count 1 Violation of N.J.A.C. 4A:2-2.3(a)(12), Other Sufficient Cause, for improper employment practices—retaliation and/or disparate treatment in violation of New Jersey and Federal Employment Laws

Count 2 Violation of N.J.A.C. 4A:2-2.3(a)(9) - Discrimination that affects equal employment opportunity

Count 3 Violation of N.J.A.C. 4A:2-2.3(a)(6), – Conduct Unbecoming

Count 4 Common Law Claim, – Unbecoming Conduct

The incidents giving rise to the charges were the same for all counts and stated in pertinent part:

> 1. On or about November 30, 2018, PBA Local 266, which represents members of the Vineland Police Department ("VPD"), provided the City of Vineland ("City" or "Vineland") with the draft of a civil lawsuit that the PBA intended to file in New Jersey Superior Court on behalf of its members ("Draft Complaint")
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> 2. In response to the Draft Complaint, the City commissioned an outside employment investigation into these allegations.
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> 3. As detailed in the extensive employment investigation, Thomas Riordan, through his actions or omissions, and through the use of his authority and power, retaliated against and/or disparately treated persons who complained of wrongdoing, or who were perceived as associated with those who complained of wrongdoing. Riordan also aided and abetted an environment whereby such intimidation and/or punishment would occur.
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> 4. As an example, Sgt. Riordan performed a willfully sham investigation of an employee complaint relating to an allegedly unconstitutional and illegal order by Captain Adam Austino to arrest of [T.C.] on June 10, 2017. The investigation report rubbert-stamped anan exoneration of Captain Austino, even though Austino was never even interviewed, all in the service of Chief Beu's ongoing effort and pattern of abusive conduct, protecting his police allies and attempting to damage those officers who were not so allied. This complicit conduct on the part of Sgt. Riordan extended to an intentionally false conclusion that Sgt. Pacitto and Lt. Landi had lied in their critical assessments of Captain Austino's order for the arrest of [T.C.]. Moreover, Sgt. Riordan went so far as to ignore Chief Beu's rejection of Riordan's effort to implicate Landi. Whereas Beu had ordered that any potential charges against Lt. Landi be administratively closed, Riordan, against that order, entered a final disposition in the IA file of "sustained" as to Landi, for a violation of a "performance of duty" cause for disciplinary action.
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> 5. In another example, in or about March 2020, Lt. Chris Landi of Internal Affairs was conducting a review of new AG "Brady" Guidelines, as they might related to VPD officers who had been the subject of sustained untruthfulness charges.

Landi discovered that Officer John Gabrielle had in his record a sustained charge of untruthfulness and so advised Officer Gabrielle. Gabrielle filed a CEPA complaint, asserting that the untruthfulness charge stemmed from an investigation in which Internal Affairs Policies and Procedures had not been followed, he had never been notified that he was the target of an untruthfulness charge and he had never been advised that an allegation of untruthfulness had been sustained against him. The underlying matter involved the application of policies concerning Field Training Officers (FTOs) with Gabrielle having complained that FTOs were volunteers and need not remain in that position unless they are willing to do so voluntarily. An IA investigation was commenced by Sgt. Riordan into Gabrielle's FTO complaint, which then led to collateral review of Lt. Austino's concurrent allegation, vehemently voiced to Riordan, that Gabrielle's complaint was aimed at harassing and discrediting Austino as part of a union retaliation against Austino. There was also a collateral untruthfulness investigation pursued by Riordan against Gabrielle concerning Gabrielle's recollection that he had sent an email to Lt. McCann requesting that Gabrielle not be kept on as a FTO. Motivated by Lt. Austino's malicious and entirely unsupported claim that Gabriell was acting in concert with the union, Sgt. Riordan with equal maliciousness, having "exonerated" Austino, wrote up a disposition of "Untruthfulness/Sustained" and allowed that to be a matter of record against Officer Gabrielle (with the potential of there being serious career "Brady" implications for Gabrielle) despite the Action Taken being recorded as "Per Chief Beu no discipline issued."

6. In another example, Riordan engaged in retaliatory actions as to former Internal Affairs Sergeant Leonard Wolf, targeting Wolf because Wolf was perceived as unsupportive of Beu, Finley, and Austino, including with respect to their efforts to conduct a private investigation of former Chief Timothy Codispoti over VPD's long-time maintenance of a "Soda Fund" which had contained proceeds from a soda machine. Well after the Soda Fund events had been put to rest, with the Chief Beu having taken charge following the retirement of Chief Codispoti, Sgt. Riordan investigated Wolf and concluded, utterly without factual foundation, that Sgt. Wolf had neglected his duty by not conducting a VPD IA investigation into the Soda Fund matter. The report of the "investigation" by Riordan was effectively an attack on Wolf and lacked any facts to support Riordan's conclusions and recommendations.

7. In yet another example, on February 5, 2021 VPD IA Lt. Chris Landi received a request from Lt. Craig Scarpa (Hereinafter "Scarpa") to allow Scarpa to review his personal Internal Affairs file. This was after Scarpa had been informed that he had been under a 2018 IA investigation for insurance fraud. Lt. Landi determined that no such investigation was referenced in Scarpa's IA file and there was no notification to Scarpa of any such investigation. Upon further review, Lt. Landi found an IA spreadsheet entry indicating that Lt, Landi's predecessor in IA, Riordan, was the complainant in a matter where Scarpa was the subject of a misconduct investigation noted as "other criminal violation-insurance fraud." This related to a workers compensation claim of Scarpa having sustained personal injuries arising out of his having participated in a deadly force incident. Rather than having conducted a thorough and impartial investigation, Riordan put together a false and entirely speculative scenario that Scarpa was faking his complaints of residual health issues resulting from the lethal force incident. Without citing any reliable evidence and asserting his own subjective, biased "suspicions" of "truthfulness" issues (acting under instructions and pressure from Executive Capt. Austino and from former Chief Beu) Riordan attempted to have the Cumberland County Prosecutor's Office (CCPO) take the matter up for criminal charges. After the CCPO requested multiple times from Riordan, documentary information to sustain Riordan's purely speculative theories, and receiving none, the CCPO issued a Declination Letter dated November 2, 2018, declining to prosecute Scarpa for insurance fraud. Thereafter, in an effort to justify his entirely inappropriate actions, Riordan prepared, but failed to submit to Scarpa, a report under the above noted IA case number, which he submitted to the CCPO Professional Standards Unit, with the CCPO taking no action thereon. Lt. Riordan's conduct in pursuing Scarpa with potential criminal charges arising out of Scarp's absolute right to seek Worker's Compensation benefits for harm he incurred in the line of duty, is a blatant display of dereliction of duty, employee misconduct, conduct unbecoming a public employee and retaliation against Scarpa for assertion of his right as a public employee.

8. The actions of Riordan as identified above, as well as those actions of Riordan as set forth in Mr. Gelfand's 2021 "REPORT OF INVESTIGATION IN THE MATTER OF VINELAND WORKPLACE HARASSMENT AND RETALIATION INVESTIGATION," demonstrate retaliation, disparate treatment, and/or the aiding and abetting of same as to the PBA, those bringing good faith concerns to the attention of management, and those perceived as associated

with such complainants, thus warranting serious remedial action. Such conduct creates an intolerable and unsustainable risk of civil liability under anti-discrimination and anti-retaliation laws, policies, and procedures to wit:

a. The New Jersey Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1 *et seq.*;

b. The New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 *et seq.*

c. The New Jersey Civil Rights Act ("NJCRA"), N.J.S.A. 10:6-1 *et seq.*

d. The New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 *et seq.*;

e. 42 U.S.C. Sec. 1983;

f. F. City of Vineland Policy Nos. 1151 ("Whistleblower Act") and 1152 ("Employee Complaints"); and

g. Similar such laws, regulations, and policies as set forth in Mr. Gelfand's 2021 Report. [3]

Count 1. Violation of N.J.A.C. 4A:2-2.3(a)(12), Other Sufficient Cause, for improper employment practices—retaliation and/or disparate treatment in violation of New Jersey and Federal Employment Laws.

Other sufficient cause is a catchall provision of the code for why an employee may be subject to major discipline. It has been interpreted to mean that a finding of misconduct deserving of discipline need not "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 39-40 (App. Div. 1992) (citing references omitted).

The respondent has charged the appellant with other sufficient cause under the premise that appellant's actions "clearly implicate well-settled principles governing the

[3] Transcribed verbatim. The typographical errors were in the FNDA.

protection of employees who bring good faith complaints forward to management," (Respondent's Brief at 6.) Respondent further contends that it is accountable for appellant's actions and equally accountable to ensure that those who make a good faith complaint are not improperly treated.

To establish a prima facie claim under the New Jersey Conscientious Employee Protection Act (CEPA), pursuant to N.J.S.A. 34:19-3, a plaintiff must demonstrate that:

> (1) he or she reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) he or she performed a "whistle-blowing" activity described in N.J.S.A. 34:19-3c; (3) an adverse employment action was taken against him or her; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action. Kolb v. Burns, 320 N.J. Super. 467, 476, 727 A.2d 525, 530 (App. Div. 1999) (citation omitted); see also Mosley v. Femina Fashions, Inc., 356 N.J. Super. 118, 127, 811 A.2d 910, 915–16 (App. Div. 2002), certif. denied, 176 N.J. 279, 822 A.2d 609 (2003).
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> [Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003).]

If a plaintiff establishes a prima facie case, the defendant must advance a legitimate, non-retaliatory reason for the adverse employment action. Klein v. Univ. of Med. & Dentistry of New Jersey, 377 N.J. Super. 28, 38–39 (App. Div. 2005); Kolb, 320 N.J. Super. at 477. If the defendant meets this minimal burden, plaintiff must "raise a genuine issue of material fact regarding whether the employer's proffered explanation is pretextual or whether, the 'retaliatory discrimination was more likely than not a determinative factor in the decision.'" Kolb, 320 N.J. Super. at 477 (quoting Bowles v. City of Camden, 993 F. Supp. 255, 262 (D.N.J. 1998)).

Similarly, it has long been the law in New Jersey that the principles governing employer liability under the New Jersey Law Against Discrimination apply with equal force to CEPA. See Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 417–418;

Lehmann v. Toys 'R' Us, 132 N.J. 587 at 623 (setting forth standards for employer liability under the LAD). In protecting a multitude of classes of persons, LAD provides:

> It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:
>
> a. for an employer because of the race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy or breastfeeding, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer, to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment . . .
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> [N.J.S.A. 10:5-12(a).]

LAD is very clear on the variety of protected classes enumerated under the statute, none of which identify "union membership" as a protected class. The New Jersey Employer-Employee Relations Act, however, does state that ". . . public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity," and that public employers are prohibited from:

> 1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by [the New Jersey Employer-Employee Relations Act].
>
> 2. Dominating or interfering with the formation, existence or administration of any employee organization.
>
> . . . .
>
> 4. Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit,

> petition or complaint or given any information or testimony under this act.
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> [N.J.S.A. 34:13A-5.3; N.J.S.A. 34:13A-5.4(a)(1), (2), and (4).]

Pursuant to City of Vineland Policy 1151 (Whistleblower Act), and Policy 1152 (Employee Complaints), respondent maintains its own anti-retaliation and employee complaint policies. The Whistleblower Act Policy provides in pertinent part:

> An employee has the right under the Whistleblower Act, to complain about any activity, policy or practice that the employee reasonably believes is in violation of a law, rule or regulation promulgated pursuant to law without fear of retaliation or reprisal . . .
>
> The City shall not take any retaliatory action or tolerate any reprisal against an employee for any of the following:
>
> - Disclosing or threatening to disclose to a supervisor, Department Director, the Business Administrator, other official or to a public body, as defined by the Whistleblower Act an activity, policy or practice that the employee reasonably believes is in violation of a law, a rule, or regulation promulgated pursuant to law;
>
> - Providing information to, or testifying before any public body conducting an investigation, hearing, an inquiry into any violation of law, or a rule or regulation promulgated pursuant to law; or
>
> - Objecting to, or refusing to participate in any activity, policy or practice that the employee reasonably believes is:
>
> a. A violation of a law, rule or regulation promulgated pursuant to law;
>
> b. Fraudulent or criminal . . .
>
> [R-26.]

The Employee Complaints Policy provides in pertinent part:

> Employees who observe actions they believe to constitute harassment, sexual harassment or any other workplace wrongdoing should immediately report the matter to their supervisor, or, if they prefer, or do not think that the matter can be discussed with their supervisor, they should contact the Personnel Director or Business Administrator. . . . All reports of harassment, sexual harassment or other wrongdoing will be promptly investigated by a person who is not involved in the alleged harassment or wrongdoing . . .
>
> No employee will be penalized in any way for reporting a complaint made in good-faith . . .The complaining employee will be notified of a decision at the conclusion of the investigation within a reasonable time from the date of the report [of] an incident.
>
> [R-26.]

Respondent contends that it has more than met its burden of proof (prima facie) to overcome the appellant's motion for a directed verdict as it relates to all the counts under the FNDA based upon the testimonial and documentary evidence presented in this matter.

The FNDA cites several specific incidents—the T.C. matter, the Soda Fund investigation, and the Gabrielle and Scarpa incidents. The FNDA also includes, as a catchall, Paragraph 8, which states: "The actions of Riordan as identified above, as well as those actions of Riordan as set forth in Mr. Gelfand's (Gelfand) 2021 'REPORT OF INVESTIGATION IN THE MATTER OF VINELAND WORKPLACE HARASSMENT AND RETALIATION INVESTIGATION . . .'" [4] (See FNDA; R-1.)

Starting with Paragraph 8, it's apparent that this paragraph is a catchall paragraph that encompasses everything that Gelfand reviewed and concluded in his 211-page report. By regulation and caselaw, such a catchall provision is improper, as an appellant

[4] Throughout this opinion, individuals who have been identified more than once have been referred to by their last name. This is not meant to be disrespectful rather done to streamline summaries of the voluminous documents and testimony presented in this matter.

must be provided a notice that "set[s] forth the charges and statement of facts supporting the charges (specifications), and afforded the opportunity for a hearing prior to imposition of major discipline." N.J.A.C. 4A:2-2.5(a). This is consistent with my ruling on the respondent's motion for leave to amend the FNDA.[5]

The controlling case on this issue is Hammond v. Monmouth Cnty. Sheriff's Dept., 317 N.J. Super. 199, 206 (App. Div. 1999), where the court held:

> Manifestly, an appeal to the Merit System Board is from the final notice of disciplinary action issued by the appointing authority. The Civil Service Act mandates review only of the adverse decision of the appointing authority as stated in the final notice of disciplinary action, since that is what the employee appeals to the Board. To hold that the appointing authority, on appeal, is entitled to broaden the charges as determined on the local level, would be to surcharge the right to appeal with a cost which violates any decent sense of due process or fair play. [citations omitted.]

The sentiment of Hammond is consistent with that found in West New York v. Bock, 38 N.J. 500, 522 (1962), where our New Jersey Supreme Court stated:

> Properly stated charges are a sine qua non of a valid disciplinary proceeding. It is elementary that an employee cannot legally be tried or found guilty on charges of which he has not been given plain notice by the appointing authority. The de novo hearing on the administrative appeal is limited to the charges made below. [citations omitted.]

With the above in mind, one of the first incidents that respondent cites in support of its position that a prima facie case has been presented is the mobile video recorder (MVR) incident. (Respondent's Brief at 10–11). It is respondent's position that the appellant participated in a concerted effort to avoid any serious investigation of the MVR matter by never interviewing Pacitto or Armstrong, both of whom respondent identified as CEPA-protected complainants, due to their involvement in reporting the MVR matter to the prosecutor's office for investigation. Respondent further notes that Austino was never

[5] See the November 22, 2023, Order Denying Motion For Leave To Amend The Final Notice of Disciplinary Action which is attached hereto and incorporated herein.

interviewed, nor were Pacitto and Armstrong, and nor was the Police Benevolent Association (PBA) notified of the outcome of the investigation.

Because the CEPA-protected MVR complaints were not properly investigated under respondent's supervision, the respondent contends that it has satisfied its prima facie burden to show that there were improper employment practices on the appellant's part as well as violations of Vineland City Policies 1151 and 1152.

As noted above, these alleged violations were not specifically identified in the FNDA and appear to fall within Paragraph 8—the catchall provision of the FNDA—and fail to provide "plain notice" to the appellant of the incidents giving rise to the charges. As such, I **FIND** that as a matter of law, Paragraph 8 of the FNDA as it relates to "those actions of Riordan as set forth in Mr. Gelfand's 2021 'REPORT OF INVESTIGATION IN THE MATTER OF VINELAND WORKPLACE HARASSMENT AND RETALIATION INVESTIGATION'" that are not specifically identified in the FNDA, are ripe for dismissal pursuant to Rule R. 4:37-2(b) in their entirety.

For the foregoing reasons, I **CONCLUDE** that the allegations as set forth in Paragraph 8 relating to actions identified by Gelfand in his report against the appellant that were not specifically identified in the FNDA, should be **DISMISSED**.

FNDA – Count 1, Paragraph 4: T.C. Arrest

Through this count, respondent asserts:

- Appellant performed a "sham" investigation of an employee complaint relating to an allegedly unconstitutional and illegal order by Austino to arrest T.C. on June 10, 2017.
- The investigation report "rubber-stamped" an exoneration of Austino, even though Austino was never interviewed by the appellant.
- This was all done in the service of "Chief Beu's ongoing effort and pattern of abusive conduct, protecting his police allies and attempting to damage those officers who were not so allied."

- The "complicit conduct" by the appellant extended to an intentionally false conclusion that Pacitto and Landi lied in their critical assessments of Austino's order for the arrest of T.C.

- Appellant ignored Chief Beu's (Beu) rejection of appellant's recommended charges and ordered that all potential charges against Landi be dismissed. Instead, Riordan entered a final disposition in the Internal Affairs (IA) file of "sustained" as to Landi, for a violation of a "performance of duty" cause for disciplinary action.

