



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.

Among the appointing authority's exceptions, it argues that the initial decision cannot be adopted as it was issued outside the 45-day period proscribed in *N.J.S.A. 52:14B-10* and *N.J.A.C. 1:1-18.1(e)*. The Commission rejects this contention. The initial decision clearly states that the record closed on October 26, 2023, making its December 8, 2023, issue date timely. Even assuming, *arguendo*, that the record closed when the appointing authority contends, October 21, 2023, making it untimely, would not persuade the Commission that it cannot be considered. Initially, the appointing authority has presented no evidence that the alleged untimely issuance prejudiced it in any way. Moreover, pursuant to *N.J.A.C. 1:1-18.8(a)* and (c), ALJs may request extensions to issue an initial decision. Such an extension would have certainly been granted by the Commission if it were needed in this case. To find otherwise would be the epitome of placing form over substance.

The appointing authority also argues that the ALJ's dismissal of certain charges during the hearing was improper. The Commission disagrees. In this regard, the Commission finds that the ALJ's April 17, 2023, Order regarding that issue to be thorough, comprehensive and firmly based on her assessment of the credible evidence in the record. The Commission finds nothing in the record or the appellant's exceptions to indicate that the determination made by the ALJ in that Order should be overturned.

Additionally, the appointing authority states that it should not have been required to provide pay to the appellant pursuant to *N.J.S.A. 40A:14-201*, arguing, in essence, that it is in violation of the New Jersey Constitution. The Commission rejects this contention. *N.J.S.A. 40A:14-201* was passed by the legislature and signed into law by the sitting Governor. The subsequent enabling regulations found in Title 1 and Title 4A of the New Jersey Administrative Code were properly promulgated under the Administrative Procedures Act. Any argument that the appointing authority has as to the constitutionality of these provisions is not properly raised before the Commission, and therefore, will not be considered.

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 on April 30, 2023, pursuant to *N.J.S.A.* 40A:14-201. Assuming the accuracy of this information, the appellant, therefore, will have already received any pay that he would be entitled to from that date 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 17<sup>TH</sup> DAY OF JANUARY, 2024



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Chairperson  
Civil Service Commission

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Attachment



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

**INITIAL DECISION**

OAL DKT. NO. CSR 09763-22

AGENCY DKT. NO. N/A

2023-939

**IN THE MATTER OF RUDOLPH BEU,  
CITY OF VINELAND.**

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**Colin G. Bell, Esq.**, for appellant, Rudolph Beu (Hankin Sandman Palladino Weintraub and Bell, attorneys)

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

Record Closed: October 26, 2023

Decided: December 8, 2023

**BEFORE KATHLEEN M. CALEMMO, ALJ**

**STATEMENT OF THE CASE**

Appellant, Rudolph Beu (Beu), appealed his removal, effective November 15, 2021, by the respondent, City of Vineland (Vineland). At the time of his removal, Beu maintained the Civil Service title of Chief of Police of the Vineland Police Department (VPD). Vineland removed Beu based on the following charges contained in the Final Notice of Disciplinary Action (FNDA) dated October 21, 2022: Count I – 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 II – N.J.A.C. 4A:2-2.3(a)(9) – discrimination that affects equal employment opportunity

(withdrawn by Vineland); Count III - N.J.A.C. 4A:2-2.3(a)(6) – Conduct Unbecoming a Public Employee; and Count IV – common law claim for unbecoming conduct. (J-1.)

### **PROCEDURAL HISTORY**

On October 25, 2022, Beu filed an appeal contesting his removal. On October 31, 2022, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 40A:14-202(d).

The following orders were entered:

1. Order denying motion for consolidation,<sup>1</sup> dated January 11, 2023;
2. Pre-hearing order, dated January 19, 2023;
3. Order dated April 17, 2023, on appellant's oral motion to dismiss all charges contained in the FNDA as set forth on Schedule A, argued after respondent rested. (J-1.) Under the order the allegations contained in Count I, paragraphs 4, 5, and 7 were dismissed. Count II was withdrawn by respondent. The motion was denied as to all remaining charges in Count I, and Counts III and IV;
4. Oral order on June 7, 2023, denying Vineland's request for additional rebuttal witnesses and to amend the FNDA to add new charges for neglect of duty on the last day of hearing;
5. Order, dated June 20, 2023, returning appellant to pay status; and

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<sup>1</sup> Vineland's termination of Beu, Captain Adam Austino, and Lieutenant Thomas Riordan, stemmed from the same human resource investigation. Their appeals were separately transmitted to the OAL and assigned to different Administrative Law Judges.

6 Order, dated September 28, 2023, denying respondent's omnibus motion seeking to re-open the record, amend the FNDA to add new charges, and for reconsideration of my April 17, 2023, Order.

There were twelve hearing days, beginning on January 24, 2023, and concluding on June 7, 2023. The respondent used seven hearing days and one day for a rebuttal witness. The appellant used four hearing days.