As it relates to this count, respondent asserts that the three officers (Pacitto, Landi, and Shaw), who were involved in the review/preparation and/or filing of a critical incident sheet (CIS) against Austino that raised concerns over the legitimacy of T.C.'s arrest, were CEPA-protected complainants. With regard to Landi, respondent argues that it has unequivocally demonstrated actual retaliation by the appellant, and therefore a prima facie case, based upon appellant's actions in conducting an investigation without notifying Landi that he was a target; making a finding of untruthfulness; and then, in contravention of Beu's order to dismiss all of the charges, entering a disposition of "sustained" for violation of performance of duty.

Respondent also contends that Pacitto and Shaw were similarly treated and were CEPA-protected complainants. Pacitto filed the CIS and never heard anything after that. He was never interviewed or given an update or a disposition. The same with Shaw. He became a collateral target under Lieutenant Matt Finley's (Finley) investigation yet was never notified. It was not until sometime later that they learned that they were also targets in the appellant's investigation.

It is the respondent's position that actual retaliation is not required for the City to intervene in a matter. The fact that the appellant conducted an "untruthfulness investigation in secret against CEPA complainants is a major CEPA liability." (Respondent's Brief at 19.)

Appellant points out that Finley conducted the initial IA investigation into T.C.'s arrest when the CIS was filed against Austino. In his report, he determined that Landi, Shaw, and Pacitto conspired together to fabricate the CIS against Austino, noting that Pacitto filed the CIS after conducting a limited investigation into the incident and Landi,

who was present at the scene and made statements in support of T.C.'s arrest at the time, then reversed his opinion when he was with Pacitto and Shaw.

Appellant further points out in his brief, that he was ordered by Beu to conduct a review of Finley's investigation and made it abundantly clear in his report, that he was tasked with reviewing Finley's investigation to support or refute his findings—not to conduct an entirely new or different investigation. (R-41.) In so doing, he disagreed with Finley's findings that Pacitto, Shaw, and Landi conspired with one another to fabricate the writeup. He did find that Pacitto violated the rules and regulations by not seeking clarification from Austino about his order to arrest T.C. He also recommended charges of untruthfulness for Landi based upon Finley's investigation, Landi's statements to Finley, and Landi's failure to perform duties.

Beu disagreed with his findings as to Pacitto and the untruthfulness charge against Landi but did concur with the recommended charge of failure to perform his duty. (R-41) However, Beu also ordered that the charge against Landi—performance of duty—be administratively closed. Appellant acknowledges that while Beu's decision was properly documented in the report, it was not properly documented on the disposition page.

Appellant also noted that while Landi thought he had been retaliated against because of the findings of untruthfulness, he could not point to any other instances of retaliation. Landi also acknowledged that the appellant had exonerated him in another IA investigation and that he was promoted to lieutenant under Chief Beu's administration.

The following facts are unrefuted, and therefore I **FIND** them as **FACT**:

- On June 10, 2017, VPD was dispatched to the scene of a fight involving three subjects. Among the officers who were present at the scene were Austino, Officer Michael Dennis (Dennis), and Landi.

- T.C. was present at the scene and was one of the individuals detained at the time under the belief that he may have been one of the subjects involved in the fight.

- The entire time that T.C. was detained and even after he was told that he was free to leave, he was uncooperative, belligerent, and backtalking the officers.

- When it was determined that T.C. was not involved in the incident, he was told several times that he was free to go. As T.C. began walking away from the scene, he yelled over his shoulder, "Fuck you, you bitch-ass cops," after which Austino gave the order to arrest T.C. for disorderly conduct.

- Dennis wrote up the complaint and the incident report on T.C. Prior to submission, he asked his supervisor, Pacitto, to review the same. Pacitto disagreed with the charge, believing that the proper charge should have been obstruction.

- Pacitto discussed the charge with Landi and Shaw.

- Pacitto filed a CIS against Austino on June 13, 2017, stating that after discussing the matter with Landi and Shaw, they all believed that the charge and the arrest did not coincide with what happened at the scene.

- Finley conducted the IA investigation into the matter. (R-41.) While there is no date on the report, it appears that it was finalized either late 2017 or early 2018. No evidence was submitted in the record that Landi, Shaw, and Pacitto were notified that they had become collateral targets under the investigation.

- Among other findings, Finley determined:

> It appears to this officer that Sgt. Pacitto did not do his due diligence in reviewing of the videos, but it appears that his motives are questionable and a deliberate attack on Captain Austino and his authority. It further appears that Landi, Shaw and Pacitto conspired together to fabricate this write up, while there was no complaint filed by the arrestee [T.C.], or by any of the involved officers. Pacitto in reviewing the incident made

> a determination based on limited and insufficient investigation, Landi, who was at the scene and made statements in support of actions at the scene, then reversed his opinion during the forum by the three (3) Sergeants and cannot support his agreement with his reversal when shown video evidence of facts and statements captured at the scene. Shaw's opinion and involvement is unknown for relevance except that he has an on-going documented issue with Police administration due to his actions within the last eighteen (18) months.
>
> Captain Austino exonerated of all wrongdoing, Chief Beu to decide on collateral issues by Sergeants Pacitto, Shaw and Landi, including but not limited to false information and reporting by filing said critical incident and then Landi providing false and contradictory statements to actual video evidence.
>
> [R-41.]

- After Finley submitted his findings to Beu, Riordan was requested to review Finley's investigation. (R-41.) In the first paragraph of appellant's report, under "purpose," appellant states:

> Chief Beu requested that I review Captain Finley's investigation with the intention to support or refute his findings so that he could make an informed decision on what, if any, disciplinary action should be taken. It is not the intention of this document to redo or supersede Captain Finley's administrative investigation.

- Riordan identified several collateral issues of violations of certain rules and regulations from General Order 2014-012 as to Landi, Pacitto, and his basis for such findings, which were not addressed by Finley in his report. These included:

  - 3:1.1 Performance of Duty (Landi)
  - 3:3.1 Question regarding Orders
  - 3:3.5 Reports of Unlawful or Improper Orders (Pacitto, Landi)
  - 3:3.6 Criticism of Official Acts or Orders
  - 3:13.5 Truthfulness (Landi)

- Riordan disagreed with Finley's findings that Pacitto, Shaw, and Landi conspired together to fabricate the writeup and that it was a deliberate attack on Austino and his authority. He agreed, however, that Austino should be exonerated.

- Riordan did not notify Landi, Shaw, or Pacitto that they had been or were continuing to be collateral targets of the CIS filed against Austino.

- Upon review of appellant's supplement to Finley's report, Beu ordered that Austino be exonerated and that there was insufficient evidence to warrant disciplinary action against Pacitto. Beu further determined that the allegation of untruthfulness was unfounded but did find that Landi failed to perform his duties as a supervisor (Rules and Regulations 3:1.1); however, due to the delay in bringing the charges, Beu ordered that any potential charges against Landi be administratively closed.

- On the disposition sheet, Riordan marked the disposition for Austino as "exonerated," the disposition for Pacitto as "unfounded," and the disposition for Landi as "Sustained Performance of Duty" and action taken as "Counseled." (R-41.)

In addition to the above findings of fact, testimony as it relates to the T.C. arrest was heard from both Pacitto and Landi. Shaw did not testify. Gelfand also testified about his findings and conclusions as to the validity of the arrest of T.C. and his take on both Finley's investigation and appellant's review of that investigation, and his opinion that Beu, Austino, Finley, and to some extent Riordan conspired with one another to retaliate against Landi in the form of an unobjective IA investigation which did not comply with the Internal Affairs Policies and Procedures (IAPP).[6] (R-1 at 141–147.)

[6] Throughout his analysis of the T.C. matter, and in his report as a whole, Gelfand repeatedly inserted negative inflammatory commentary, conclusions, and/or opinions about Beu, Finley, Austino, and Riordan, that, whether by design or not, had the potential to bias the reader. As such, many times it was difficult to draw reasonable legitimate inferences from some of Gelfand's report findings and/or conclusions.

On cross-examination, Gelfand stated that he believed that there was a pattern of harassment and retaliation by Beu, Austino, and Finley, but not Riordan. He also acknowledged that the VPD had a history of inefficiencies in their application of the IAPP process—even prior to Beu becoming the chief—and that the CCPO had to come in several times to conduct audits of the VPD IA processes.

Pacitto Testimony

In review of Pacitto's testimony as it relates to the T.C. matter, he stated that he has been with the VPD since 2006 and has worked his way up the ranks over the years. In 2023, he was promoted to the rank of captain. He is an active member of the PBA, and since 2017, he has been the PBA's president.

In or around June 2017, he was promoted to the rank of sergeant. As part of his responsibilities, he reviewed officers' reports and supporting documentation for accuracy—both in substance and form. On June 13, 2017, Dennis, one of his squad officers, asked him to review his report pertaining to the arrest of T.C. who had been charged with disorderly conduct. In review of Dennis' report, he became concerned that there was nothing illegal about the alleged conduct. When he questioned Dennis why the arrest was made, he was informed that Austino had ordered the arrest. He rejected Dennis' report and told him to go back and review his work or speak with Austino. (R-112.)

In addition to the report, he reviewed bodycam footage of the incident from various officers who were present, including those of Officer Santiago and Landi. (R-7; R-120.) Upon review of the same, he was still of the belief that the arrest was improper. Contrary to Austino's statement on the footage, the suspect did not "square up" and was in fact walking away.

After reviewing the footage, he filed a CIS against Austino. (R-8.) His rationale was that there was a possible unlawful arrest, and he would have been derelict in his duty as a supervisor if he failed to report it. If he was right, then the charges would be dismissed; if he was wrong, then he would be educated as to why he was wrong. Riordan

was in IA when the CIS was filed, and at no time did appellant or anyone else in IA reach out to talk to him about what he had filed. He even offered his availability to speak to Riordan about the CIS but was told that Austino had already clarified things. He found this statement concerning because CISs are filed confidentially, and Austino was not in IA at the time it was filed.

While preparing to testify in this matter, he reviewed a copy of the documentation that he had filed with IA. In so doing, he noted his name handwritten on the bottom of the first page with the word "exonerated" written next to it. (R-8.) It was not his handwriting, and it was his interpretation that at some point in time, unbeknownst to him, there must have been an IA investigation of him, probably having something to do with his filing of the CIS. Per the Attorney General Guidelines, for any investigation in which a person is a target, notification to that target is required. Riordan never notified him that he was the subject of any investigation, which is the same for another officer—Officer Gabrielle (Gabrielle)—who was never notified that he was the target of an IA investigation. Pacitto later in his testimony acknowledged that Gabrielle was never disciplined in that matter and that Riordan had in fact been disciplined for his failure to notify the officer that he was the target of an IA investigation.

On June 14, 2017, one day after the CIS was filed on Austino, the PBA attorney sent Beu a letter raising concerns of retaliation and "cherry picking" of IA investigations against officers who were involved in raising the issue and/or investigation of the live streaming issue of both the MVR system and lieutenant/sergeant's office phone. (R-10.) Pacitto went on to note that two weeks after that, on June 30, 2017, Austino sent a letter to Beu alleging retaliation against him by both the City and VPD.

According to Pacitto, there came a point in time that the PBA had its attorney send a draft civil complaint to the City naming the City, the Department, Beu, Austino, and Finley. Riordan was not specifically named, but that was by design and part of their attorney's strategy. The complaint raised the concern that matters that were brought to the attention of the administration were not being properly investigated, such as the MVR and phone issues and the T.C. arrest. After receiving the draft complaint, the City retained Gelfand to conduct an investigation into the allegations. It was his belief that Riordan saw

a copy of the complaint because he commented upon it at the PBA meeting by saying that there were consequences for every action. When asked if that was a threat, Riordan said "no." (1T-157:6–33.) Later in his testimony, he acknowledged that Riordan's comments had been referred to the prosecutor's office, which determined that the allegations were unfounded.

On cross-examination, Pacitto acknowledged that Riordan did not get promoted to the rank of lieutenant until 2018 and was not in charge of IA in 2017. The lieutenant in charge would have been either Finley or Lieutenant Triantos or possibly Lieutenant Wolf. He also acknowledged that since 2017, he (Pacitto) has been promoted three times—sergeant, lieutenant, and captain—and admitted that he was very close friends with the Mayor of Vineland, Anthony Fanucci, the appointing authority for promotions.

When asked about his involvement in reporting the MVR and phone issues to the prosecutor's office, Pacitto stated that he was the one who reported both matters to the prosecutor's office. He was interviewed as part of their investigation, but the target was not. He felt that the prosecutor's office investigation was lacking and violative of the Attorney General Guidelines because the target was never interviewed and he was never notified of their findings. He also disagreed with the prosecutor's office determination that there was no wiretap violation, it being his belief that there was probable cause of a wiretap violation.

Regarding the T.C. matter, Pacitto concurred that there were a couple of internal investigations surrounding the arrest and that Riordan was only involved in the investigation. He was cognizant that T.C. pled guilty to the charge of disorderly conduct but still believed that T.C. had not been appropriately charged. When questioned what body camera footage he viewed prior to filing the CIS against Austino, he stated more than one. He disagreed with the notion that he should have done a more thorough investigation prior to filing the CIS, believing that that was the job of IA. When asked why he didn't contact the prosecutor's office if he felt that the arrest was improper, he stated that at the time, he wasn't certain if the arrest was proper, which is why he referred it to IA, where he believed it would be properly investigated. Prior to referring the matter to

IA, he ran it past two senior officers—Landi and Captain Pagnini—both of whom agreed that his actions were proper in referring the matter to IA.

Also touched upon was his testimony that Riordan had made a threat at the PBA meeting regarding the draft complaint—specifically, the fact that Riordan's comment had been reported to the prosecutor's office. Pacitto also acknowledged that the IA policy prior to 2017 was that individuals who filed a CIS were not notified of the investigative outcome.

Landi Testimony

In review of Landi's testimony as it relates to the T.C. matter, Landi testified that he has been in law enforcement for approximately twenty-five years and has been with the VPD since 1999. He has worked his way up through the ranks over the years getting promoted to sergeant in 2006 and then to lieutenant in 2017. He was in the Patrol Unit when he was promoted to lieutenant. In 2019, he was transferred into IA, which is where he is currently assigned.

He was working on the night of June 10, 2017, when T.C. was arrested. At one point during his shift, a call came in about a fight with a knife and a foot chase. When he finished the call that he was on, he went to the location to assist the officers who had responded. When he arrived, there were several officers present, and the scene appeared to be under control.

As he was walking away, he noticed a commotion taking place and words being exchanged. When he turned to see what was happening, he saw an individual (T.C.) being placed under arrest and heard T.C. say "shut the fuck up." T.C.'s friend was nearby and was visibly upset over the fact that T.C. was being placed under arrest. When he saw this, he (Landi) spent a few minutes trying to calm the friend down, at one point telling the friend that T.C. wanted to get arrested. He said this to T.C.'s friend, despite not knowing the details surrounding the arrest.

After he walked away from the friend, he approached Austino, who was in charge of the scene, and another officer that was present, Officer Selby, and asked them what had happened. This conversation was captured on his body camera, as was his conversation with T.C.'s friend. (R-120.) Austino told him that T.C. kept running his mouth and what ultimately led to his arrest was T.C. "squaring up" with them. (3T-16:3–4.) Landi went on to state that Austino was the supervisor in charge of the scene; therefore, it was his (Austino's) responsibility to ensure that the arrest was appropriate.

A couple of days after the incident, Pacitto approached him and Shaw and questioned them about the T.C. arrest—specifically whether the expletive "Fuck you, bitch-ass cops" was a sufficient basis to have arrested T.C. Not knowing the full circumstances behind the arrest, they pulled the body camera footage of some of the officers who were present. Officer Santiago's body camera footage appeared to have the best angle. (R-7.) His takeaway after reviewing the footage was that T.C. did not "square up" and had in fact turned and started walking away after he was released, cursing at the officers as he was walking. When T.C. questioned why he was being arrested, he was told that he was being arrested for disorderly conduct and because "he was begging for it." (3T-23:23–25.) After review of the body camera footage, it was his belief that T.C.'s conduct did not rise to the level of disorderly conduct—a sentiment that he conveyed to Pacitto.

He himself did not do anything further after reviewing the footage; however, Pacitto filed a CIS. Five months later, Finley, who was the captain in IA at the time, asked to interview him, which he did. It was his belief at the time that he was being interviewed as a witness—not as a target. At no time was he informed that he was the subject of an investigation or a target. Several months after that, in May 2018, Riordan, who was the lieutenant in charge of IA at the time, called him into his office and told him that the T.C. investigation was being finished up and that there were collateral issues identified as part of that case that pertained to him (Landi) for which he was being counselled.

According to Landi, he was stunned when appellant told him that he was being counselled. When he walked out of Riordan's office, he ran into Beu, who also asked to speak to him. Beu informed him that they had found some collateral issues during the

T.C. investigation, that it wasn't a big deal but that he (Landi) was going to have to take a little "spanking." (3T-31:5–11.)

He was extremely upset over everything and believed that somehow, he was being held responsible for Austino's actions. He was unaware at the time that the CIS naming Austino in the T.C. matter had been administratively closed. He subsequently learned, when he was transferred into the IA unit in September 2019, that the T.C. matter had been administratively closed. He was shocked by the findings that Finley had made in the report, how blatant the lies were, and how he had been portrayed.

For instance, Finley disputed that he (Landi), Pacitto, and Shaw had reviewed more than one angle of body camera footage and/or selectively looked at certain footage to make Austino look bad. Finley found that this was the first lie that Landi had told. Landi went on to state that Finley's report read similarly throughout, and it was clear that he (Finley) had made up his mind on what outcome he wanted and how he was going to portray Austino. On this point, had Finley looked at the metadata report, he would have seen how many and whose body camera footage he and his colleagues had reviewed. (R-13.)

Finley also rendered another conclusion that Landi's interview statement was inconsistent with his body camera footage. More specifically, Finley noted that during the interview, when asked why he hadn't spoken to Austino about the incident, he (Landi) had advised that he did not have all of the facts and hadn't observed T.C.'s behavior. Yet on the body camera footage, Landi is heard talking about the arrest to T.C.'s friend.