As a result of respondent's omnibus motion, the deadline for submission of summation briefs was extended until October 17, 2023. Upon receipt of respondent's summation brief, I closed the record.

### **FACTUAL DISCUSSION**

Beu became a full-time police officer with VPD on April 25, 1982. During his career, Beu held the following ranks: sergeant (1995-2005); lieutenant (2005-2008); captain (2008-2017); and chief, appointed on January 4, 2017. Beu served as chief until his suspension in February 2020. After appealing the suspension, Beu returned to VPD as deputy chief interim until his removal, which is the subject of this appeal.

Over the course of his career, Beu was assigned to the Patrol Division, the Detective Bureau, and the Crime Scene Unit. He was never assigned to Internal Affairs (IA). For most of his career, Beu was a member of the Police Benevolent Association (PBA).

### **Count I – Improper Employment Practices**

In the FNDA, Count I, respondent alleged that "Beu, 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. Beu also aided and abetted an environment whereby such intimidation and/or punishment would occur." (J-1.)

Respondent offered the following examples as evidence of Beu's improper employment practices:

**Mobile Video Recorders and Telephone**

In paragraph 6 of Count I, Respondent alleged that "[i]n 2017, Beu aided and abetted a retaliatory environment with respect to his handling of a series of officer complaints relating to the activation of a live-stream audio feed in VPD vehicles and in the Lieutenant's Office." (J-1.) The claim against Beu was that he shut down any "administrative review of Austino and Finley, both of whom were widely known to be centrally involved in this matter." Id. In support of this claim, respondent contended that the IA investigation of Austino's order was flawed because of lack of interviews, especially Austino's. Beu exonerated Austino of any wrongdoing in connection with his order to activate the audio component of the Mobile Video Recorders (MVR) on December 12, 2016. Respondent maintained that Beu's handling of the administrative review "trivialized and disregarded" the officers' "good faith privacy concerns." Id. Respondent further maintained that Beu's conduct caused "a total loss of confidence in the disciplinary system" and sent a "message that similar complaints would be given the same treatment." Id.

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

In 2015, MVRs were placed in certain patrol vehicles. The purpose for the MVRs and the policy considerations for their use were stated in General Order # 2015-016 issued by Chief Codispoti on September 9, 2015, and revised by him on November 10, 2016. (R-3). In accordance with the general procedures:

The MVR is preprogrammed to automatically begin recording when any one of several different "triggers" are activated. These triggers include:

- a. The vehicle's emergency lights are activated;
- b. The wireless microphone is activated;
- c. The vehicle speed exceeds 65 MPH; or
- d. The vehicle is involved in a crash.



[R-3 at VPD009410.]

The Order contained the policy for an officer's use of the MVR, supervisors' review of the recordings, retention of the recordings, and safeguarding recordings as evidence. Id., at VPD009412-417.

Sergeant Christopher Fulcher (Fulcher) was the supervisor in Operation Support, the VPD's Information Technology (IT) department. Among its responsibilities, Fulcher's IT department maintained the MVR system. Beginning on or about April 1, 2016, Fulcher had discussions with Safety Vision, LLC, the vendor of the MVR, about privacy concerns with the livestreaming function. Fulcher communicated to the service department of Safety Vision, LLC, in a telephone conversation, that the officers were unhappy with the "live audio on camera 2." (R-31, VDIS001060.) An email between technicians at Safety Vision characterized the problem as follows:

On the DVR, the live audio setting is set to Off. The live audio is silent on the DVR side. However, when the users log into DVMS Pro and view live view, they are able to hear audio from camera 2.

Further complication . . .

In the substreaming menu, camera 2 is set to OFF, which should stop camera 2 from being seen with DVMS Pro. However, they are still able to see camera 2 as well as hear audio.

His officers are very unhappy about this, and are threatening to take action. He needs a fix for this issue as soon as possible.

[Id.]

The return email from the technical analyst at Safety Vision recommended disabling camera 2 "altogether (Recording and Live)" while they continued to analyze the problem. Id. at VDIS001059. In a return email dated April 4, 2016, Fulcher wrote that as "a temporary stop-gap procedure" VPD elected to "mute the rear cameras live audio." Id. at VDIS 001058. By email, dated April 13, 2016, Fulcher was advised that the issue was

identified, and the engineering team was working towards a resolution. (Id. at VDIS 001057.)

The problems with the system continued. On October 25, 2016, Fulcher sent an email requesting a service technician visit because of the many glitches with the system. The issues included.

1. Audio issues – we are still unable to find the correct combination of settings to allow audio to be recorded within the vehicle, during an event, but live should be muted when using live view;
2. Mic Packs – we seem to be experiencing several issues with wireless mic packs syncing properly and starting a recording properly;
3. Storage Exception Alarms – I receive alarm emails, on a daily basis, for several vehicles reporting “Storage Exception’ errors. When I go to the unit in the vehicle, neither SD card is full;
4. Rear Camera access – suddenly we are receiving “Video Loss” error messages when attempting to view the rear seat camera. This has occurred in about 5 different vehicles so far;
5. GPS Data – some recorded video events do not have GPS associated with them. GPS seems to be working correctly and this is not happening all the time, or with the same vehicle, but we have several videos without any GPS.