Landi reiterated that what he said to T.C.'s friend was an attempt on his part to diffuse the situation and a conjecture on his part as to what had taken place given the fact that he had just arrived at the scene. Had Finley asked him about the perceived inconsistency, he would have told him the same thing—that he was attempting to diffuse a potential situation with T.C.'s friend.

Finley also threw in a conspiracy theory in his findings, alleging that he (Landi) had colluded with Pacitto and Shaw to fabricate the writeup. As with the other charges, he

felt that this was an absurd conclusion, as he had no reason to fabricate a writeup on anyone.

Landi went on to state that at no time did Riordan inform him of any of the findings, much less the one that specifically related to him. He had no idea that he had been accused of making false contradictory statements, which is a very serious charge and terminable.

He felt that it was strange and unusual that Riordan did a review of Finley's investigation into the T.C. matter. When he read Riordan's report, it was clear that he (Landi) was being targeted. It was also one of the worst reports that he had ever read. Documents that Riordan claimed to have reviewed and outlined did not match up with his conclusions. The brunt of the report attacked his (Landi's) ethics, honesty, and credibility and failed to address why the CIS was filed in the first place. Riordan did not conduct any new or additional interviews, which to him, contradicted the first paragraph (purpose) of the report, which stated that "the review was to provide Chief Beu with credible evidence to support or refute Captain Finley's findings so that a just decision can be made." (3T-49:11–16.) Landi went on to state that Riordan also contradicted the latter statement by going into "collateral issues not addressed by Captain Finley" in the report. (3T-49:18–20.)

When he read Riordan's report, he became extremely angry. The charges that were levied against him were wrong, unsupported, and several of them inapplicable. They were also out of time, which was why they were on paper, marked to be administratively closed. Additionally, he wasn't even the supervisor on the scene—Austino was—yet he was being cited for performance of duty and Austino was exonerated.

It was his belief that how Riordan recorded the discipline and case closure were intentional on his part. Both he and Riordan were up for promotion to become a lieutenant at the time, and he (Landi) was ahead of Riordan on the list. The fact that he was ultimately promoted to lieutenant did not change his belief that Riordan acted intentionally in the handling of the IA file. He found it offensive that an investigation was even done

on him given the context of his peripheral involvement in the entire event. What was even more offensive was the fact IA files are more accessible today and such findings could detrimentally impact him down the road, even if an addendum to the report was written that vindicated him. Clearly, he was the collateral damage from a power struggle between factions. He did not file a lawsuit against the City for several reasons—one of which is that he tries to avoid drama and stress in his life. Filing a lawsuit would be both. Second, he had several years to go in the VPD, and he could not imagine filing a lawsuit against the individuals in question.

On cross-examination, Landi concurred that he arrived at the scene towards the end of the interaction. Upon his arrival, he believed that he needed to deescalate T.C.'s friend, who appeared concerned with what was happening with T.C. – telling the friend that T.C. was "begging to be arrested." Landi went on to note that anything can happen instantaneously at a scene. He further agreed that when an individual is told repeatedly to leave and they don't, that could be grounds for an arrest, stating that it goes to the totality of the situation and is a subjective call by the officer. He could not recall what he and Austino spoke about when he turned his body camera off right after T.C. was arrested.

When asked why he or Pacitto didn't approach Austino about the legitimacy of the arrest before filing the CIS, he stated that such questioning was for the IA unit to conduct. Additionally, when Pacitto came to him, it was two or three days after the arrest, which was when, after reviewing the footage, they realized that an improper arrest had taken place. Putting aside the fact that Austino does not like having his authority questioned, given the time lag between the arrest and the discovery, it was their obligation to file a CIS.

Landi was also questioned about what body camera footage he reviewed as it related to the T.C. matter. When shown a metadata sheet which identifies the case number, footage reviewed, and officer who reviewed it, he acknowledged that the metadata sheet did not reflect that he had reviewed footage under T.C.'s case number. (R-13.) He went on to state, however, that he did not put in the case number on each

body camera footage that he reviewed and that the metadata sheet before him was incomplete.

He recalled telling Finley that he did not look at his own body camera footage but quickly added that just because he opened his own footage doesn't mean that he actually looked at it, so he wasn't lying when he said that to Finley. (3T-135:22–136:4.) Landi talked around why no one reviewed Officer Selby's body camera footage or if they looked at certain footage, why it was disregarded. According to Landi, the whole goal of looking at the body camera footage of several of the officers who were present at the scene was to find the best vantage point. Had Finley asked him to provide the metadata footage that he reviewed, he would have provided it to him.

In discussing his comments to Finley when he was being interviewed that T.C. could have been arrested for obstruction, Landi stated that there may have been a point in time during the interaction that an obstruction charge would have been appropriate. However, that charge would no longer have been sustainable once they released him from custody and told him to leave, which T.C. was in the process of doing when they placed him under arrest for disorderly conduct. Given the totality of the circumstances at the time, even the disorderly conduct charge was inappropriate.

He was cognizant of the fact that the original IA investigation of the T.C. arrest was done by Finley, and that subsequent to the issuance of that report, Beu directed Riordan to review Finley's report. He vehemently disagreed with Riordan's findings, noting several discrepancies, such as the fact that he was not the senior supervisor on the scene—Austino was—and that it was not his place to question Austino's orders. Riordan also had sustained charges that he (Landi) did not question anything at the scene, but as clearly seen on Sergeant Selby's body camera footage, he did ask Austino what had taken place. Riordan also sustained a charge against him for performance of duty as it related to Pacitto. According to Landi, both he and Pacitto at the time were sergeants and of equal rank. It was not his job to supervise Pacitto.

He was aware that Riordan had sustained several charges against him, such as performance of duty and untruthfulness. He was also aware that Beu disagreed with

Riordan's finding on untruthfulness but did find that he (Landi) had failed to perform his duty as a supervisor. Despite Beu's order that the matter be administratively closed due to the concern that the forty-five-day rule would be violated, the disciplinary action noted by Riordan was "counseled."

When questioned, he agreed that the findings in his IA file did not affect his promotion and placement as the head of the IA unit by Beu. However, it was his continued belief that the findings in the IA report were retaliation in its purest form—findings that will remain in his IA file in perpetuity. He went on to add that he believed being placed in IA, while a promotion, was also retaliatory. Beu knew that he did not want to get transferred into the unit, but he was forced to go there anyway.

Prior to the IA investigation, he did not believe that Riordan had an ax to grind with him. On his end, he had no prior issues with him—while not friendly outside of the job, they had a cordial working relationship. He again reiterated that he believes he has been caught in the middle of two factions. One of the factions being Beu, Finley, Austino, and Riordan. The other faction consisting of Dave Cavagnaro, Scarpa, Pacitto, and Gabrielle to a lesser extent.

Gelfand Report

In his report, Gelfand stated that Pacitto and Landi were whistleblowers with CEPA protection for filing the CIS. Therefore, any adverse employment action against them was illegal. Additionally, such action without any type of notification was in violation of the IAPP. Gelfand further found that Finley's actions in this matter violated the IAPP and that his investigation was biased and lacked objectivity. In sum, Gelfand found that Finley's actions were illegal and retaliatory, as were Beu's actions.

Gelfand further opined that Riordan's review also failed to comply with the IAPP guidelines. He did not conduct any interviews or provide target letters, and his conclusions recommended illegal retaliatory actions against Landi and Pacitto. Gelfand further concluded that because Riordan agreed with Finley's finding that Landi had lied, this demonstrated that he (Riordan) was in "lock step" with Finley in his retaliatory actions.

Additionally, upon his independent review and lengthy dissertation of what he believed to be the applicable caselaw, Gelfand also determined that Finley's legal analysis was flawed as it related to what constitutes "disorderly conduct." Therefore, the exoneration of Austino was based upon a faulty analysis of the caselaw.

Last, he noted that Riordan's actions, by going against Beu's order to administratively close out the charges against Landi, further supported the PBA's allegations of retaliation and differential treatment that was pervasive under Chief Beu's regime. (R-1 at 135–147.)

Gelfand Testimony:

Gelfand testified that one of the complaints that he looked at as part of his investigation was the T.C. arrest. As part of his review, he looked at the CIS, the IA reports, and body camera footage as well as other documents. (R-41.) He went through his interpretation of the underlying incident surrounding T.C.'s arrest and how Austino directed Dennis to arrest T.C. for disorderly conduct. After Dennis wrote up the complaint, he asked Pacitto to review it. Dennis did not originally inform Pacitto that Austino was the one who ordered him to sign the complaint. When Pacitto reviewed the complaint, he felt that the charges were inappropriate and asked Landi and Shaw to review the complaint to get their input. As a result, Pacitto filed a CIS reflecting his, Landi's, and Shaw's review of the body camera footage, and their collective conclusion that the charges were inappropriate.

Two IA investigations took place as a result of the filing of the CIS by Pacitto. One by Finley and the second one by Riordan at the behest of Beu. He felt that it was unusual that two reports on the same CIS or underlying issue had been undertaken. The more usual course of action if the police chief doesn't concur with an IA investigative finding is to return the file to the original investigator and have them expand upon their findings.

Finley exonerated Austino in his report and made collateral findings as to Pacitto, Shaw, and Landi because of their review of only one of the videos and their concurrence

with Pacitto's concerns. The collateral findings being false information and filing of the CIS, and false and contradictory statements when compared to the actual video evidence by Landi. The only person that Finley interviewed was Landi, and at no time was he (Landi) given target warnings. The same with Pacitto and Shaw—at no time were they given target warnings.

In his report, Riordan outlined Finley's findings and in summarizing everything, concluded that Finley's findings as to Landi for providing false and contradictory statements should be sustained along with new findings against Landi and Pacitto. Neither officer was advised that they were targets of an investigation, and no one was interviewed. Notably, neither was Austino, which was in and of itself contrary to IA guidelines. Among Riordan's findings against Landi was a charge of deception by Landi during his interview with Finley. According to Gelfand, such a charge is potentially career-ending for an officer.

He recited Beu's response to appellant's findings, which was that there was insufficient evidence to warrant disciplinary action against Pacitto. Beu also determined that the charge of untruthfulness was unfounded but did find that Landi failed to perform his duties as a supervisor. Due to the delay by the Department in bringing the charge, Beu determined that any charges against Landi were to be administratively closed. (R-43.) While Beu ordered that the charges be administratively closed, Riordan put the disposition as "Sustained – performance of duty," and the action taken as "counseled." (R-43.)

In summing up his findings on the T.C. matter, Gelfand stated that Pacitto and Landi filed the CIS in good faith and supported it with the body camera recordings that they had reviewed as part of the investigation. The basis of the arrest appears to rely heavily on the events that occurred before T.C. was told that he was free to leave. The derogatory commentary by T.C. as he was walking away, in his opinion, did not rise to the level of disorderly conduct.

Gelfand went on to state that from an HR standpoint, Landi's and Pacitto's claim of retaliation appeared to be valid. While Beu, Finley, and Riordan claimed that the IA

findings and proposed discipline were because Pacitto and Landi lied during their interview and provided false information, he could not reconcile their position with his own investigative findings, which were compounded by the facts that there were multiple infractions and that the IA guidelines were not followed. While Landi was only counselled and not suspended or terminated, such fact did not alleviate the potential civil liability on the City's part as it related to a potential CEPA claim.

On cross-examination, Gelfand was questioned about the criminal allegations that Austino had levied against him. He acknowledged that he was upset that his integrity and ethics had been brought into question and agreed that he was not particularly fond of Austino given the criminal charges that he (Austino) had filed against him. Despite this, he believed that he tried to be as fair and impartial as he could in his investigation.

He would not commit to the statement that initially, his investigation focused on Beu, Austino, and Finley, stating that it focused on those three individuals but not to the exclusion of other individuals, such as Richard Tonetta (Tonetta), the mayor, and PBA members. In other words, he focused on the complaints that were handed to him. In his findings, he concluded that the VPD under Beu had factions—the "A" team and "B" team. The "A" team consisted of Finley, Austino, Beu, and at times, Riordan. The "B" team consisted of individuals who Finley, Austino, Beu, and Riordan collectively perceived as threats at the time, such as Pacitto, Cavagnaro, Landi, Wolf, and other PBA supporters. He also concluded that Beu and his administration weaponized the IA unit to punish individuals who were not aligned with them. Further, it was his position that such action created a hostile workplace and disparate treatment regarding discipline, which was evidenced by the IA files that he reviewed.

When asked how many IA files he reviewed as part of his investigation, Gelfand indicated that he reviewed six or seven files that were related to the complaints that had been lodged. He felt that he reviewed a sufficient number of IA files to make a determination of disparate treatment in this case. On this note, he also reviewed the IA index file at some point during the investigation, but he could not recall if it related to this investigation or a different investigation.

He disagreed with the statement that if the IA unit had been weaponized and there had been charges of disparate treatment, the index file would reflect an increased number of instances involving the same officer. It was his belief that disparate treatment can be based on one incident.

Gelfand acknowledged that in his report, as it related to the PBA complaints, he determined that there was a pattern of harassment and retaliation by Beu, Austino, and Finley, but not Riordan. He also acknowledged that such conduct predated Beu's ascension to chief. He also concurred that the VPD had a history of inefficiencies in their application of the IAPP process—even prior to Beu becoming the chief under Chief Codispoti's regime—to the point that the CCPO had to come in and conduct audits of the VPD's IA processes. According to Gelfand, IAPP violations have the potential to expose the City to liability and lawsuits.

Gelfand was also questioned about T.C.'s arrest and his findings that the arrest was unlawful—more specifically, his qualifications to make such a determination. In this regard, he acknowledged that he has never been a county prosecutor, has never prosecuted criminal matters, nor has he ever had to approve or deny charges at the request of a police officer. He went on to state, however, that he has defended officers on behalf of police departments against claims of unlawful arrest and was aware that the standard for an arrest is probable cause, not beyond a reasonable doubt.

He was also questioned about the caselaw that he cited in his report that discussed the level of proof required to obtain a criminal conviction, which is different than the standard of proof required to arrest an individual. In response, he stated that he felt that Finley's analysis of the caselaw as it related to the T.C. arrest was flawed, so he did his own research and found cases that were more on point of what a lawful arrest looks like and from that determined whether Landi and Pacitto had a good faith basis for their claim that probable cause did not exist. The reason he did not mention in his report that T.C. pled guilty to the charges was because he did not believe it was relevant. He agreed that T.C. never filed a lawsuit against the City, nor was an IA complaint lodged.

Gelfand was aware that it was Finley who conducted the initial investigation surrounding T.C.'s arrest and that Riordan was tasked by Beu to review Finley's report. He was also aware that Finley concluded in his report that Pacitto, Shaw, and Landi conspired to prepare a false document against Austino and that Landi was untruthful in his statement to IA. He concurred that Riordan was tasked to review Finley's findings and conclusion—not to conduct a new IA investigation. Based upon Riordan's review, Pacitto was exonerated from all wrongdoing, and a determination was made that there was no conspiracy by Pacitto, Shaw, or Landi against Austino. Riordan did sustain the charges against Landi for untruthfulness and performance of duty.

In discussing the basis for some of appellant's findings, he agreed that some of Landi's statements were indeed untruthful or less than forthright—an example being Landi's statements as to the number of body camera recordings that he reviewed. He was cognizant of the fact that Beu disagreed with some of Riordan's findings—specifically, the finding of untruthfulness against Landi. Beu did agree, however, with the performance of duty finding. (R-43.) Gelfand was aware that Beu had a concern with the delay in bringing the charges within the requisite forty-five days in accordance with N.J.S.A. 40A:14-147 and because of that concern, ordered that the potential charges against Landi be administratively closed. This effectively meant that no discipline was to be imposed. Gelfand, after talking around the question for several minutes, ultimately acknowledged that counselling was not discipline. Later, on redirect, he changed his testimony and stated that counselling was in fact discipline. He also walked back on his prior statements that the appellant was not tasked with conducting a new IA investigation in the T.C. matter. He believed that Riordan should have interviewed Landi and given him an opportunity to tell his side of the story. Landi also was unaware that he was a target; all the appellant did was substantiate Finley's findings that Landi had been untruthful.

Legal Analysis:

Respondent has charged the appellant with a violation of N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause) for improper employment practices—specifically retaliation and/or disparate treatment in violation of New Jersey and Federal Employment Laws.

As noted more fully above, the test here is whether "'the evidence, together with the legitimate inferences therefrom, could sustain a judgment in favor' of the party opposing the motion, i.e., if, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied." Dolson v. Anastasia, 55 N.J. 2, 5 (1969) (citations omitted) (emphasis added).

It is respondent's position that when the appellant conducted an "off the books" secret investigation in the T.C. matter; failed to notify Landi, Pacitto, or Shaw that they were the targets of that investigation; and made a finding of untruthfulness against Landi, which is a career-breaker in law enforcement, that such actions constituted retaliation and violations of the City's policies (City Policy 1151 and 1152).

As set forth more fully above, among other criteria, to establish a CEPA claim, a plaintiff must demonstrate that an adverse employment action was taken against him or her and that there was a causal connection between the whistle-blowing activity and the adverse employment action. Kolb v. Burns, 320 N.J. Super. 467, 476 (App. Div. 1999); Mosley v. Femina Fashions, Inc., 356 N.J. Super. 118, 127 (App. Div. 2002), certif. denied, 176 N.J. 279 (2003); Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003).

In Klein v. Univ. of Med. and Dentistry of New Jersey, 377 N.J. Super. 28, certif. denied, 185 N.J. 39 (N.J. 2005), the Court noted that:

> The Legislature has defined a "[r]etaliatory action" under the CEPA statute as "the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." N.J.S.A. 34:19-2e. In Hancock

> v. Borough of Oaklyn, 347 N.J. Super. 350, 360, 790 A.2d 186, 193 (App. Div. 2002), we interpreted this provision as requiring an employer's action to have either impacted on the employee's "compensation or rank" or be "virtually equivalent to discharge" in order to give rise to the level of a retaliatory action required for a CEPA claim.