[Id. at VDIS00 1064-65]

On November 2, 2016, Fulcher sent an additional email stating that the “[c]urrent combination of settings is correctly muting Live audio, but not allowing recorded audio from each vehicle when the cameras are activated.” As a result of this concern, a technician from Safety Vision was scheduled to be on site for a service call on December 15, 2016, and December 16, 2016. Id. at VDIS 001069.

On December 12, 2016, Fulcher was approached by IA Sergeant Leonard Wolf, who told him to turn the microphones on under the authority of Captain Austino. As a result of this order, Fulcher began the process of activating the live audio through the rear cameras.

On or about December 14, 2016, Detective Gregory Pacitto of the VPD notified Chief Codispoti that "live streaming" could be heard from patrol vehicles. Codispoti immediately called Fulcher and told him to deactivate the system. By this time, Fulcher had activated nineteen patrol cars. Fulcher stopped any further activation and began the deactivation process.

On December 14, 2016, then Detective Pacitto, President of the PBA, filed a complaint with the Cumberland County Prosecutor's Office (CCPO) alleging a possible wiretap violation against Captain Austino for his role in the activation of a live-stream audio feed in VPD patrol vehicles. CCPO assigned the complaint to Detective Sergeant Ronald Henry (Henry) for investigation.

On December 19, 2016, Detective Scott O'Neill of the VPD contacted Henry by telephone to report another issue involving a telephone in the Lieutenant's Office. It was alleged that conversations and sounds from within the Lieutenant's Office were being transmitted from this telephone to certain computers in Dispatch and IA. Henry investigated the telephone as a continuation of the wiretap allegation. (R-34.)

On December 14, 2016, Pacitto also filed a Grievance of Austino's order turning on the microphones without the officers' knowledge or consent. As part of the Grievance, the PBA members stated they felt "threatened and concerned for whistleblowing the unlawful action occurring within the Department." (R-5.) On January 4, 2017, Beu issued a letter to Pacitto denying his grievance. Beu wrote that "Captain Austino's order to activate the microphones in all vehicles has already been rescinded on December 14, 2016." (R-6.) Pacitto did not appeal Beu's decision.

Pacitto also submitted an Open Public Record Act (OPRA) request for all log in and additional information for all MVR devices for the month of December 2016.

On December 15, 2016, Henry interviewed Pacitto, who told Henry what he learned from Sergeants Shaw and Armstrong. Shaw verified that by logging onto the system, he could listen to live audio from the vehicle. Pacitto told Henry that ten to fifteen officers told him how upset they were about the live audio. Pacitto was unaware of any officers being called to Captain Austino's office for infractions based on information learned from livestreaming. Pacitto shared with Henry the email documentation from his OPRA request that showed there were no recordings of livestream conversations. (P-5, at 2-5.)

After interviewing Pacitto, Henry went to VPD, where he met with Lieutenant Finley, who was the IA supervisor, and Fulcher. From Fulcher, Henry learned how the MVR operated. Fulcher confirmed that there were no recordings of the live audio. During Henry's visit, there was a Safety Vision technician on site attempting to fix the problems with the MVR. Henry informed Finley and Fulcher that they could proceed with deactivating the "live" audio if the department deemed it necessary. (P-5, at 6-7.)

On January 4, 2017, Henry interviewed Wolf, who had been assigned to IA since 2012. The pertinent information from the interview established that Wolf was familiar with the on-going problems with the MVRs and the search for a software solution. After a discussion with Austino about the lack of audio for triggered events, Austino instructed Wolf to direct Fulcher to activate the microphones. Wolf never listened to any live conversations. Wolf's only concern was having recorded audio for triggered events. Wolf had no information about the phone in the Lieutenant's Office. (P-5, at 9-10.)

Henry also interviewed Fulcher on January 4, 2017. Fulcher explained that the MVR system was designed for the live view/audio to always be activated. After the live view/audio was disabled, the system would no longer record audio from captured events. Fulcher had been working for months with technicians from Safety Vision, to find a solution. On December 12, 2016, Wolf told him to activate the live/view audio at Austino's request. Wolf did not provide a reason and Fulcher did not question the order. Given the known problems with the system, Fulcher did not think there was anything wrong with the order to activate the live audio. On December 14, 2016, Chief Codispoti called him and

asked him to explain how the MVR system worked. Codispoti then ordered Fulcher to turn the "live" audio function off. Fulcher was in the process of disabling the live function when this complaint happened. He had no knowledge of anyone listening to the livestream to gain information for improper purposes. (P-5 at 10-12.)

Fulcher learned about the "livestreaming" phone from Finley. They logged into the computer together and it sounded "live." Fulcher explained that the telephone system was old. In the Lieutenant's Office, there was a dedicated line for the officers' use when speaking with a judge or whenever a conversation needed to be recorded. After learning of the problem on this phone, Fulcher checked three other phones with recorded lines. Those phones functioned appropriately. Fulcher confirmed that the converter used, so the line could be recorded, was the cause of the malfunction. Fulcher removed the converter and returned the phone to the office without further incident. The dispatch office, IA, and Fulcher all have access to the recorded phone lines through computer software. (P-5, at 12-13.)

On January 4, 2017, Henry also interviewed Shaw. Shaw learned of the "live" audio from Officer Crystal Cavagnaro, who worked in IT under Fulcher. She advised him that the rear cameras had been activated. After receiving the information, Shaw informed Armstrong. They accessed the computer and verified "live streaming" audio could be heard. Shaw did not have any information about how the livestream was being used. (P-5 at 13-14.)

Henry's last interview on January 4, 2017, was with Armstrong, who was told about the livestreaming from Shaw. Together with Shaw, they logged into the computer and heard sounds coming from the vehicle in real time. Armstrong confronted Fulcher, who told him that audio was needed for recorded events. (P-5 at 14-15.)

Armstrong learned about the phone issue on December 19, 2016, when a dispatcher informed him that there was a live feed coming from the phone on the desk where he was working. Armstrong told O'Neill, and together they informed Finley in IA. Finley and Fulcher went to the Lieutenant's Office, unplugged the phone, and took it. The phone was returned but it was no longer a recorded line. (P-5 at 16.)

On January 5, 2017, Henry interviewed Officer Chrystal Cavagnaro (C. Cavagnaro). As part of Fulcher's team in IT, she was aware of the issues with the MVRs. She confirmed that Fulcher had been working with the company to correct the problems. Prior to December 14, 2016, Cavagnaro stated the lack of recorded audio for triggered events from the video recordings within the patrol vehicles created multiple problems. As to prior notification to the officers, C. Cavagnaro confirmed Fulcher's statement that in accordance with past practices, notification was sent after a task had been completed. C. Cavagnaro's reason for telling Shaw was to give him a heads up that the audio was being activated. Cavagnaro did not assign any ulterior motive for the activation. (P-5 at 16-17.)

After concluding its investigation, the CCPO issued a letter of declination dated April 4, 2017. (P-4, at VDIS009916.) After declining criminal prosecution, the CCPO returned the matter to Beu to "take any administrative action" deemed "appropriate." (R-36, at VDIS 001045-46.)

On April 4, 2017, a Critical Incident Sheet was generated in IA against Austino. (P-4.) The administrative review was assigned to Sergeant Thomas Riordan for investigation. Riordan reviewed all the available documents from the CCPO investigation.

As stated in his report, Riordan and Beu met with Fulcher on June 15, 2017. (P-4, at VDIS 009917-18.) Fulcher explained that after the MVR system was installed, they learned that the microphones were designed to be on for the system to work properly. Due to complaints from the officers, Codispoti ordered the audio portion of the MVRs turned off. Fulcher continued to work with the company to fix this problem. The lack of audio caused new problems, including complications with meaningful reviews and evidentiary issues. According to Fulcher, because of these problems, Austino ordered that the "live audio" be activated. To the best of Fulcher's knowledge, the only person whom Austino told was Wolf, who told Fulcher. Fulcher also explained that the system can only be accessed from limited computers within the building.

Riordan also questioned Fulcher about the land-line telephone in the Lieutenant's Office. Initially, Fulcher did not know what caused the problem until he examined the phone and the converter, used for recording. He discovered that the converter caused the malfunction. The phone was returned as an unrecorded landline.

On June 16, 2017, Riordan interviewed C. Cavagnaro. She confirmed the problems with the lack of audio when the live audio was deactivated. She also corroborated Fulcher's statement that the department would wait until a procedure was fully implemented before sending out an email notification or policy update. She was aware that Austino and members of IA were constantly asking about the lack of audio for the recorded videos. She did not assign any improper reason for the order to reactivate. She was unaware whether anyone ever listened to the livestream audio. C. Cavagnaro did not have any information about the phone in the Lieutenant's Office. (P-4, at VDIS 009908-11,)

On June 21, 2017, Riordan interviewed Officer Gene Sherban, (Sherban), who was also assigned to the Services Division or IT. Sherban was responsible for preserving conversations from the recorded lines. According to Sherban, during the month of December 2016, the phone system started to malfunction. There were problems with logging on and the system crashing. Eventually the phone system was replaced. (P-4, at 009911.)

On June 21, 2017, Riordan also interviewed Lieutenant Wolf. Wolf expressed that he had discussions with Austino about the MVR's malfunctioning, noting that the lack of audio impacted meaningful reviews and complaint investigations. During one of his discussions with Austino, Austino ordered him to inform Fulcher to reactivate the audio. Wolf relayed the order to Fulcher. (P-4, at VDIS 009911-12.)