Even giving the respondent the benefit of all reasonable inferences, based upon the evidence presented as it relates to the T.C. Arrest, I cannot find that the appellant was acting in concert with Finley, Austino, and Beu. If anything, it was to the contrary.

It is undisputed that the appellant was charged by Beu with reviewing Finley's report to sustain or refute his findings. In so doing, the appellant agreed to some extent with Finley's findings as they related to the exoneration of Austino, but disagreed that Pacitto, Shaw, and Landi conspired together to fabricate the writeup on Austino. While Beu determined that all of the charges against Landi and Pacitto should be dismissed, the appellant put a sustained charge against Landi for performance of duty and counselling. In other words, there was no prima facie showing that Beu, Austino, Finley, and the appellant were working in concert.

While Gelfand disagreed with Finley's legal interpretation of the definition of disorderly conduct in the exoneration of Austino, even assuming arguendo his legal analysis was correct, no evidence was presented that such interpretation was intentional or part of an overall scheme on the part of Finley, Beu, Austino, and the appellant to exonerate Austino and weaponize the IA process to institute a collateral action against Pacitto, Landi, and Shaw.

Respondent also argues that the appellant's actions were retaliatory when he determined that Landi was untruthful during the investigation; however, respondent's own witness (Gelfand) acknowledged that several of the statements that Landi made in his interview with Finley were not truthful and/or less than forthright—implying that there were nuances of acceptable levels of untruthfulness and that Landi's statements somehow fell below that threshold. Additionally, at one point in his testimony, Gelfand agreed that counselling was not "discipline" but later did a 180 on redirect as it related to this statement. Even Landi testified that just because he opened his own body camera

footage doesn't mean that he looked at it. As such, his statement to Finley that he hadn't looked at his body camera footage, was not technically a lie.

Again, giving the respondent the benefit of all reasonable inferences, based upon the above testimony and documentary evidence presented in this matter, one cannot legitimately and reasonably agree that appellant's actions in this matter were retaliatory in nature.

Last, Landi also testified that he never had a problem with the appellant and could not point to any other instances of retaliation against him, and he was promoted under Chief Beu's regime. While he claimed that he was being retaliated against by Beu when he was promoted to lieutenant and placed in IA, no evidence was presented that the appellant was involved in such a decision. The same with Pacitto and Shaw—no evidence of retaliation or disparate treatment was presented, and Pacitto, as with Landi, went on to be promoted several times over the years. No evidence was presented on this count that adverse employment actions were taken against Landi, Pacitto, or Shaw. There was no demonstration of any material impact on the terms and conditions of their employment such as discharge, demotion, reduction in compensation or rank, or loss of benefits.

In sum, the respondent has failed to demonstrate a prima facie case that Landi, Pacitto, or Shaw suffered an adverse employment action as a result of this incident.[7]

Respondent also failed to present a prima facie applicability of each of the anti-discrimination and anti-retaliation laws identified in Paragraph 8 of the FNDA. As set forth more fully above, LAD is designed to prevent unlawful discrimination by an employer and is very clear on the protected classes. N.J.S.A. 10:5-12(a). Union membership is not one of the enumerated protected classes. Ibid.

Likewise, Policy 1151 (Whistleblower Act) and Policy 1152 (Employee Complaints) were based on CEPA, N.J.S.A. 34:19-1 et seq. (R-26.) There is no dispute that Pacitto

[7] IAPP violations which were repeatedly pointed out by Gelfand in both his report and testimony are not before the Tribunal and therefore were not considered as part of this application.

had the right to file the CIS against Austino without fear of retaliation or reprisal. It is also undisputed that Landi and Shaw's involvement in the filing of the CIS was protected activity. However, as noted above, the respondent has failed to present a prima facie case that Landi, Pacitto, and Shaw were retaliated against or disparately treated. Along this same vein, Policies 1151 and 1152 do not prevent collateral investigations. Contrary to counsel's argument, a collateral investigation is not retaliation.

Accordingly, I **CONCLUDE** that respondent has failed to present a prima facie case that the appellant violated N.J.A.C. 4A:2-2.3(a)(12) by engaging in improper employment practices, retaliation, and/or disparate treatment. Therefore, Count 1, Paragraph 4 is **DISMISSED**.

FNDA – Count 1, Paragraph 5: Gabrielle matter

Through this count, respondent asserts:

- In or about March 2020, Landi, while conducting an IA review under the Attorney General guidelines for VPD officers who had been the subject of sustained charges for untruthfulness (Brady), discovered that Officer John Gabrielle (Gabrielle) had, in his record, a sustained charge of untruthfulness.

- Landi informed Gabrielle, who filed a CEPA complaint asserting that the untruthfulness charge stemmed from an IA investigation wherein the IAPP procedures had not been followed in that he was never notified that he was the target of an untruthfulness investigation or that the charges had been sustained.

- The underlying matter involved the application of policies concerning Field Training Officers (FTOs), with Gabrielle having complained that FTOs were volunteers and need not remain in that position unless they are willing to do so voluntarily.

- An IA investigation was commenced by Sgt. Riordan into Gabrielle's FTO complaint, which then led to collateral review of Austino's concurrent allegation, vehemently voiced to Riordan, that Gabrielle's complaint was aimed at harassing and discrediting Austino as part of a union retaliation against Austino.

- There was also a collateral untruthfulness investigation pursued by Riordan against Gabrielle concerning Gabrielle's recollection that he had sent an email to Lt. McCann (McCann) requesting that Gabrielle not be kept on as an FTO.

- Motivated by Lt. Austino's malicious and entirely unsupported claim that Gabrielle was acting in concert with the union, Sgt. Riordan, with equal maliciousness, having "exonerated" Austino, wrote up a disposition of "Untruthfulness/Sustained" and allowed that to be a matter of record against Officer Gabrielle (with the potential of there being serious career "Brady" implications for Gabrielle) despite the action taken being recorded as "Per Chief Beu no discipline issued."

  (J-1)

As it relates to this count, respondent asserts that the appellant violated multiple employment practice rules and regulations when he conducted an improper investigation into Gabrielle and sustained charges of untruthfulness against him. This finding came to light in 2020 during an IA file audit for sustained charges of untruthfulness under the "Brady Guidelines." It was during this audit that it was learned that Gabrielle not only had a sustained charge of untruthfulness in his IA file, but that at no time was he given a target notification or provided the disposition of the investigation.

It is respondent's position that the untruthfulness finding and lack of notification to Gabrielle was directly linked to Gabrielle's filing of a CIS in July 2018 wherein he expressed his frustration that he was being forced to continue on as an FTO despite it being a voluntary position. In or around this same time period, Austino filed a claim that Gabrielle's complaint was aimed at harassing and discrediting him as part of a union retaliation against him.

Respondent also contends that the appellant was "motivated by Austino's malicious and entirely unsupported claim that Gabrielle was acting in concert with the union" and that appellant "with equal maliciousness having 'exonerated' Austino, wrote up a disposition of 'Untruthfulness/Sustained' and allowed that to be a matter of record." (See FNDA and Respondent's Brief at 21.) Respondent further contends that when taken in context with other matters where the respondent participated in sustained charges against PBA complainants who made complaints against Beu, Austino, and Finley, a prima facie case has been met that appellant was a willing participant in carrying out the retaliatory actions against PBA complainants, as evidenced by this matter.

The appellant argues on several fronts. First, he has already been disciplined for failing to notify Gabrielle of the outcome of the administrative investigation. Second, Gabrielle did not testify in this matter, and Gelfand did not interview him. Third, no evidence was presented that Gabrielle was targeted, was retaliated against, or suffered any harm as a result of the appellant's findings. Last, as acknowledged by respondent's own witness, Gelfand, the VPD IA Unit had a systemic problem of failing to adhere to IAPP guidelines as they related to providing notifications.

The following facts, while partially hearsay, appear to be undisputed, and for purposes of this application, I **FIND** them as **FACT**:

- In May 2017, Gabrielle requested that he be released as an FTO. A couple of days later, McCann informed him that his request was denied.

- On July 31, 2018, Gabrielle filed a CIS against Austino as it related to the denial to have him released as an FTO. (P-6.)

- Riordan was in IA at the time, and he was the assigned investigator for the matter. Riordan told Gabrielle to provide him with a copy of the original email that he claimed he had sent to McCann.

- On August 1, 2018, Gabrielle provided a word document, representing that that was the email that he had sent to McCann. (P-6 at 000375.)

- Riordan contacted Sgt. Fulcher, the VPD IT person, and requested that he conduct a search of the email database to find the original email. Sgt. Fulcher was unable to locate the email.

- On November 13, 2018, Riordan interviewed Gabrielle. Gabrielle informed him that he couldn't find the email that he had sent on May 1, 2017. Riordan also questioned McCann, who told him that he did not have it either, nor did he

remember receiving anything from Gabrielle, but he believed he may have sent something.

- Riordan asked Sgt. Fulcher to expand his search dates for the email in question to no avail.

- Riordan determined that a collateral issue arose in the investigation surrounding Gabrielle's claim that he had sent an email. The document that Gabrielle sent to Riordan that he claimed to be the email was in fact not an email, nor could the email be found at that time. No notice was sent to Gabrielle that he had become the target of an investigation.

- Riordan determined that Austino should be exonerated and that Gabrielle was untruthful regarding the email, and he recommended a charge of untruthfulness, which was sustained. Chief Beu ordered that no discipline was to be issued against Gabrielle. No notice of the disposition of the investigation was provided to Gabrielle, but notification was sent to Austino that he had been exonerated.

- In the first quarter of 2020, the VPD underwent an IA audit for Brady/Giglio files. In so doing, it was discovered that there was a sustained charge of untruthfulness against Gabrielle. There was no documentation in the file indicating that Gabrielle had been notified of the finding, but there was a notification to Austino that he had been exonerated.

- On March 12, 2020, Gabrielle learned that there was a sustained charge of untruthfulness against him. On this same date, he filed a formal complaint against Riordan.

- Based upon the IA investigation done by Sgt. Candelario, a sustained charge of failure to provide a complaint disposition/outcome letter was issued against the appellant with the recommended discipline of counselling.

Three witnesses testified as to the Gabrielle matter—Landi, Gelfand and Tonetta.[8]

Landi Testimony

Landi had no first-hand knowledge of this matter. The matter was brought to his attention by Sgt. Candelario as a result of a Brady-Giglio audit that was done at the behest of the prosecutor's office. At that time, he learned that Gabrielle was not notified of the collateral investigation or the investigative outcome. He was aware that Gabrielle had submitted a document to the appellant and speculated that Gabrielle had submitted the document to outline the substance of the original email because he could not find the original email at the time. He didn't have an answer when asked why Gabrielle did not say up front that the document he had provided was not the original email.

Gelfand Testimony

As with Landi, Gelfand also did not have any first-hand knowledge of the Gabrielle investigation or basis for the finding. Everything in his report is what he gleaned from reading other reports or speaking to other individuals. He did not interview Gabrielle as part of his investigation.

Gelfand testified that he was aware that Gabrielle had filed a CIS against Austino for requiring him to remain in the field training officer program and that the appellant was the IA officer who handled the investigation. As part of the investigation, Riordan interviewed Gabrielle, who informed him that he had sent an email to McCann, the supervisor of the training unit, asking to be released from the program. Gelfand was aware that Riordan asked Gabrielle to provide the email in question, and in response, Gabrielle produced a word document that he purported to be the email that he had sent. (R-1 at 154.) When Riordan searched the email server to try to find the actual "email" purportedly sent to McCann, he was unable to find it, ultimately enlisting the aid of Fulcher, the PD's

[8] Pacitto touched upon the Gabrielle matter in passing with no substantive testimony presented.

tech person, to try to find the email. Fulcher was also unable to locate the document in the system.

When asked on cross-examination if the information that Gabrielle provided to Riordan during the investigation was "truthful," Gelfand eventually conceded that in the context that it was given, Gabrielle's responses could be viewed as untruthful. He went on to note, however, that Gabrielle was never notified that he was the target of an investigation, much less of the outcome; therefore, he never had an opportunity to defend himself on the charge. He agreed, however, regardless of whether he was notified that he was a target, Gabrielle at all times had the obligation to tell the truth. He further agreed that failure to follow IA protocols as they related to providing target notice and case outcomes was a systemic problem at the PD that predated even Beu's ascension to chief. Gelfand also acquiesced that the untruthfulness charge, while sustained against Gabrielle on paper, never resulted in the issuance of discipline. It was not until an audit was done by the CCPO that the charge came to light and was eliminated from Gabrielle's file. Notably, after the charges came to light, Gabrielle found the email that he had originally sent seeking to be released from the program. It had been sent to a different party. Gelfand agreed that the fact that there was a finding in Gabrielle's file of untruthfulness did not appear to have impacted him professionally and that he didn't seem to have been retaliated against or harassed.

Gelfand Report

In his report, Gelfand stated that in March 2020, Gabrielle filed a complaint with the City concerning an alleged CEPA violation. The filing of the complaint coincided with his learning that there was a finding of untruthfulness in an IA file that he had filed a CIS on. Gabrielle was never notified that he was a target or that a finding had been made against him. Gabrielle alleged that his CEPA rights had been violated because he had filed a complaint as a result of him being denied his request to be removed as an FTO, a voluntary position, in violation of the departmental policies.

He reviewed the CIS that Gabrielle had filed (VPD IA file 2018-0083) on July 31, 2018, and provided a synopsis in his report of his review of appellant's investigation, stating inter alia that:

- Riordan was the IA officer who investigated Gabrielle's complaint.

- As part of the investigation, appellant requested a copy of the email that Gabrielle stated he had sent to McCann requesting to be released from the program.

- On August 1, 2018, Gabrielle sent Riordan an email, stating that it contained the email that he had sent to training requesting to be removed from the program.

- Riordan, in his report, stated that the email that Gabrielle had sent was not an email, rather a word document.

- Prior to interviewing Gabrielle, he asked VPD IT person, Fulcher, to try to locate the original email. Fulcher was unable to find the email.

- Riordan interviewed Gabrielle on November 13, 2018, but did not give target notification, only witness notification.

- Gabrielle indicated in the interview that McCann told him that he was to remain in the FTO position as decided by someone "higher than [McCann's] pay grade."

- During his interview, Gabrielle was asked about the email, and Gabrielle reported that he could not find the email but did confirm that he sent it to McCann's work email.

- After the interview, Riordan asked Fulcher to expand his search to no avail.

- Riordan also interviewed Austino, and in the IA report, he noted that Austino felt that the CIS filed by Gabrielle was retaliation/harassment by the union and an ongoing course of conduct by the union to discredit him.

- At the conclusion of his investigation, Riordan concluded that Gabrielle was untruthful regarding the email and that a charge of untruthfulness should be sustained. He also concluded that Austino's claim of harassment/retaliation by the PBA, a collateral issue, should be sustained. Beu, in his review, determined that no action was to be taken against the PBA and that no discipline was to be issued against Gabrielle.

Gelfand's takeaway was that Gabrielle did not appear to specifically identify Austino as the person responsible for the decision that he was to remain in the FTO position.[9] He also noted that Riordan did not appear to consider other reasons why the email couldn't be found; i.e. Gabrielle may have recalled the email, or the email may have been sent to someone other than McCann. Gelfand also went into detail as it related to IAPP violations that took place during this investigation—no target warnings, no notice of disposition, and lack of explanation on Beu's part as to why he decided that no discipline was to be levied against Gabrielle. Last, Gelfand also points out that after Gabrielle filed the CIS against Riordan in 2020, he was able to locate the email in question. The email had been sent to another person on a different date—not to McCann.

It was Gelfand's position that the email was irrelevant to the CIS complaint filed by Gabrielle. He further speculated as to why nothing was done with the sustained charges against the PBA, stating:

> There was no further PD action after Beu sustained the Austino complaint of harassment against "the PBA" perhaps because "the PBA" is not an entity against whom an internal affairs finding can be issued or administrative disciplinary charges sought. Perhaps nothing further was done because

[9] The CIS was not submitted into evidence, nor was the appellant's investigative report, therefore Gelfand's statements such as Austino was not named or inferred in the CIS, will be taken at face value. Having said that, all other reports that were entered into evidence appear to name Austino as the target of the CIS filed by Gabrielle and the person who made the decision to keep Gabrielle in the FTO position.

> it was a completely unsupported conclusion upon review of the VPD IA investigation report. It is absolutely clear that Gabrielle's complaint concerned the decision to require him to continue in the FTO program regardless of who made the decision. The idea that this complaint targeted Adam Austino as retaliation is absurd given the complete lack of any indication in the file, factually, that Gabrielle ever attributed the decision to Austino, or anyone by name for that matter.
>
> When considered in context with the other matters where Riordan participated in sustained charges against the PBA complainants who made complaints against Beu, Austino and Finley, I believe a preponderance of evidence establishes that in fact Riordan was a willing participant in carrying out the retaliatory actions against the PBA complainants, not a victim of retaliation himself.
>
> [R-1 at Bate Stamp 000379.]

Tonetta Testimony

Similar to the other two witnesses, Tonetta had no firsthand knowledge of the Gabrielle matter. What he believed to have occurred was that Gabrielle had volunteered to conduct training within the department. When he was getting ready to retire the following year, he advised his supervisor that he no longer wanted to do the volunteer training. His supervisor, Austino, denied his request, so Gabrielle filed a grievance because it was a volunteer position.

Riordan was the IA officer who investigated the matter, and one of the questions he asked Gabrielle was how he notified his supervisor. Gabrielle informed him that he had emailed his supervisor, but when asked for a copy of the email, he couldn't produce it. Austino was exonerated, and Gabrielle, who was also heavily involved in the PBA, was found to be untruthful. Gabrielle was never informed that he was a target, nor were the investigative findings disclosed to him. Tonetta went on to state that a finding of untruthfulness is detrimental to an officer's career. When Gabrielle finally learned of the finding, he contacted someone who was able to dig up the email that he had sent. When he presented it to IA, they still refused to take the finding out of his file.

Tonetta was unaware that Riordan was disciplined for his failure to notify Gabrielle of his findings. He had no issue with Riordan being disciplined twice for the same conduct, pointing out that IA charges/discipline were different than discipline for HR violations.