In concluding his investigation, Riordan determined that Austino had the authority to activate the live audio, even though it conflicted with a prior order deactivating the audio. (P-4 at VDIS 009912.) He determined that the malfunctioning telephone was the product of an antiquated system that had since been replaced. Riordan recommended

that Austino be exonerated because his order was not unlawful, and it did not violate any VPD rules, regulations, or policies. (P-4 at VDIS 00913.) As chief, Beu accepted the recommendation and exonerated Austino. On June 22, 2017, Riordan issued a letter to Austino informing him that he was exonerated in the complaint made against him by Pacitto. (P-4, VDIS009926.)

On or about November 30, 2018, the PBA provided Richard Tonetta, Vineland's Solicitor (Tonetta), with a draft complaint for a lawsuit it intended to file. (R-11.) Tonetta as Solicitor is responsible for employment matters, claims made under the Conscientious Employee Protection Act (CEPA), and violations of municipal policies. Tonetta shared a copy of the draft complaint with Beu. Due to the allegations of criminal conduct, Beu notified the CCPO.

In March 2019, Vineland commissioned Todd Gelfand, Esquire to investigate the allegations in the draft complaint. (J-1, par. 2 of Count I.) The investigation was intended to focus on the PBA members' workplace concerns as potential violations of Human Resource (HR) Policies 1151, 1152, and 1153. (R-26.) These policies govern retaliation practices in the workplace and authorize investigations. Policy 1152 requires the reporting of any conduct that may constitute harassment, sexual harassment, or any other workplace wrongdoing to a supervisor or Business Administration for investigation. The allegations in the complaint were directed at Beu, Austino, retired Captain Finley, and Riordan. Austino had also filed cross-complaints alleging he was the victim of retaliation from the City and members of the PBA.

Among the allegations in the draft complaint were that "Captain Austino ordered Sergeant Fulcher to turn on the MVR audio system in an effort to spy on Plaintiff and Plaintiff's members without their knowledge." (R-11 at par. 14.) The PBA further alleged that they uncovered an open phone in the Lieutenant's office, where the officers discussed union matters. The allegation was that "[t]he recording and/or listening in on Plaintiff and its members' discussions of union business is a clear violation of the New Jersey Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 256A-1-34, as well as a clear invasion of Plaintiff's and its members privacy." (R-11, at par. 19.)



In his report, Gelfand wrote that "[t]here is no evidence or testimony, however, to substantiate that anybody, including Captain Austino, ever listened to the live audio stream, other than when it should have been streaming and recording for 'triggering events.'" (R-3 at VDIS 000314.) Based upon his interviews and the evidence provided to him, Gelfand included in his report that,

Captain Austino directed the activation of the live stream audio feature of the MVRs in December 2016, *not* for purposes of spying on PBA members, but rather because the department was having difficulties setting up the MVRs or other recording devices so that "triggering events" for the recording of video in the police cars, such as for example prisoner transports, would be recorded with *audio and video*. I indeed believe that this, rather than any form of "spying on officers," was his true motivation for activation of the live stream audio.

[R-3 at VDIS 000326 (emphasis in the original)]

Pacitto, Armstrong, Wolf, Austino, and Fulcher testified in accordance with the summaries included within Henry's report which were provided within a few weeks of the December 12, 2016, and December 19, 2016, incidents. (P-5 and R-34.) Their testimony was also consistent with the summaries provided in Riordan's IA report. (R- 36.) Although C. Cavagnaro did not testify, the information she provided included in the investigation summaries was corroborated by the testimony of Fulcher.

### Testimony

**Wolf** testified as a rebuttal witness for respondent. In December 2016, Wolf was a sergeant in the VPD assigned to IA. Wolf recalled his frustration with the on-going problems with the MVR system of not capturing audio in connection with triggering events. Wolf brought his concerns to Chief Codispoti and Captain Austino. Due to the on-going issues, Wolf testified that there were different iterations involving turning the microphones on and off. On December 12, 2016, Wolf had a conversation with Austino about activating the microphones in the MVR system as a solution to having no captured audio with triggering events. On Captain Austino's authority, Wolf instructed Fulcher to activate the microphones.

**Austino** was called to testify by the appellant. In December of 2016, Austino was not assigned to IA. Austino testified that he was aware of the issues with the MVR system. Austino also recalled his conversation with Wolf during which Wolf vented about his frustration with the system. The concern was that the triggered recordings were silent movies, with little evidentiary value. Thereafter, Wolf went to Fulcher on Austino's authority and told Fulcher to reactivate the microphones.

**Fulcher** was called to testify by the appellant. Fulcher retired from VPD and currently works in IT in the private sector. In 2015, as the IT supervisor, Fulcher was involved in selecting the MVR and drafting the policy in the General Order. Fulcher testified that a selling feature for VPD when it decided to purchase the MVR system was its livestream functionality. This was considered an added safety mechanism for the officers. The livestream did not trigger a recording. Access to the livestream could only be done from certain computers within the VPD.

Fulcher understood that the activation order from Wolf was on Austino's authority. Upon receiving this order, Fulcher did not question it or have any concerns about following it. Fulcher explained that activation can only be done when the vehicle is running. After checking which vehicles were in use, Fulcher began the process. The officers were not given advance warning of the activation of the livestreaming. Fulcher testified that notice in the form of an email would have been provided to the officers after the activation had been completed.

**Armstrong** testified as a witness for respondent. Armstrong testified that the livestream functionality on the MVRs had been deactivated because of the officers' concerns. He felt it was a violation of privacy for it to be reactivated without notice. The timing of the reactivation of the audio in the MVRs with the phone issue was suspicious. Armstrong was alarmed to learn that private conversations occurring in the Lieutenant's Office could be listened to by IA and the dispatchers. He considered this office a private space. When he learned that the phone in the Lieutenant's Office was transmitting to computers, he brought the information to O'Neill, who reported it to CCPO. Armstrong

also recalled being caught completely off guard when Finley and Fulcher came into the office and abruptly removed the phone.

Within a few hours of removing the telephone, Finley ordered Armstrong to provide him with a timeline outlining what he knew, how he knew it, and who he told. This directive from Finley alarmed Armstrong. As a result, Armstrong and O'Neill reported what they learned about the phone and their complaint to CCPO to Vineland's Solicitor, Richard Tonetta. Armstrong was present when Tonetta called Finley to tell him the officers would not be responding to his order. Armstrong testified that the reason for going to see Tonetta was because of concerns about retaliation for reporting the wiretapping issues to the CCPO.

After these events, Armstrong claimed that he felt targeted. He received unwarranted write-ups. He was constantly moved in and out of platoons and given different shift schedules. Junior sergeants were getting shift assignments over him, even though he was a senior supervisor. Armstrong did not state who was responsible for the alleged retaliation.

Despite his concerns, Armstrong never complained about the alleged retaliation to Beu. As chief, Beu never sustained any disciplinary action against Armstrong. Codispoti was chief, not Beu, when Armstrong and O'Neill met with Tonetta due to their fear of retaliation for reporting to the CCPO.

**O'Neill** was also called to testify by respondent. He testified that after learning from Armstrong that the dispatchers could hear live audio from the Lieutenant's Office, he went to the dispatcher's office to confirm it. At his request, a dispatcher accessed the software program and O'Neill could hear everything being said upstairs in the Lieutenant's Office. IA had the same software in their computers. O'Neill went outside and called Henry at CCPO. Henry told him to report it to IA, which made O'Neill uncomfortable because Finley was the supervising officer in IA.

O'Neill brought a dispatcher with him to IA, to confirm for Finley that the same software was in the IA's office. Within an hour, Finley sent O'Neill an email requesting

details about how O'Neill learned about the software, what he did with the information, and names of all those he contacted. This made O'Neill uncomfortable because the investigation was at the prosecutor's office not with IA.

O'Neill went with Armstrong to the Solicitor's office. O'Neill was present when the Solicitor called Finley and told him that the investigation was being handled by the CCPO and his actions were an interference.

In January 2017, O'Neill was promoted to sergeant. Lieutenant Finley was promoted to captain. After the December 2016 incident, O'Neill believed that Finley's attitude towards him changed.

Chief Beu never sustained any disciplinary charges against O'Neill and O'Neill never went to Beu with any concerns about Finley.

**Pacitto** testified as a witness for the respondent. Pacitto was so alarmed by the livestreaming, he felt compelled to contact the PBA's attorney. He believed that the administration downplayed the officers' valid concerns about their privacy rights.

Pacitto submitted a Grievance for a maintenance of standards violation and a statutory violation under the wiretap provisions in N.J.S.A. 2A:15.6A-3. (R-5.) His grievance involved Captain Austino's order to activate the microphones on the MVR in certain patrol cars. It also stated harassment and violation of the members' rights to voice valid concerns. During his testimony, Pacitto could not recall any particulars regarding harassment. He expressed general concerns that whistleblowers were not being protected. Pacitto has been an officer with the VPD since 2006. He was promoted to sergeant In 2017, lieutenant in 2020, and captain in 2023.

Pacitto's main concern was that Austino's order reactivating the microphones and the phone issue were never thoroughly investigated by IA.

**David Cavagnaro**<sup>2</sup> (D. Cavagnaro) was called as a witness by the respondent. Officer D. Cavagnaro was Vice-President of the PBA when Pacitto was the President. In 2017, D. Cavagnaro became president, after Pacitto's promotion to sergeant. In December 2016, D. Cavagnaro had been assigned to the Street Crimes Unit (SCU). After learning that Austino ordered the microphones in the patrol cars to be turned on, many of the officers in SCU believed that Austino was spying on them.

D. Cavagnaro did not have any direct involvement with the phone issue, but he believed that it was connected to the MVR livestream issue. According to D. Cavagnaro, IA never conducted a meaningful investigation into the phone issue. IA's ability to listen to conversations in the Lieutenant's Office was a clear privacy violation that D. Cavagnaro felt was never addressed.