Legal Analysis

Respondent has charged the appellant with a violation of N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause) for improper employment practices—specifically retaliation and/or disparate treatment in violation of New Jersey and Federal Employment Laws as they relate to this incident. While all reasonable inferences must be given to the respondent, it is unclear whether Gabrielle's filing of a CIS for not being released from the FTO program qualifies as a CEPA-protected activity. Even assuming arguendo that it does, no evidence was presented that Gabrielle was retaliated against and/or disparately treated. Gabrielle did not testify in this matter. No evidence was presented that his employment was impacted in any way shape or form. There was no evidence of a discharge, demotion, reduction in compensation or rank, or loss of benefits. See Klein at 28.

It is respondent's position that a preponderance of evidence was presented to demonstrate that the appellant was a willing participant in carrying out retaliatory actions on behalf of Beu, Austino, and Finley against PBA complainants, as evidenced by the "secret investigation" against Gabrielle.

Innuendos and supposition do not make a prima facie case. As noted above in the T.C. analysis, a collateral investigation that arises during an investigation is not, in and of itself, retaliatory. No causal connection was presented that the untruthfulness charge was levied against Gabrielle because he filed a CIS. This finding is underscored by, among other things, respondent's own witness, Gelfand, who acknowledged that Gabrielle's actions and statements could be viewed as "untruthful." Nor was there any evidence presented that the appellant conducted the collateral investigation on behalf of Beu, Austino, and Finley. While Gabrielle was not notified of the collateral investigation or disposition, again, other than conjecture, the respondent failed to establish a prima

facie case that such omission was part of a greater scheme to retaliate against Gabrielle—a PBA member.

Respondent has also failed to present a prima facie applicability of each of the anti-discrimination and anti-retaliation laws identified in Paragraph 8 of the FNDA. Again, LAD is designed to prevent unlawful discrimination by an employer and is very clear on the protected classes. N.J.S.A. 10:5-12(a). Union membership is not one of the enumerated protected classes. Ibid.

Likewise, Policy 1151 (Whistleblower Act) and Policy 1152 (Employee Complaints) were based on the CEPA, N.J.S.A. 34:19-1 et seq. (R-26.) Gabrielle had the right to file the CIS without fear of retaliation or reprisal. While it is questionable whether the basis of the CIS was protected activity, assuming arguendo that it was, the respondent has failed to present a prima facie case of retaliation or disparate treatment. Along this same vein, Policies 1151 and 1152 do not prevent collateral investigations. Contrary to counsel's argument, a collateral investigation does not equate to retaliation.

Accordingly, I **CONCLUDE** that respondent has failed to present a prima facie case that the appellant violated N.J.A.C. 4A:2-2.3(a)(12) by engaging in improper employment practices, retaliation, and/or disparate treatment. Therefore, Count 1, Paragraph 5 is **DISMISSED**.

FNDA – Count 1, Paragraph 6: Soda Fund Investigation

Through this count, respondent asserts:

- In another example, Riordan engaged in retaliatory actions as to former Internal Affairs Sergeant Leonard Wolf, targeting Wolf because Wolf was perceived as unsupportive of Beu, Finley, and Austino, including with respect to their efforts to conduct a private investigation of former Chief Timothy Codispoti over VPD's long-time maintenance of a "Soda Fund" which had contained proceeds from a soda machine.

- Well after the Soda Fund events had been put to rest, with Chief Beu having taken charge following the retirement of Chief Codispoti, Sgt. Riordan

> investigated Wolf and concluded, utterly without factual foundation, that Sgt. Wolf had neglected his duty by not conducting a VPD IA investigation into the Soda Fund matter. The report of the "investigation" by Riordan was effectively an attack on Wolf and lacked any facts to support Riordan's conclusions and recommendations.
>
> (J-1)

Two witnesses testified as it relates to this count—Wolf and Gelfand.

Wolf Testimony

Wolf testified that he recalled several conversations taking place in or around June 2015 between Austino, Finley, and Beu regarding the "Soda Fund." One such conversation took place on June 22, 2015, in the sergeant/lieutenant office when he was present. Based upon what they were saying, he did not believe the discussion centered on an IA investigation or a potential IA investigation. He went on to note that he was in IA at the time and at no time during their discussion did they make a formal request to him to start an IA investigation or file a CIS.

Throughout all their conversations surrounding the Soda Fund, they collectively felt that the fund was not only bad practice but a potential liability to the department. This belief was conveyed to Codispoti on several occasions to get him to close out the fund. During one of these conversations, Finley went off on a tangent and disparaged Codispoti, questioning his moral compass and ethics.

Concerned over the vehemency of Finley's commentary and the possibility that third parties may have overheard the conversation, Wolf went to see Codispoti and told him what Finley had said. He was aware that there may be consequences for his actions—him being a sergeant at the time and the other individuals in the room holding higher ranks—but he felt it was the right thing to do. It was never his intention to disclose an investigation or potential investigation because there was no investigation or potential investigation to disclose.

After he informed Codispoti of Finely's commentary, the Chief ordered Beu to file a CIS on Finley. (R-32.) In review of Beu's report, nowhere in the report did it state that he (Wolf) had been tasked with investigating the Soda Fund. If anything, Beu stated that there were several debates on how to proceed with review of the account. He (Wolf) also generated a CIS on Finley that outlined Finley's commentary about Codispoti and subsequent actions/comments towards him personally, post disclosure to Codispoti. (R-32.) No action was taken on the CIS that he had generated against Finely. The matter was closed per Codispoti's order.

At some point in time, the county prosecutor's office became involved in the Soda Fund investigation. This was after Codispoti asked the City to audit the account, which in turn led to the City referring the matter to the county prosecutor's office for review. He could not recall what, if anything, happened at the county level or whether it was sent back for administrative action. Regardless, at no time was he assigned to handle an IA investigation into the Soda Fund account.

He was promoted to lieutenant in January 2017, which was in or around the same time that Beu was promoted to chief and Finley was promoted to captain. Several months later, in August 2017, he was called into a meeting with Beu, Riordan, Bill Hiley, and Steve Triantos regarding discipline for the Community Policing investigation. The only thing he could recall about the IA investigation was that he had, at some point, spoken to Triantos about the fund.

At the meeting, he was informed that he was being disciplined on several charges, one of which included neglect of duty. The discipline being sought was a multi-day suspension. Among the allegations was the claim/charge that he failed to notify anyone in the department between the time he found out and before the prosecutor's office became involved in the case as it related to the Community Policing Fund.

He believed that the charges were unfounded. On June 22, 2015, he met with Codispoti and talked to him about the potential issue with the Community Policing Fund. Codispoti at the time reassured him that there was nothing nefarious going on with the account—that it was an audit issue. Codispoti did not want him to document anything,

again reassuring him that there was no issue with the handling of the fund. It was subsequently learned that other parties had referred the matter to the prosecutor's office for investigation.

He was shocked and angry when he was informed that disciplinary action was being taken against him. Beu repeatedly attempted to calm him down and told him that it was important for him to take the discipline and that he (Wolf) did not want to go up against them. He ultimately took the discipline. He felt threatened and forced into taking the discipline. He was a new lieutenant; the "power structure" of the VPD was telling him that he needed to accept the discipline; and he was being told that the City was upset with how the matter was handled. He did not believe he really had a choice other than to take the discipline if he wanted to further his career with the VPD. The FNDA was issued on August 8, 2017, and had sustained charges of performance of duty with the disciplinary action of a three-day suspension. Until the hearing, he had never seen the IA investigative report, nor was he ever informed that he had violated anything by going to Codispoti with the issue. Additionally, at no time was he told by Riordan that there was a collateral investigation involving him; that he was a target of an investigation that related to the Soda Fund; or that there were sustained findings.

On this last point, the Soda Fund investigation, he was familiar with the January 25, 2017, letter from the Cumberland County prosecutor informing Beu that the Soda Fund investigation was complete, including the administrative investigation of Codispoti. (R-32.) No collateral issues were raised in the letter, which, according to Wolf, would trigger another investigation by the prosecutor's office. Given the prosecutor's findings, the VPD's file should have been closed out. He was stunned when he saw the IA report on him for the first time before the hearing. Riordan had conducted an IA investigation on him after the prosecutor's office closed out their investigation of the Soda Fund. According to Wolf, the report was full of lies and blatant misrepresentations. One example was the banker box of records that Riordan claimed he was concealing. In reality, he was told to bring the boxes to the City comptroller, which he did, and then he was told to pick them up, which he did. He did not know what was in the boxes; he just transported them.

It troubles him tremendously that the charges have been sitting on the IA books for years and not only was he unaware of the charges, but he never had an opportunity to defend himself, and they are in his IA file, which is discoverable.

He was abruptly transferred out of IA in October 2017, a couple of months after the FNDA was issued, and placed in the Patrol Division. He was not happy with the transfer, having been in IA for several years, but he accepted it without issue.

On cross-examination, when questioned about the bank boxes that he had testified to earlier, Wolf could not recall telling Gelfand that he had never transported the boxes.

When shown the January 25, 2017, letter from the county prosecutor to Beu and questioned about the statement that the IA file "can be closed in this matter," he interpreted it to mean that no further investigation needed to be done. He did not agree with the notion that other individuals involved in misconduct or collateral matters could still be investigated.

Wolf was also questioned about his testimony that he was confused by the charges that were levied against him in the August 2017 PNDA and the fact that he had been in IA at that point for several years. He acknowledged that he was aware of his rights to challenge the charges in the PNDA, but he was being threatened by everyone present, including Riordan, who was subordinate and reported to him. He did not recall telling Gelfand that the reason he accepted the disciplinary action was because his promotion was being threatened, despite the fact that he had been promoted several months earlier.

Wolf went on to state that he accepted the disciplinary action because the higher-ups, with whom he lumped Riordan despite the fact that he held a junior rank to him, could make his life a "living hell" because they were in control of the VPD. (3T-244:3–22.) His belief that they could make his life miserable was evidenced by the scrutiny that he was put under for prior cases that he had worked on in IA in which they found errors such as unsigned reports and multiple writeups for things that would not normally rise to the level of an IA investigation.

He was unaware that the prosecutor's office had conducted multiple audits of the IA process at the VPD. Nor was he aware that Riordan did not conduct the IA investigation into the Community Policing fund, which is the one he had been disciplined on.

When asked about the Soda Fund and why he didn't conduct an investigation, Wolf stated that he would not characterize the Soda Fund issue as either a criminal or administrative issue. He likened the conversations that he participated in a discussion on departmental operating procedures surrounding how the fund was being used and how it should be changed. He acknowledged that he was unaware that at the time the discussions were taking place, another officer, Bowers, had received payment for a hotel that she was otherwise not entitled to. He had heard rumors to that effect, but nothing concrete. Despite hearing the rumors, he did not believe an investigation into the fund was necessary.

Wolf was also questioned on his rationale for going to Codispoti about Finley's commentary. In response, he stated he went to the Chief because Finley, who he (Wolf) disliked, was making disparaging comments about the head of the agency—a man who was both moral and ethical.

Gelfand Testimony

He reviewed the "Soda Fund" investigation, which was started in 2015 by then Lieutenants Finley and Austino, and by Beu before he was the chief. The investigation surrounded a Soda Fund that was kept by the VPD in violation of several municipal finance laws and regulations. Finley, Austino, and Beu never filed a CIS on the matter, so no IA investigation was opened at the time. At some point, the prosecutor's office became involved because a criminal investigation was undertaken. The matter was subsequently returned to the VPD for an IA investigation, which was conducted by Riordan. (R-32.)

Riordan issued his report in April 2017, wherein, among other findings, he made a collateral finding against Wolf. Wolf was in IA at the time that Beu, Finley, and Austino

commenced their Soda Fund investigation. Among other findings/charges, Riordan determined that Wolf's judgement was inappropriately compromised due to his loyalty to retired Chief Codispoti, and recommended charging Wolf with failing to accept an internal complaint forwarded to him by Beu, Finley, and Austino. He also determined that Wolf had tipped off the targets of the investigation—Codispoti and Captain Bowers (Bowers).

Another finding was that Wolf attempted to cover up the Soda Fund account and improperly retrieved boxes of documents pertaining to the account that had been delivered to the City to audit and close out the account. Riordan never notified Wolf that he was the target of an investigation, nor did he interview him or inform him of the outcome.

Gelfand believed that Riordan's findings were improper for several reasons, one of which was the fact that at no time was a CIS filed by Beu, Austino, or Finley, which would have triggered an IA investigation. While Wolf attended a meeting with Beu, Austino, and Finley where he was informed of their investigation, he was also informed that they were going to continue the investigation themselves. Contrary to what Beu and Finley reported to the CCPO, Wolf was never asked to open an IA investigation. Additionally, it was Wolf who told them (Beu, Austino, and Finley) that given the nature of their investigation and who the targets were—one of which was Codispoti—that the matter needed to be referred to the prosecutor's office. This was because the IA unit did not investigate criminal matters and could not investigate the Chief.

Another reason he believes that Riordan's findings were improper was because Wolf did not disclose the Soda Fund investigation to Codispoti or Bowers. When he (Gelfand) put together a timeline of events, it was clear that both Codispoti and Bowers were informed of the investigation before Wolf even learned of it. Codispoti had been informed by Beu hours before Beu met with Wolf. Bowers had been informed a couple of weeks prior by Austino.

Gelfand also determined, based upon his investigation, either through the interviews he conducted or the documentation he reviewed, that there wasn't any factual basis for Riordan's finding that Wolf had improperly retrieved the box of documents from

the City. He believed that the reason Beu administratively closed the IA Soda Fund investigation without issuing any discipline against Wolf was because he was confused with discipline that Wolf had received in another IA matter involving the Community Policing Fund.

On cross-examination, Gelfand acknowledged that both the Soda Fund investigation and the Community Policing Fund investigation predated Riordan in IA and that both had been referred to the prosecutor's office. He also agreed that the CCPO declined criminal prosecution in both matters and sent them back to the VPD for whatever administrative action was deemed appropriate.

He was aware that when the CCPO sent the declination letter, the declination letter, along with the evidence, ended up in the director of police, Edwin Alicia's (Alicia), basement. He did not find it improper that the files went back to the police director instead of the Chief of Police as head of IA. According to Gelfand, when an investigation touches upon a police chief, as it did with both the Community Policing Fund matter and the Soda Fund matter, if the prosecutor's office declines prosecution and sends it back for administrative action, the file will go to the city because the police chief cannot investigate himself.

He also did not think it odd for the file to be in the police director's basement or garage as opposed to city hall because he personally takes files home all the time. When pressed, Gelfand really didn't have an answer as to why the files were not returned to the VPD IA unit because when the declination letter came out, Codispoti was no longer with the VPD. When he asked Alicia why the boxes were in his basement, Alicia informed him that he did not know what to do with the files.

He was aware that Triantos investigated the Community Policing Fund matter and that Riordan was the investigator for the Soda Fund matter. No discipline came out of the Soda Fund investigation, and it was administratively closed on Beu's order. Discipline was issued out of the Community Policing Fund investigation—specifically, Lt. Bowers was disciplined for poor oversight over the fund, and Wolf, the lieutenant in IA at the time, was disciplined for failure to conduct an investigation and performance of duty. Wolf

retained counsel at the time and in August 2017 pled guilty to the charges and received minor discipline. (P-2.) The only reason Wolf accepted the charges was because his promotion to lieutenant was being threatened.

When shown a VPD promotional list for January 2017 announcing Wolf's promotion to lieutenant, Gelfand agreed that Wolf's statement to him was inconsistent. He (Gelfand) refused to say that Wolf lied to him, likening the inconsistency to a mistake and stating that there was probably a plausible explanation as to why Wolf told him that his promotion would have been held up if he didn't take the disciplinary hit.

When asked, Gelfand acknowledged that the IA file on the Community Policing Fund, which was investigated by Triantos, was missing documents. No discipline was issued against Triantos for the incomplete IA file, nor did he (Gelfand) recommend discipline—it was his belief that Triantos was no longer in IA, and therefore, it would have been moot.

Gelfand Report

Gelfand discussed the Community Policing Investigation and Soda Fund investigation in Section II(A)(3) of his report. In his findings, he stated, inter alia:

- Dating back to 1985, the VPD maintained a cash fund and bank accounts that were illegal. Three of these funds were routinely used for illegal expenditures in violation of City laws, departmental policies, and/or state law.

- The VPD personnel most responsible for these violations were never properly investigated or held accountable in accordance with the IAPP and VPD IA policy primarily due to Beu, Finley, and Austino's violations of and/or disregard for the IAPP.

- The illegal funds came to the attention of the City administration and the prosecutor's office in 2015, when Codispoti was the Chief of Police. Some

combination of Beu, Finley, and Austino first began investigating the cash funds, Vineland Police Training Academy (VPTA), and the Soda Fund, in or around that time.

- Finley began investigating the Soda Fund in or around the same time that Codispoti and Bowers disciplined Finley for his mismanagement and misappropriation of the Confidential Informant (CI) funds.

- As to the Soda Fund investigation, without ensuring that a proper IA investigation was done, Beu ordered the case to be administratively closed with no discipline issued to any of the involved police personnel.

- Wolf was a casualty of the Soda Fund investigation because Beu found him guilty of serious misconduct, which was not supported by the VPD IA investigation.

- As it relates to the Community Policing Fund investigation, Bowers was appropriately disciplined. Wolf was also disciplined, but he (Gelfand) did not believe that there was a factual basis in the VPD IA investigation to support the charge.

- Given the timing of these investigations, which took place after the CI Fund mismanagement investigation and the "take home vehicle" investigation, which were both against Finley, he (Gelfand) concluded that it was apparent that Finley's actions in the Soda Fund investigation and Community Policing Fund investigation were retaliatory in nature against PBA members. Beu and Austino were aware of Finley's retaliatory motives and assisted him to clear the way for the three of them to take over command of police administration.

- The VPTA matter. Austino was assigned to the Vineland Police Training Unit in 2011. At that time and prior to Austino's assignment to the unit, money was collected from various sources—civilians who attended the defensive driving

program, other law enforcement agencies using the shooting range, and the sale of shell casings (brass). However, the money was kept in the safe at the academy, which violated several laws and regulations for various reasons.

- Austino was concerned over the handling of the monies, and eventually, the captain (Lauria) directed that the monies in question be turned over to the Records Department (Pedulla), along with the ledger, where it was deposited into the Soda Fund account. Unbeknownst to Austino at the time, this fund was also being mishandled by the VPD.

- In May 2015, contrary to Austino's order, brass was recycled. Instead of filing a CIS and following proper IAPP and VPD IA procedures, Austino began asking questions as to why the brass had been recycled in violation of his order. Austino was not in IA at the time.

- In or around this same time period, Finley started looking into the legitimacy of the Soda Fund account.

- On June 15, 2015, Austino met with VPD IA personnel Lt. Bowers and Sgt. Wolf regarding the Soda Fund and informed them that he had interviewed VPD Officer Rodriguez (the target), who admitted that he had taken the brass and had it recycled. The $830 that was received from the sale of the brass had been deposited into the Soda Fund account. Austino also informed them of other interviews that he had conducted, none of which were formally documented. He also told them that he would continue to investigate the matter for possible discipline.

- There is nothing in the file to reflect that Austino filed a CIS or requested that a VPD IA investigation be conducted or a referral to the prosecutor's office or the Chief.

- On June 19, 2015, two days later, Beu and Finley met with Wolf, Captain Lauria, and Michelle Pedulla (Pedulla), at which time Pedulla was questioned about the Soda Fund account. Pedulla disclosed that the account was not a city account, how the account was set up, and what the monies had been used for.

- After the meeting, Beu filled Austino in on the meeting and indicated that he (Beu) would be confronting Chief Codispoti the following Monday, June 22, 2015.

- On June 22, 2015, Beu met with Chief Codispoti and urged him to close the account. On that same date, Chief Codispoti met with Austino and informed him that he "may have" ordered the sale of the brass when Austino was on leave but could not specifically recall. Neither meeting was documented in writing until a month or so later.

- On June 22, 2015, later in the day, Beu, Austino, Finley, and Wolf met concerning the Soda Fund account. Finley explained to Wolf everything that he had discovered about the account. During this meeting, Beu, Finley, and Austino expressed criticism to Wolf about how the account had been used, all of which had been authorized by Chief Codispoti. Finley levied further criticisms and accusations against Chief Codispoti at that time as well.

- Gelfand references a timeline prepared by Austino as to the events surrounding the Soda Fund investigation and other incidents. In his timeline, Austino states that during the June 22, 2015, meeting, Wolf was asked to open an IA investigation. Wolf also created a timeline and/or memorandum surrounding the incident wherein he stated that at no time was there a request for an IA investigation. The meeting was an informal meeting.

- The prosecutor's office, in their report, noted that after the June 22, 2015, meeting between Beu, Austino, Finley, and Wolf, that Austino met with Beu, who directed Finley to conduct an investigation.

- It was Gelfand's opinion that Wolf was never asked to conduct an investigation.

- It was Gelfand's further belief that when Riordan was tasked with conducting an IA investigation years later when Beu was the chief, his finding that Wolf neglected his duty by not conducting an IA investigation was improper and without foundation.

- After the meeting between Beu, Austino, Finley, and Wolf took place, Wolf informed Chief Codispoti of Finley's derogatory remarks, who then directed Beu to issue a CIS against Finley.

- A CIS was issued against Finley on June 30, 2015, by Beu. Nothing in the CIS suggested that Wolf was asked to open an IA investigation regarding the Soda Fund. Gelfand went into detail on Beu's report and his (Gelfand's) interpretation of the same. He believed that the CIS filed by Beu was designed to exculpate Finley regarding the insubordination reported by Wolf to Chief Codispoti and was vague and entirely untruthful.

- Gelfand also went on to summarize Finley's statements to the prosecutor's office as they related to what he told Wolf regarding Chief Codispoti's various indiscretions.

- Prior to Riordan's involvement in the matter, Finley and Beu accused Wolf of wrongdoing by divulging the June 22, 2015, meeting to Bowers and Chief Codispoti. Gelfand noted that the accusation was inappropriate because Beu

had previously told Codispoti of the Soda Fund investigation and Austino had already discussed the matter with Bowers and Wolf jointly on June 17, 2015.[10]

- Gelfand also deduced that Finley had also either directly or indirectly disclosed the Soda Fund investigation to Chief Codispoti prior to Wolf speaking to him.

- Gelfand also went on to note that Finley did not mention to the prosecutor's office that he met with Wolf on June 19, 2015. He only mentioned the June 22, 2015, meeting. He also noted that Finley's statements did not jive with Austino's timeline. He believes that this is significant given how Riordan later "attacked" Wolf's integrity in his report without a sufficient basis.

- Gelfand reviewed Finley's statement to the prosecutor's office wherein he (Finley) discussed what took place during the June 22, 2015, meeting, in which Wolf was present. He described how Bowers received inappropriate reimbursements from the Soda Fund account and how he went about collecting the account documents and who he spoke to. Gelfand noted that none of this was reflected in any of the VPD IA files, nor was anyone given IA notifications. Finley also claimed that Chief Codispoti overheard some of his questioning of staff and ordered Beu to instruct him (Finley) to stay out of the matter and hand everything over to Captain Lauria. He did hand everything over in a sealed box but not before making copies which he later analyzed. After everything was boxed, it was sent to the City. Finley further informed the prosecutor's office that Chief Codispoti instructed Wolf to retrieve the box from the City shortly thereafter. A few days later, the box was back in Chief Codispoti's office—unsealed. Notably, the allegation that Wolf was the one directed by the Chief to retrieve the box of evidence to interfere with the investigation was not addressed by the prosecutor's office. In Gelfand's opinion, Riordan, when he later conducted his IA investigation, reached an unsupported conclusion and recommended that Wolf committed "egregious" violations by doing this.

[10] Earlier in his report, Gelfand stated that the meeting with Austino, Wolf, and Bowers took place on June 15, 2015.

- Gelfand notes that later on in the prosecutor's office investigation, Beu, Finley, and Austino reported that they had been subjected to harassment and retaliation by some combination of Chief Codispoti, Bowers, and/or Captain Ulrich. According to Gelfand, it is unclear whether the City was placed on notice and whether it was related to the Soda Fund investigation. Finley also filed a CIS with Wolf alleging harassment by Chief Codispoti. According to Gelfand, none of the complaints that were filed by Beu, Finley, and Austino were filed on a CIS. Despite this, Riordan addressed their claims as a collateral matter in his IA investigation.

- In his report, Gelfand described in detail the prosecutor's office's findings as they related to the origins of the Soda Fund, how it was funded, and how the funds were mishandled and by whom. On May 5, 2016, the prosecutor's office issued a declination letter to prosecute the matter; however, it indicated that there was a basis for administrative disciplinary action against Chief Codispoti and other VPD personnel that were not addressed in their letter.

- Gelfand reported that there was never any disposition letter from the prosecutor's office as to any other police personnel implicated by the Soda Fund investigation nor any recommendation for further VPD action—whether by the IA Unit or otherwise. Yet, an IA investigation was undertaken by Riordan into this matter.

- Riordan's criticism of Director Alicia for retaining the Soda Fund investigation files was noted in Gelfand's report, and great detail was given by Gelfand regarding Beu's and Austino's position on Director Alicia's actions in this regard. Gelfand also extensively questioned why Riordan did not interview Bowers or Wolf as part of his investigation and raised the issue that no target notification was given to anyone.

- Gelfand noted that while Bowers, who clearly violated VPD rules and regulations, was not even interviewed or charged by Riordan, Riordan did address Austino, Finley, and Beu's claims of harassment and retaliation by Bowers and Chief Codispoti. Riordan concluded without interviewing any of the parties in question and without target notifications, and only after reviewing other VPD IA files, that there was no support for Beu and Austino's claim but that there was support for Finley's claim. Upon his review, Beu made a determination to close the investigation with no action against anyone. No explanation was in the file as to why Beu made such a final determination or whether the findings were substantiated or not.

- Gelfand also detailed his findings/review of the Community Policing fund/National Night Out Accounts. This VPD IA investigation was done by Lt. Triantos, not Riordan. Wolf was one of the targets in the investigation and was ultimately charged with a performance of duty—work expectation charge. The FNDA imposed a three-day suspension, which Wolf accepted. Gelfand disagreed with the findings against Wolf, stating that there was no basis for the findings and that Wolf was railroaded by Riordan and Beu as retaliation. According to Gelfand, Wolf accepted the suspension because Beu had implied to him that he would not be promoted if he did not accept the discipline, and it was Wolf's firm belief that Riordan was put in IA because he was aligned with Beu, Finley, and Austino's agendas.

- In summing up his analysis of the VPD funds violations, which included the Soda Fund investigation, Gelfand went into great detail of the IAPP violations by Beu, Riordan, Finley, and Austino. He went on to opine that Wolf was the biggest victim/casualty of the "rogue" VPD IA processes with the ultimate responsibility of the casualty resting on Beu as the chief. Gelfand further opined that Finley got Riordan into IA with a mission to find fault with Wolf—a retaliatory motive. Gelfand went on to state that because Wolf would not go along with the "rogue" investigation of Codispoti, he was penalized, as evidenced by the Community Policing Fund investigation.

The following overarching recitation of facts appears to be undisputed or not evidence was presented to the contrary, therefore for purposes of this application, I **FIND** them as **FACT**:

- In or around 2015, it was discovered that VPD had several unauthorized funds/accounts, among which included the Soda Fund and the Community Policing Fund.

- Codispoti was the chief of VPD at the time, Beu was a captain, Austino and Finley were lieutenants, and Wolf was a sergeant in IA.

- On June 22, 2015, a meeting took place between Beu, Austino, Finley, and Wolf regarding the Soda Fund account. Appellant was not present in the meeting, nor was there any testimony presented that he was aware of what transpired after the meeting.

- There is a discrepancy in the events that took place during this meeting as they relate to whether Wolf was told to open an IA investigation, but for purposes of this motion, all inferences will inure to the respondent on this issue. Additionally, during this meeting, Finley allegedly made disparaging remarks against Codispoti, which Wolf reported to Codispoti after the meeting along with everything else that was discussed at the meeting.

- There is also a discrepancy in when Codispoti learned of the Soda Fund investigation and who told him first. Again, no evidence was presented that the appellant was in the picture at this time.

- Codispoti ordered Beu to file a CIS against Finley for the disparaging comments. Wolf also filed a CIS against Finley.

- The Soda Fund matter was referred to the City, who in turn referred it to the prosecutor's office. Prior to referral to the prosecutor's office, the files were brought back to the VPD by Wolf and were seen unsealed in Codispoti's office. The prosecutor's office declined to prosecute the matter and referred the matter back to the City/PD for whatever administrative action the City and/or PD deemed appropriate/necessary.

- The files did not immediately get returned to the VPD IA department; instead, they were placed in Director Alicia's basement, who reportedly did not know what to do with them.

- When the files were returned to the VPD in 2017, an IA investigation was opened by the appellant as to the Soda Fund, and an investigation of the Community Policing Fund was done by Triantos. Beu was the chief at that time.

- In his conclusion, appellant found that Codispoti allowed to be maintained an unauthorized account (Soda Fund) and that he used the account for purchases—some of which the City would not have otherwise authorized. He further determined that because Codispoti had retired, the VPD could no longer discipline him. Appellant also determined that collateral issues arose during his investigation, one of which related to Captain Lauria and the other relating to Wolf. As to Wolf, he stated that Wolf's loyalty to Codispoti clouded his judgment and that he failed to accept an internal complaint forwarded to him by Beu, Austino, and Finley. He further determined that Wolf had informed the targets of the preliminary investigation and also participated in a cover-up of the same by retrieving a box of evidence and authorizing a questionable internal affairs report. Appellant also expressed his belief that it would be easy to prove Title 4A charges—incompetency, inefficiency, or failure to perform duties, neglect of duty, and other sufficient cause; however, he did not recommend any discipline against Lauria or Wolf. Beu, upon review, ordered

that the matter be administratively closed. As such, no discipline was issued against Wolf relating to the Soda Fund investigation.

- No notice was sent to Wolf or Lauria that they were the targets of a collateral investigation, and no notice was sent as to the disposition of the matter.

- Triantos conducted the Community Policing Fund investigation. No evidence was presented that appellant was involved in that investigation. As a result of that investigation, Triantos recommended that Wolf be disciplined for, among other things, neglect of duty. This disciplinary action was approved by Beu. Riordan had no authority to approve or disapprove of discipline and was not involved in this determination, and no evidence was presented to find otherwise.

- Wolf accepted the FNDA as it related to the Community Police Fund and was suspended for three days. He was a lieutenant at the time, having been promoted several months earlier. No evidence was presented that Wolf's promotion was delayed, or denied as a result of this investigation and the finding.

- While Wolf testified that he feels that he has been retaliated against, there was no testimony or evidence presented of when such actions took place, who was involved, and what role, if any, appellant played in any of that.

- Against his wishes, Wolf was transferred out of IA. No evidence was presented that the appellant had any authority, input, or knowledge of the transfer.

Legal Analysis

Respondent contends that a prima facie case has been presented as to this count, particularly when viewed in the context of all the other incidents of retaliatory actions by the appellant in concert with Beu, Austino, and Finley. In this incident, the Soda Fund

investigation, respondent asserts that the appellant took a "completely off-the-books secret investigation of Wolf, the former IA Sergeant, attacking his honesty and ethics, without any notice to Wolf that he was under any investigation at all." It is respondent's further assertion that this investigation was intentionally undertaken by the appellant because Wolf was perceived as an unwilling participant in schemes by Beu, Austino, Finley, and Riordan to abuse internal affairs processes to target officers.

The appellant points out that there were two investigations—the Soda Fund investigation and the Community Policing Fund investigation. He performed the Soda Fund investigation. Triantos performed the Community Policing Fund investigation. Appellant was not involved in that investigation. There was no discipline issued as a result of the Soda Fund investigation, and the case was administratively closed. There was, however, discipline issued—a three-day suspension resulting from the Community Policing Fund investigation, which Wolf accepted. Again, that investigation was done by Triantos, not the appellant.

As noted above, respondent has charged the appellant with a violation of N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause) for improper employment practices—specifically retaliation and/or disparate treatment in violation of New Jersey and Federal Employment Laws as they relate to this incident. While all reasonable inferences must be given to the respondent, no evidence was presented that Wolf was retaliated against and/or disparately treated by the appellant. His employment was not impacted in any way, shape, or form. He was not discharged or demoted, nor was his salary reduced or any benefits lost. While the appellant conducted the investigation into the Soda Fund and believed that there were possible Title 4A violations, he made no recommendations as to discipline, and he is not the one who determined to administratively close the file—that was Beu.

Notably, the Soda Fund account came to light two or three years prior to appellant's placement in IA. While respondent claims that Finley's initial investigation into the Soda Fund was in retaliation for two prior investigations that had been taken against him—the CI fund and "take home vehicle" investigations, and that Finley is the one who placed Riordan into the IA unit with a mission to find fault with Wolf—such a finding takes a

quantum leap, and one that no reasonable person would take without more of a foundation.

There is no question that a collateral investigation was commenced in the Soda Fund matter and that Wolf was not notified—certainly an IA violation, but other than conjecture, respondent failed to establish a prima facie case that such omission was part of a greater scheme by the appellant, to retaliate against Wolf.

Respondent has also failed to present a prima facie applicability of each of the anti-discrimination and anti-retaliation laws identified in Paragraph 8 of the FNDA. Again, LAD is designed to prevent unlawful discrimination by an employer and is very clear on the protected classes. N.J.S.A. 10:5-12(a). Union membership is not one of the enumerated protected classes. Ibid.

Likewise, Policy 1151 (Whistleblower Act) and Policy 1152 (Employee Complaints) were based on CEPA, N.J.S.A. 34:19-1 et seq. (R-26.) Even assuming arguendo that Wolf's disclosure to Codispoti of what Finley said in the June 22, 2015, meeting was protected activity, the respondent has failed to present a prima facie case of retaliation or disparate treatment. Along this same vein, Policies 1151 and 1152 do not prevent collateral investigations. Contrary to counsel's argument, a collateral investigation is not retaliation.

Accordingly, I **CONCLUDE** that respondent has failed to present a prima facie case that the appellant violated N.J.A.C. 4A:2-2.3(a)(12) by engaging in improper employment practices, retaliation, and/or disparate treatment. Therefore, Count 1, Paragraph 6 should be **DISMISSED**.

FNDA – Count 1, Paragraph 7: Scarpa Matter

Through this count, respondent asserts:

- February 5, 2021, VPD IA Lt. Chris Landi received a request from Lt. Craig Scarpa (Scarpa) to allow Scarpa to review his personal Internal Affairs file. This

was after Scarpa had been informed that he had been under a 2018 IA investigation for insurance fraud.

- Lt. Landi determined that no such investigation was referenced in Scarpa's IA file and there was no notification to Scarpa of any such investigation.

- Upon further review, Lt. Landi found an IA spreadsheet entry indicating that Lt. Landi's predecessor in IA, Riordan, was the complainant in a matter where Scarpa was the subject of a misconduct investigation noted as "other criminal violation-insurance fraud." This related to a workers' compensation claim of Scarpa having sustained personal injuries arising out of his having participated in a deadly force incident.

- Rather than conducting a thorough and impartial investigation, Riordan put together a false and entirely speculative scenario that Scarpa was faking his complaints of residual health issues resulting from the lethal force incident. Without citing any reliable evidence and asserting his own subjective, biased "suspicions" of "truthfulness" issues (acting under instructions and pressure from Executive Capt. Austino and from former Chief Beu), Riordan attempted to have the CCPO take the matter up for criminal charges.

- After the CCPO requested multiple times from Riordan documentary information to sustain Riordan's purely speculative theories, and receiving none, the CCPO issued a declination letter dated November 2, 2018, declining to prosecute Scarpa for insurance fraud.