As president of the PBA, D. Cavagnaro was involved in presenting the concerns outlined in the draft complaint to the PBA's attorney, Doug Long. The purpose of the draft complaint was to give Beu, Austino, and IA notice of the PBA's concerns. The PBA members wanted more transparency and answers to their concerns.

D. Cavagnaro believed that because of his involvement on behalf of the PBA, he was targeted. His shifts were often short-handed. After presenting the draft complaint, D. Cavagnaro was skipped for three assignments, when he had seniority and possessed all the necessary credentials. The reasoning was always management's discretion.

Cavagnaro's main concerns centered around Finley's intimidating conduct and threatening behavior. He also testified that Austino was not trusted by the members of the SCU. D. Cavagnaro expressed his concerns with Austino's management style.

On September 5, 2017, D. Cavagnaro on behalf of the PBA filed a Grievance against a standing order from Beu that Cavagnaro believed targeted his platoon from eating while on Department premises. The Grievance was also against the derogatory treatment by Finley and Administration that created a hostile work environment. (R-118.)

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<sup>2</sup> David Cavagnaro is married to Chrystal Cavagnaro, who was the officer assigned to IA under Fulcher. Their first initial will be used to distinguish them.

Austino responded as acting chief in Beu's place. Austino determined that Beu's order was "lawful, proper, and clearly within management's rights" because it placed reasonable restrictions on where food could be consumed and applied equally to all platoons. As to the second part of the Grievance, Austino asked for more detailed information. (R-119.) There was no indication from D. Cavagnaro whether he ever supplied the additional information.

After not getting the Traffic Division position, for which he was qualified, D. Cavagnaro applied for a position with the Detective's Bureau, and he did not get that position either. He filed a Grievance and appealed Beu's decision to the Vineland's Public Safety Director, Edwin Alicea, who upheld Beu's decision.

Beu never sustained a complaint against D. Cavagnaro.

**Gelfand** was also called to testify by respondent. Gelfand had no firsthand knowledge of any of the incidents but testified in accordance with his HR investigation and report (R-1) for Vineland.

Gelfand met with Doug Long, Esq., the lawyer for the members of the PBA, who drafted the Complaint. Most of the incidents that he was tasked with investigating by Solicitor Tonetta were contained within the draft complaint.

Under the whistleblower's act, a party only needs a good faith reasonable belief to make an allegation. The plaintiffs in the draft complaint claimed that the vehicles were illegally wire tapped as retaliation by Captain Austino and as an illegal privacy invasion. Gelfand attempted to balance his investigation by exploring whether Beu and Austino had a legitimate explanation for why or how this happened. Gelfand believed that Austino trivialized the incident and the privacy rights of the officer. As to why Austino was never interviewed, Beu could not even recall whether Austino was asked to provide a reason for his activation order. Gelfand did not accept Beu's response as a legitimate reason to explain why the target, Austino, was never interviewed.

Under his analysis, Gelfand weighed the alleged retaliatory action against a reasonable business explanation. Gelfand applied a burden shifting analysis. He weighed each side and looked for inaccuracies, inconsistencies, and incoherence to determine which side provided more accurate and plausible information. In this case, Gelfand was looking for a legitimate reason why the target was never interviewed and could not find one.

The issue with the phone was investigated by the CCPO but very little investigation was done by IA. Riordan and Beu talked to Fulcher, who was at the center of the MVR and phone issues. Gelfand questioned why Beu was involved with Fulcher's interview. After Riordan's investigation, Beu accepted that the phone issue was merely the result of an outdated malfunctioning system without further analysis or investigation.

Gelfand professed that the IA's failure to conduct a thorough investigation lent credence to the PBA's complaints that their privacy rights were violated. Gelfand also testified that he believed, contrary to the determination by CCPO, that the activation of the microphones may have even been a criminal wiretap violation. He opined that Austino's activation order violated the officers' reasonable expectation of privacy in their patrol vehicles. Gelfand viewed the exoneration of Austino by Beu as an example of differential treatment when Austino was the target of an IA investigation.

According to Gelfand, Beu should have reviewed Riordan's IA report, dated June 22, 2017, (R-36) and at least questioned why the target, Austino, was not interviewed.

**Sergeant Raymond Cavagnaro**<sup>3</sup> is an investigator with the CCPO. He was called by appellant to testify about his investigation and report (P-35) prepared for the CCPO. On November 15, 2021, Prosecutor Webb-McRae assigned R. Cavagnaro to investigate the alleged IAPP violations contained in the Gelfand Report.

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<sup>3</sup> Sergeant Raymond Cavagnaro has no relationship with Officers Chrystal and Dave Cavagnaro of the VPD. To distinguish, these individuals, first initials are used.

R. Cavagnaro's Investigation included an audit of IA files from 2014 to 2020. R. Cavagnaro's investigation revealed recordkeeping deficiencies in the IA files which predated Beu's tenure as Chief and continued after his removal. The deficiencies included failures to provide target notification letters, failures to list dispositions, and failures to include reviews by the chief within the IA files.