- Thereafter, in an effort to justify his entirely inappropriate actions, Riordan prepared, but failed to submit to Scarpa, a report under the above noted IA case number, which he submitted to the CCPO Professional Standards Unit, with the CCPO taking no action thereon.

- Lt. Riordan's conduct in pursuing Scarpa with potential criminal charges arising from Scarpa's absolute right to seek workers' compensation benefits for harm he incurred in the line of duty is a blatant display of dereliction of duty, employee misconduct, conduct unbecoming a public employee, and retaliation against Scarpa for assertion of his right as a public employee.

Three individuals testified on this matter—Landi, Tonetta, and Gelfand. Scarpa did not testify in this matter.

Landi Testimony

Landi testified that when he was transferred into the IA unit in 2019, Riordan, his predecessor, went through the operations and pending matters, which included matters

referred to the prosecutor's office, to determine if there was criminality. The Scarpa matter was never brought up during this transition period.

A year or so later, on February 5, 2021, he received a couple of emails from Scarpa requesting to see his IA file. (R-137.) Apparently, Gelfand, as part of his investigation, had interviewed Scarpa, during which Gelfand informed Scarpa that he had been the subject of an IA investigation in 2018 for insurance fraud. After receiving Scarpa's emails, he went through the IA sheet and found a Scarpa entry; however, he could not locate the physical file.

He contacted the prosecutor's office and was informed that the IA report that had been authored by Riordan had been referred by the VPD IA unit in September 2018. After reviewing the referral, on November 2, 2018, the prosecutor's office issued a declination letter declining to prosecute Scarpa for insurance fraud and sent the matter back to the VPD for an administrative investigation.

Upon learning this, he opened an investigation to determine why there was an open IA investigation on Scarpa. As part of his investigation, he interviewed Scarpa, Riordan, Beu, Austino, and the county prosecutor. The county prosecutor told him that the declination letter was sent after requests were sent to the VPD IA unit, seeking additional information. When none was provided, the declination letter was sent out.

Based upon his investigation, he learned that when the declination letter was received, Riordan, Beu, and Austino disagreed with the prosecutor's office's determination and requested a meeting. From what the prosecutor told him, a meeting was held, during which Riordan, Beu, and Austino represented to the prosecutor's office that there was more evidence, which they were asked to provide. No additional documentation/evidence was forthcoming, so the file remained closed. Had the prosecutor's office decided to reconsider its position, it would have sent notification to the VPD IA unit that the matter had been reopened and was under investigation. None of that occurred in the Scarpa matter, nor was there any documentation to the effect that any other law enforcement agency was looking into the allegations.

During Riordan's interview, he mentioned that one of the reasons that the file may not have been closed out was because the FBI had been looking into the matter. According to Riordan, after the declination letter was received, Austino approached him and asked if he (Riordan) would be willing to speak to the FBI, to which he agreed. Riordan didn't hear anything from the FBI until after he was notified that he was the target of an IA investigation, which was a couple of years later. Landi went on to state that conveniently, after Riordan was given target notification, Austino informed him (Landi) that Agent Ethan Johnson from the FBI had been in contact and wanted whatever information Riordan had on the Scarpa insurance fraud case. When Austino was interviewed, he relayed the same information as Riordan.

After interviewing Riordan, he (Landi) reached out to Agent Johnson, who refused to provide any information as to whether there was an investigation on Scarpa. Additionally, there was nothing in writing in the IA file, formally or informally, from the FBI relative to Scarpa. To date, nothing has been received from the FBI.

After he concluded his investigation, he submitted his report, which included his recommendation, to Chief Casiano for review. (R-137 to R-139.) He felt that Riordan's actions in opening the Scarpa investigation were suspect and at a minimum, Riordan failed to competently perform his job responsibilities. However, without any input from the FBI, he did not believe that he could prove or disprove whether Riordan's actions were appropriate; therefore, he recommended a finding of "not sustained." (R-138.) Landi believed that his investigation into Riordan's actions was fair and unbiased. Chief Casiano disagreed with his recommendation and instead determined that certain charges should be levied against Riordan. (R-139.)

On cross-examination, Landi agreed that an IA investigation cannot be undertaken when there is an open criminal allegation. He also agreed that when he was conducting the Scarpa IA investigation, Austino could not answer any questions with respect to the FBI involvement in the matter, and that even Agent Johnson refused to talk to him.

Tonetta Testimony

Tonetta testified that in 2018, several grievances were filed by the PBA. These types of grievances were typically handled by the Chief of Police unless it involved a human resource issue, at which point the matter was sent to the City to handle. Most of the grievances sent to the City involved people not getting along with one another. He is notified of all grievances that are filed. In November 2018, a draft complaint was sent to the City by a law firm that represented the PBA. (R-11.) The allegations of the complaint were against many members of the senior staff of the PD, including Riordan, who was the head of IA at the time, and Beu. Some of the claims had criminal implications, and others were more of a human resource issue.

Concerned about the allegations, he forwarded a copy of the complaint to the Chief of Police (Beu), Austino, and Finley, as well as the prosecutor's office given the criminal allegations contained therein. From what he could garner, the purpose of the draft complaint by the PBA was to try to get the VPD back under control, the concern being that the Chief (Beu) was going rogue and that he was using the IA unit as a weapon to go after officers who were not in line with him. As examples of how IA could be weaponized, he pointed to failure to notify a target of an investigation, failure to interview people, or putting sustained violations in files without telling anyone.

Several allegations were noted in the draft complaint, which included live feed issues in the patrol vehicles as well as the sergeant/lieutenant office phone. His concern with all of this was the City's potential exposure to a lawsuit, recalling that a year and a half prior, he had received a copy of a letter addressed to Beu from the PBA raising retaliation concerns for those who had reported the "live feed" issues. (R-10.)

After receiving the draft complaint, the City started an investigation into the matter with one of the staff attorneys tasked with handling the investigation. Interviews commenced with some of the named individuals including Austino, Beu, and Riordan; however, the attorney passed away, which was when Gelfand was retained. According to Tonetta, Gelfand was tasked with looking into the allegations in the draft complaint as well as the CEPA complaint that had been filed by Austino. The investigation expanded

as time went on because the more Gelfand dove into the investigation, the more issues came up beyond what was alleged in the draft complaint. At the end of a lengthy investigation that took over two years, Gelfand submitted a report to the City, dated November 21, 2021, which outlined his findings, recommendations, and conclusions. (R-1.) The delay in getting the report completed earlier was in part due to the lack of cooperation by the IA unit and the Chief of Police, who, under the Attorney General (AG) Guidelines, is the gatekeeper of IA files/records. Under the AG guidelines, the chief is required to release IA files to the City so that the municipality can protect itself from civil liability and take the appropriate action. In this case, Beu, as the chief, was refusing to cooperate, and criminal allegations were levied against Gelfand and himself in an effort to stop the investigation. Ultimately, the county prosecutor's office got involved.

Gelfand needed to see the IA files to see if there was any potential liability on the part of the City based upon officer complaints that had been filed and the IA investigations that had been conducted relevant to the complaints. Some of the investigations had been conducted by Riordan.

Gelfand's report raised serious concerns about how the VPD was being run and the conduct of the upper management itself. As a result, the City put its insurance carrier on notice and retained outside counsel to determine what, if any, human resource violations existed, and if so, the appropriate measures and/or disciplinary actions that needed to be taken. Based upon Gelfand's findings, disciplinary charges were brought against several individuals, one of whom was Riordan. (J-1.) The disciplinary action was removal.

Tonetta went through examples of Riordan's conduct, one of which was the Scarpa matter. Other matters that he touched upon were the Gabrielle and T.C. investigations. In discussing the Scarpa matter, he stated that Scarpa, a high-ranking officer in the PBA, was involved in a fatal shooting. After the shooting, instead of going through workers' compensation, he used his personal sick leave to seek treatment. When he (Tonetta) learned that the officer was using his personal leave instead of the correct channel, workers' compensation, he contacted the City's third-party administrator to correct the

situation. According to Tonetta, Riordan filed a complaint with the county prosecutor's office alleging that he (Tonetta) colluded with the officer to commit insurance fraud.

On cross-examination, Tonetta acknowledged that Riordan had sought CEPA protection against him (Tonetta) during the course of the investigation and that this information was passed along to Gelfand. He also acknowledged that Riordan was not named in the draft complaint sent over by the PBA's attorney but went on to state that he was mentioned in the complaint for making sexual innuendo remarks to another officer's (DeMarchie) wife. It was his belief that such conduct constituted sexual harassment and was criminal in nature. When questioned further about this statement, he acknowledged that the prosecutor's office had found no criminal implications and sent the matter back to the City for administrative determinations, if there were any.

He agreed that if the IA unit was being used as a weapon to go after officers who were averse to the administration, there would be an increased number of investigations and more severe discipline being meted out to the dissenters. He went on to point out the Pacitto, Landi, Gabrielle, and DeMarchie investigations as disciplinary examples; however, when questioned about what discipline the officers received, other than Gabrielle, he had no idea if DeMarchie received any discipline and acknowledged that Landi had been exonerated. He was aware that Riordan did not do the initial investigation on Pacitto but wasn't sure if he took over the file or just reviewed it. In either event, he knew that Beu disagreed with Riordan's determination in the matter; however, according to Tonetta, that didn't deter Riordan from disregarding the chief's recommendations. This level of disregard was also seen when Austino and Finley made recommendations.

Tonetta acknowledged that his conclusion that the IA unit was being used as a weapon by Beu and Riordan was based upon Gelfand's report. He did not personally review the IA files, nor did Gelfand have access to all of the IA files—just a select few.

He was aware that one of the charges against Riordan was disparate treatment. While a large sampling would be preferred in proving the charge, he believed that more than one or two would suffice to constitute a thorough investigation. When questioned about the discrimination charges that had been levied against Riordan, Tonetta agreed

that the allegations were not based on race, gender, ethnicity, or anything along those lines.

He also acquiesced that in late 2020 or early 2021, the Cumberland County Prosecutor's Office took over the IA unit due to findings of significant issues within the unit itself. After corrections were made, the prosecutor's office turned the unit back over to the VPD. He concurred that some of the problems that were identified pre-dated Riordan's assignment to the IA unit. He also agreed that when Riordan first went into IA in 2017, he was not the commander of the unit. He could not say exactly how many officers were assigned to IA, what dates Riordan worked in the unit, or when Riordan became the unit commander.

Gelfand Testimony

Gelfand testified that as part of his investigation, he reviewed the CEPA notice that Riordan had filed with the City alleging retaliation stemming from an insurance fraud referral that he (Riordan) had made to the prosecutor's office on Scarpa. At the time, Scarpa was an active union officer/representative.

When he started investigating Riordan's claim, he attempted to look into Riordan's factual basis for referring the matter to the prosecutor's office. He wanted to know this because Beu, Austino, and Riordan appeared to file criminal claims against individuals who were against them, and none of the claims appeared to have a factual basis. Gelfand himself had been accused of criminal activity by them, as had Tonetta, and he had concern that there was an abuse of power.

In review of the Scarpa matter, he learned that Scarpa had been involved in a fatal shooting in 2017/2018. After the shooting, he sought medical help and took off from work using his personal leave. The workers' compensation people were having difficulty contacting Scarpa after the incident and difficulty in obtaining his medical records to see if it was covered under workers' compensation. Riordan alleged that Tonetta and Scarpa participated in insurance fraud by converting Scarpa's personal leave to workers' compensation leave. He and Austino referred the matter to the prosecutor's office,

claiming that the City's workers' compensation people had determined that Scarpa wasn't entitled to workers' compensation and were uncomfortable that Scarpa's personal leave had been converted to workers' compensation leave by Tonetta.

He interviewed the City workers on this matter and it was his belief that nothing untoward had occurred. The City determined that Scarpa was entitled to workers' compensation leave as a result of the shooting and retroactively converted his leave from personal leave to workers' compensation. This action was subsequently ratified by the mayor and City Council, and a resolution was passed accordingly. Gelfand went on to state that no IA file was opened by Riordan; instead, he and Austino went right to the prosecutor's office for investigation. At no time was Scarpa informed that there was an investigation or that a referral had been made.

He also interviewed Riordan and questioned him about his rationale or basis behind his actions in the Scarpa matter. He also questioned Riordan about why he believed that he was being targeted in reference to certain employment matters. (R-70.) One of the reasons that Riordan cited was the Scarpa matter that he had referred to the prosecutor's office. According to Riordan, Scarpa had been present during the fatal shooting of a suspect and subsequently suffered psychological problems and took off from work on personal leave as opposed to workers' compensation leave. City personnel attempted multiple times to reach Scarpa, and when they were unable to contact him, they contacted the VPD and Riordan as the head of IA, who became involved at that point. The issue centered on the legitimacy of how Scarpa's leave was changed from sick leave to workers' compensation by the City and Scarpa's involvement in the same. The City worker who handled insurance matters for the City had raised concerns over being told by the City solicitor, Tonetta, to change Scarpa's sick leave to workers' compensation leave.

Gelfand went on to state that in speaking to Riordan, it was Riordan's belief that he had whistleblower protection because he reported the insurance fraud allegations to the prosecutor's office. Shortly after making that referral, he was transferred out of IA at the direction of the City, and Beu had no choice but to obey the directive.

He found no merit in Riordan's conjecture that he was removed from IA at the City's direction—this was primarily because IA staffing fell squarely on the Chief of Police and no one else. Additionally, while Riordan referenced emails from Tonetta and Beau that substantiated his claim, the only emails that he saw between the parties pertained to a conflict of interest that Riordan had regarding a specific case.

On cross-examination, Gelfand disagreed with the notion that he investigated the PBA CEPA claims first over Riordan's, Austino's, and Beu's CEPA complaints, stating that their complaints were received later in his investigation. Upon investigation, he substantiated all the PBA claims and none of Riordan's, Austino's, or Beu's allegations. He went on to state that not everything that Riordan, Austino, and Beu told him was a lie or didn't happen, he just did not believe that their claims were substantiated based upon his findings.

When questioned whether Riordan was viewed as a witness or a target initially, he was vague in his response, believing that Riordan was both a witness and a target. The PBA complaint made allegations against Riordan, but Riordan himself raised CEPA concerns in his November 2019 letter. (R-70.) He did recall sending Riordan a letter indicating that he wanted to interview him, but he could not recall whether he told Riordan he wanted to both interview him and investigate him. Since his investigation was not a formal IA investigation, he had no obligation to notify Riordan that he was a target.

He acknowledged that in his report, as it related to the PBA complaints, he determined that there was a pattern of harassment and retaliation by Beu, Austino, and Finley, but not by Riordan. He also acknowledged that such conduct predated Beu's ascension to chief. He also concurred that the VPD had a history of inefficiencies in their application of the IAPP process—even prior to Beu becoming the chief under Codispoti's regime—to the point that the CCPO had to come in and conduct audits of the PD's IA processes. According to Gelfand, IAPP violations have the potential to expose the City to liability and lawsuits.

In turning to the Scarpa matter, Gelfand confirmed his earlier testimony that anyone who has a good faith basis to make a claim is entitled to whistleblower protection

and should not be subject to retaliation or harassment. In going through what happened in the Scarpa matter, he acknowledged that the issue with Scarpa started when Scarpa was involved in a civilian fatality—not as the shooter, but as an officer present at the scene. After the incident, Scarpa took personal leave, but at some point, he sought workers' compensation benefits. During this time period, Scarpa was non-compliant with requests that were made by the third-party administrator of the workers' compensation program. Ultimately, the issue of whether Scarpa could receive workers' compensation for the time he was out was resolved by way of resolution, which Gelfand conceded was atypical.

Gelfand was aware that Riordan referred the matter to the prosecutor's office due to his concern that insurance fraud had taken place. He talked at great length about the issue of insurance fraud and how the City was self-insured, and therefore, a claim of insurance fraud could not be sustained. As he kept talking, however, he changed his position, ultimately concluding that allegations of fraud could be sustained as they related to fraud on the taxpayers and taxpayer money. He was aware that Riordan was under the belief that there was still an open criminal investigation in the Scarpa matter.

Gelfand Report

In his report, Gelfand stated that he interviewed Riordan regarding his CEPA retaliation complaint filed on November 8, 2019. The complaint outlined two matters which were referred to as "insurance fraud" that he had reported for criminal investigation and for which he was being retaliated against. One matter involved Scarpa.

For a period of weeks following a fatal shooting incident that Scarpa witnessed, Scarpa did not respond to attempts made by the City's third-party workers' compensation program administrator (Qual Lynx) to reach him. Qual Lynx was having difficulty getting Scarpa to attend a mental health screening evaluation to determine if he was eligible for workers' compensation. As a result of this, Scarpa was required to use his sick time for some period of his leave time.

When it was later determined that Scarpa had a valid compensable need for leave, the City determined to convert this used sick time to paid administrative leave. Riordan, as well as "apparently Chief Beu," considered this a form of insurance fraud by the City, given that the Qual Lynx representative had determined to deny the leave time and require Scarpa to have used his sick time for the time period in question.

Following the shooting, the county prosecutor directed that all of the officers involved in the incident be questioned. Beu was uncomfortable with this request so soon after the shooting but eventually capitulated and ordered that all of the officers go in for questioning. This was apparently related to the difficulty maintaining communication with Scarpa. Riordan, as the IA officer, was the liaison for Qual Lynx and Denise Ciulla and was tasked with retrieving Scarpa's discharge paperwork from Scarpa's initial medical treatment after the shooting incident.

Gelfand, during his interview with Riordan, produced an email that had been sent to Tonetta from Scarpa in September 2018. The email showed that Scarpa had forwarded his discharge papers to a VPD IA officer (Candelario) two months prior on July 17, 2018, which Riordan was unaware of.

Riordan believed that there was a VPD IA case opened concerning Scarpa's alleged non-compliance with Qual-Lynx, but the matter was forwarded to the prosecutor's office. Riordan was unaware if there was any investigation of the matter.

Riordan objected after Scarpa filed a grievance and was given paid administrative leave retroactively in lieu of having used sick time. He claimed that the mayor made the decision because he and Scarpa were close friends. Riordan voiced his objections to Denise Ciulla and others in police administration.

According to Gelfand, Riordan did not dispute that the time that Scarpa was out and was retroactively given paid administrative leave was related to a psychological reaction to the shooting incident.

Riordan met with two officers from the prosecutor's office to discuss Scarpa's misappropriation of leave time allegation on October 9, 2018, as well as to discuss an allegation that the City had misappropriated taxpayer funds by continuing to pay another officer—Rich Burke.

Gelfand's report discussed other matters in which Riordan felt that he was being retaliated against and by whom. In rendering his conclusion on Riordan's CEPA claim and transfer out of the IA unit, Gelfand stated:

> The idea that Riordan's transfer from the IA Unit was the product of harassment, retaliation or differential treatment by Solicitor Tonetta has zero factual basis. If anyone is responsible for making the transfer decision on an inappropriate basis it is Chief Beu, who clearly neglected his duty if he transferred Riordan out of IA based upon an opinion, he himself solicited from a Solicitor whom he believed and alleged to be a major conspirator favoring the PBA to the detriment of Beu, Austino and Riordan.
>
> If the transfer would indeed be deemed retaliatory, the person responsible for the retaliation against Riordan by transferring Riordan out of the VPD IA Unit is clearly Rudy Beu. This particular complaint smacks of Chief Beu and/or Sgt. Riordan seeking to set up Solicitor Tonetta to achieve a result which could then be twisted into an allegation of retaliation...
>
> I thus believe and conclude that the transfer of Riordan to IA and later replacement [of] Riordan in IA with Lt. Landi was retaliatory on Chief Beu's part, most prominently as to Landi, Sgt. Riordan, to the extent he was aggrieved by the transfer, was aggrieved by a decision entirely in Chief Beu's discretion. If anything, Riordan's transfer appears to be a by-product or related to Beu's retaliation against Landi, with Chief Beu seizing the opportunity to portray a twisted version of reality by "blaming" the transfer on Solicitor Tonetta's advice, advice which appears to have been rendered reasonably and in good faith . . .
>
> [R-1.]

The following overarching recitation of facts appears to be undisputed and/or no evidence was presented to support a contrary finding, and for purposes of this application, **I FIND** them as **FACT**:

- On July 14, 2018, Scarpa was involved in a deadly force incident. After the incident, Scarpa went out on leave and was non-compliant with the City's insurance carrier (Qual-Lynx), who needed him to get evaluated for workers' compensation purposes.

- Riordan was in IA during the relevant time period. At some point, due to Scarpa's continued lack of responsiveness, City personnel (Ciulla), contacted VPD IA, Riordan, regarding Scarpa's leave.

- On or around August 3, 2018, Scarpa started cooperating with the City. On or about September 10, 2018, the insurance company notified the City that workers' compensation would not be paid to Scarpa for the time period that he had been uncooperative.

- Scarpa filed a grievance on this determination. Before a determination of the grievance was rendered by Beu, Tonetta told Ciulla to convert all of Scarpa's leave from the date of the incident to workers' compensation. Ciulla, concerned over this command, conveyed her concerns to Riordan.

- The decision to retroactively convert Scarpa's sick leave to workers' compensation was subsequently ratified by the mayor and City Council, and a resolution was passed accordingly. Such action on the City's part was atypical.

- An IA investigation was opened by Riordan, who immediately referred the matter to the prosecutor's office as a potential insurance fraud. The prosecutor's office subsequently declined to prosecute the matter.

- At some point, the matter was referred to the Attorney General's Office as well as the FBI by Austino. Riordan has never spoken to anyone from the FBI. As of the date of Gelfand's investigation, the FBI would neither confirm nor deny whether there was an open active investigation into the fraud referral.

- Scarpa was not placed on notice that he was the target of an investigation.

- Scarpa did not testify in this matter. No evidence was presented that he has been retaliated against for seeking workers' compensation. No evidence was presented that Scarpa was involved in the drafting of the PBA complaint sent to the City on June 14, 2017. No evidence was presented that the referral by Riordan to the prosecutor's office of a potential insurance fraud was related to the PBA complaint.

Legal Analysis

Respondent contends that a prima facie case has been presented of conduct unbecoming and common law misconduct. Respondent points out that Scarpa is a well-known, active PBA member who assisted with the 2017 draft complaint that was sent to the City. Riordan never informed Scarpa of the frivolous IA investigation that he launched against him that was filled with false scenarios and referred to the prosecutor's office for criminal prosecution.

Respondent further notes that under New Jersey law, it is unlawful to retaliate against any individual for filing a workers' compensation claim and that employment practice concerns are clearly raised when an IA supervisor uses his power to baselessly pursue potential criminal charges against a well-known, active PBA member who sought workers' compensation benefits for harm that he incurred in the line of duty.

Appellant contends that if anything, he is the one who has been retaliated against. He had a good faith belief that Scarpa, in concert with the City management, was engaging in insurance fraud. As acknowledged by Gelfand, the City's actions in

approving a resolution for retroactive benefits was an aberration and rarely done. He reported the same to the prosecutor's office and the FBI, which still has an open case.

As noted above, respondent has charged the appellant with a violation of N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause) for improper employment practices—specifically retaliation and/or disparate treatment in violation of New Jersey and Federal Employment Laws as they relate to this incident. While all reasonable inferences must be given to the respondent, no evidence was presented that Scarpa was retaliated against and/or disparately treated by the appellant. Scarpa did not testify in this matter, nor does it appear that Gelfand interviewed him on this specific issue. No evidence was presented that his employment was impacted in any way, shape, or form. He was not discharged or demoted, nor was his salary reduced or any benefits lost.

No evidence was presented that appellant's handling of this matter was related to Scarpa's involvement in the drafting of the PBA complaint. Of note, in review of the testimony presented in this matter, I did not recall seeing such a fact in the documentation submitted into evidence or testified to. What was also missing was a nexus that appellant's handling of this matter was because Scarpa filed for or received workers' compensation. That does not appear to be the issue—rather it was how his leave was handled by the City after the insurance carrier denied retroactive coverage.

In sum, even giving the respondent all reasonable inferences, it has failed to establish a single prima facie case of CEPA retaliation by the appellant against Scarpa.

Respondent has also failed to present a prima facie applicability of each of the anti-discrimination and anti-retaliation laws identified in Paragraph 8 of the FNDA. Again, LAD is designed to prevent unlawful discrimination by an employer and is very clear on the protected classes. N.J.S.A. 10:5-12(a). Union membership is not one of the enumerated protected classes. Ibid.

Likewise, Policy 1151 (Whistleblower Act) and Policy 1152 (Employee Complaints) were based on the CEPA, N.J.S.A. 34:19-1 et seq. (R-26.) Even assuming that Scarpa

had CEPA protection, the respondent has failed to present a prima facie case of retaliation or disparate treatment.

Accordingly, I **CONCLUDE** that respondent has failed to present a prima facie case that the appellant violated N.J.A.C. 4A:2-2.3(a)(12) by engaging in improper employment practices, retaliation, and/or disparate treatment. Therefore, Count 1, Paragraph 7 should be **DISMISSED**.

Count 2. Violation of N.J.A.C. 4A:2-2.3(a)(9) – Discrimination That Affects Equal Employment Opportunity

Equal Employment Opportunity under N.J.A.C. 4A:2-2.3(a)(9) provides that an employee may be subject to discipline for "discrimination that affects equal employment opportunity (as defined in N.J.A.C. 4A:7-1.1), including sexual harassment." N.J.A.C. 4A:7-1.1 states in pertinent part:

> (a) There shall be equal employment opportunity for all persons in, or applicants for, the career, unclassified, and senior executive services, regardless of race, creed, color, national origin, nationality, ancestry, sex/gender (including pregnancy), affectional or sexual orientation, gender identity or expression, age, marital status, civil union status, domestic partnership status, familial status, religion, atypical hereditary cellular or blood trait, genetic information, liability for service in the Armed Forces of the United States, or disability, except where a particular qualification is specifically permitted and is essential to successful job performance. See N.J.A.C. 4A:4-4.5 on bona fide occupational qualification.
>
> (b) Equal employment opportunity includes, but is not limited to, recruitment, selection, hiring, training, promotion, transfer, work environment, layoff, return from layoff, compensation, and fringe benefits. Equal employment opportunity further includes policies, procedures, and programs for recruitment, employment, training, promotion, and retention of minorities, women, and persons with disabilities. Equal employment opportunity but not affirmative action is required with respect to persons identified solely by their affectional or sexual orientation.

> (c) Persons with disabilities shall include any person who has a physical disability, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or any mental, psychological, or developmental disability resulting from anatomical, psychological, physiological, or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques
>
> . . . .
>
> (f) This chapter prohibits all forms of discriminatory conduct against any State employee by any other State employee or person doing business with the State. . . .
>
> (g) In local service, an appointing authority may establish policies and procedures for processing discrimination complaints.

Like the state's LAD statute, the New Jersey Equal Opportunity Statute does not create a protection for employees belonging to a union. However, it is unlawful to retaliate against any individual for filing a workers' compensation claim. N.J.S.A. 34:15-39.1 provides in pertinent part:

> It shall be unlawful for any employer or his duly authorized agent to discharge or in any manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim workmen's compensation benefits from such employer, or because he has testified, or is about to testify, in any proceeding under the chapter to which this act is a supplement.

Respondent asserts that based upon the conduct alleged in all the incidents giving rise to the sustained charges, that a prima facie case for discrimination under Count 2 has been met. Further, individuals who are mistreated for their union membership or their status as CEPA complainants fall within this regulation.

Contrary to respondent's unsupported assertion, the New Jersey Equal Opportunity Statute does not provide protection for employees just because they belong to a union. Nor does it provide specific protection for individuals who may have a CEPA claim that falls outside of one of the enumerated classes. As set forth more fully above and incorporated herein, the respondent has failed to set forth a prima facie case in any of the specifically enumerated matters that formed the basis of the FNDA of a CEPA violation, LAD claim, or violation of any of the enumerated anti-discrimination and retaliation laws identified in Paragraph 8 of the FNDA.

The only matter that could remotely fall within this count would be the Scarpa matter. However, even giving all reasonable inferences to the respondent, no evidence was presented that the appellant opened an investigation into the Scarpa matter because he filed for workers' compensation. The investigation was opened after City representative Ciulla turned to the VPD IA unit with concerns about its inability to contact Scarpa to obtain documentation after he went out on leave and how the City retroactively authorized leave after the insurance provider denied coverage for certain dates. This is an important distinction. Again, Scarpa did not testify in this matter, and no evidence was presented that the appellant was acting against Scarpa in any retaliatory way, either for his union involvement, or for filing for workers' compensation.

Accordingly, I **CONCLUDE** that respondent has failed to present a prima facie case that the appellant violated N.J.A.C. 4A:2-2.3(a)(9)—Discrimination that affects equal employment opportunity. Therefore, Count 2 should be **DISMISSED**.

Count 3. Violation of N.J.A.C. 4A:2-2.3(a)(6) – Conduct Unbecoming and Count 4. Common Law Claim – Conduct Unbecoming.

"Conduct unbecoming a public employee" encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for government employees and confidence in the operation of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Id. at 555 (citation omitted). Such misconduct

need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (citation omitted).

"It is well settled that public employees are expected to exhibit appropriate behavior, both on and off the job, in order to project a positive image to the public that they serve and the taxpayers who fund their positions. Any conduct that serves to diminish the public's trust in the integrity of its employees is intolerable." In re Green, Dep't of Human Servs., CSV 8108-05, Final Decision (June 7, 2006) https://njlaw.rutgers.edu/collections/oal/.

The New Jersey Supreme Court has spoken to the high standards for police officers both on- and off-duty:

> Society reposes in police officers responsibilities that are simultaneously weighty, sensitive, and fraught with dangerous consequences to themselves, other police officers, and the public. Police officers are authorized to carry firearms, N.J.S.A. 2C:39-5 to -6a(3), and to use deadly force in justifiable circumstances, N.J.S.A. 2C:3-7. They can engage in high-speed chases with absolute immunity from suit, Tice v. Cramer, 133 N.J. 347, 627 A.2d 1090 (1993); they are called on, in certain instances, to stop motor vehicles and search passengers without probable cause, State v. Muhammed, 134 N.J. 599, 637 A.2d 158 (1994); and they are sometimes required to intervene in domestic disputes, N.J.S.A. 2C:25-17 to -33. Not everyone can do that kind of work. Fresh in our memory is the police brutality that underlay the officer's conviction in State v. O'Donnell, 117 N.J. 210, 564 A.2d 1202 (1989). That incident serves to remind us that police work is not just another job and that some people should not serve as police officers.
>
> [In re Vey, 135 N.J. 306, 308 (1994).]

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." In re Carter, 191 N.J. 474, 486 (2007) (quoting Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966)). "[T]he role of the police in every community has always been of extreme importance to our social well-being." Irvington Policemen's Benev. Ass'n, Local No. 29 v. Town of Irvington, 170 N.J. Super. 539, 545–46 (App. Div. 1979), certif. denied, 82 N.J. 296 (1980) (citing Armstrong).

It is respondent's position that all of the referenced incidents in the FNDA easily satisfy the minimum requirements for the City's prima facie case under Counts 3 and 4. The very fact that the appellant initiated "secret investigations" into CEPA-protected complainants on multiple occasions and deemed them untruthful, dishonest, and unethical qualifies for conduct unbecoming. Respondent further asserts that standing alone, any one of the incidents is enough for a prima facie case.

As set forth in greater detail above and incorporated herein, respondent has not presented a prima facie case of any of the counts set forth in the FNDA. As such, there is no basis to sustain Counts 3 and 4.

Accordingly, I **CONCLUDE** that respondent has failed to present a prima facie case that the appellant violated N.J.A.C. 4A:2-2.3(a)(6)—Conduct Unbecoming and Count 4 - Common Law Claim—Unbecoming Conduct. Therefore, Counts 3 and 4 of the FNDA should be **DISMISSED**.

ORDER

For the reasons set forth above, it is **ORDERED** that appellant's Motion to Dismiss is **GRANTED** and that all of the charges entered against the appellant on the October 21, 2022, FNDA are hereby **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, 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.

May 17, 2024
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency: May 17, 2024

Date Mailed to Parties: May 17, 2024

TBH/dc

APPENDIX

WITNESSESS

For appellant

None

For respondent

Brian Armstrong
Scott J. O'Neill
Gregory Pacitto
Richard Tonetta
Todd Gelfand
Christopher Landi
Leonard Wolf

EXHIBITS

Joint Stipulations

J-1	Final Notice of Disciplinary Action
J-2	Preliminary Notice of Disciplinary Action with Amended Schedule A
J-3	Preliminary Notice of Disciplinary Action—Served 11.15.21
J-3A	Amended Preliminary Notice of Disciplinary Action
J-4	Ex 21 07.214 2014 AG IA Guidelines Copy
J-5	IA Policy & Procedures—November 2022

For appellant

P-1	Vineland Internal Affairs Index File 2017-2019
P-2	Vineland Internal Affairs 2016-0018
P-3	Not in Evidence
P-4	Not in Evidence
P-5	Not in Evidence

P-6 Vineland IA 2020-0026

P-7 Not in Evidence

P-8 Not in Evidence

P-9 Article

For respondent

R-1 Report of Investigation in the Matter of Vineland Workplace Harassment and Retaliation Investigation

R-2A Exhibits to Gelfand Report 1 of 2

R-2B Exhibits to Gelfand Report 2 of 2

R-3 VCPD—General Order—Mobile Video/Body Worn Cameras—Revised 2016.11.10

R-4 Not in Evidence

R-5 PBA—VCPD 2016.12.14b Grievance No. 2016-05

R-6 2017.1.4 Beu to Pacitto—Wiretap Response

R-7 2017.6.10 17-35754 AJSANTI 1-1 dp IA

R-8 VCPD Critical Incident Sheet 2017.6.13

R-9 Not in Evidence

R-10 2017.6.14 Long to Beu—Investigation

R-11 2018.11—Ex 26 PBA Local 266 v. Vineland Draft Complaint

R-12 Not in Evidence

R-13* Landi Metadata (Landi)

R-14 to R-25 - Not in Evidence

R-26 Vineland City Police Department—Policy 1151 (Whistleblower Act) and Policy 1152 (Employee Complaints)

R-27 Vineland City Police Department—General Order # 2018-002—Rules and Regulations

R-28 to R-31 - Not in Evidence

R-32 2017.1—Webb-McRae to Beu—SODA Fund—Riordan IA2017-0035

R-33 Not in Evidence

R-34 Cumberland County IA Investigation Report 2017.4.5

R-35 2017.6.15 Email Chain—PSU 16-0099

R-36 VCPD Critical Incident Sheet 2017.6.22 Wiretap—Riordan IA 2016-0257

R-37 2017.6.30 Austino to Beu—Complaint by Austino

R-38 to R-40 - Not in Evidence

R-41 2018.5 VCPD Critical Incident Sheet—OPS Case #2A2017-0112 T.C.-Landi

R-42 Not in Evidence

R-43 IA Case #2017-0112 VCPD Critical Incident Continuation—Riordan T.C. Report

R-44 to R-69 - Not in Evidence

R-70 2019.11.8 Riordan to Gonzalez

R-71 to R-94 - Not in Evidence

R-95 February 2, 2021, Tom Riordan Interview

R-96 to R110 - Not in Evidence

R-111 2017.1.24 Email—Finley to Supervisors—Re: Critical Incidents

R-112 ProPhoenix Screenshot—T.C. Incident

R-113 T.C. incident—report history

R-114 Not in Evidence

R-115 March 12, 2020, Critical Incident Sheet naming Thomas Riordan

R-116 to R-119 - Not in Evidence

R-120 BWC Footage from Landi during T.C. Incident

R-121 to R-135 - Not in Evidence

R-136 Riordan Interview

R-137 Landi IA Report

R-138 Critical Incident Continuation

R-139 Disposition Review Form

*Entered into evidence over appellant's objection