As part of his investigation into the alleged wiretapping, R. Cavagnaro reviewed the CCPO investigation of complaints made by Pacitto on December 14, 2016, and O'Neill on December 19, 2016, the subsequent IA administrative investigation of those complaints, and the Gelfand Report. (P-35, at 22-27.)

R. Cavagnaro disagreed with the conclusion in the Gelfand Report that identified Finley's action in removing the telephone from the Lieutenant's Office as a direct violation of the 2014 IAPP because a CCPO case had been initiated. R. Cavagnaro found support for Finley's conduct in the 2014 IAPP, "The internal affairs investigator shall refrain from taking any further investigative action until directed to do so by the county prosecutor unless an imminent threat exists to the safety or welfare of an individual." (P-35 at 24 & J-4.) In his review, R. Cavagnaro determined that Finley's action complied with this provision. By removing the malfunctioning telephone, Finley promoted the welfare of the department, so no violation occurred.

Gelfand had concluded that the failure to interview a target was a major IAPP deviation. R. Cavagnaro disagreed. Based upon his years of experience in conducting such investigations, he found that interviews can be useful, but they are not required. It was noted that during the criminal investigation by CCPO, Austino was not interviewed. During his investigation, R. Cavagnaro did not conduct any interviews. In his report, R. Cavagnaro stated as follows:

While interviewing the subject of an internal affairs investigation is a critical stage to the investigative process, subject interviews are not required. D.Sgt. Henry's investigation and the legal review by First Assistant Prosecutor Shapiro determined no evidence of criminal activity, therefore a decision was made by CCPO personnel that an interview of Captain Austino was not necessary. Sgt.



Riordan, upon reviewing the CCPO investigation and conducting several interviews, determined that no subject interview of Captain Austino was necessary. Sgt. Riordan determined that Captain Austino did not violate any department rules and regulation, therefore no interview was conducted.

[P. 35 at 24-25.]

Gelfand's report criticized Riordan's investigation of the telephone complaint for not pursuing "plain and obvious investigation angles." (R-1 at 103-104, P-35 at 25.) According to R. Cavagnaro's investigation, Fulcher and Sherban provided information about the antiquated phone system and its malfunctions. There was nothing in the evidence to suggest that the incident was anything more than a malfunctioning antiquated phone system. (P-35 at 26.)

As to the administrative review by IA, in accordance with the 2014 IAPP, Beu had complete discretion to determine whatever discipline he deemed appropriate. R. Cavagnaro reviewed Riordan's IA investigation and his determination that because Austino did not violate any Rules and Regulation, he should be exonerated. Beu's approval was appropriate and in accordance with the 2014 IAPP. "The law enforcement executive, upon reviewing the report, supporting documentation and information gathered during any supplemental investigation, shall direct whatever action is deemed appropriate." (J-4 at 21, P-35 at 27.)

Appellant called Cumberland County Prosecutor **Jennifer Webb McRae** to testify. As the chief law enforcement officer, she supervises and directs law enforcement activities. Per the IAPP, she has oversight over IA. Her office is charged with conducting investigations of all criminal complaints and all complaints involving the chief of police or command staff. When the CCPO declines to file charges, the matter is sent back for an administrative appropriate action. The entire CCPO's investigative file is given to IA for review. Witnesses are not required to be re-interviewed. There is usually no need to interview the same witness more than once.

The attorney general has determined that the County prosecutor has the exclusive authority to investigate IAPP violations. The Attorney General's Office directed the CCPO to investigate the allegations against Beu, Austino, and Riordan. Prosecutor Webb-McRae assigned the investigation to Detective Sergeant Ray Cavagnaro who authored a report. (P-35.) R. Cavagnaro's report was first reviewed by Chief Mach Johnson. After the Chief's review, the report was sent to Webb-McRae for her final review. Prosecutor Webb-McRae agreed with the conclusions in the report. The report represents the findings of the CCPO. R. Cavagnaro went beyond the issues in the Gelfand Report and randomly audited IA files from 2015 through 2020. There were recurring issues that predated Chief Beu and continued after Chief Beu. VPD's IA was not following all the steps required by the IAPP. On July 29, 2022, Prosecutor McRae issued a letter indicating that the investigation was completed, and she adopted R. Cavagnaro's findings as the findings of the CCPO. (P-50.)

R. Cavagnaro's investigation focused on violations of the IAPP. Prosecutor Webb-McRae believed that there could be overlapping interests between her role as chief law enforcement official and the City's interest in employment practices. While R. Cavagnaro was not tasked with looking for improper employment practices, retaliation, or discrimination, if such practices were discovered, the CCPO would be obligated to address them. Based on Webb-McRae's review of Cavagnaro's report, she did not see any indication of retaliation or discrimination.

Beu testified on his own behalf. In December 2016, his rank was captain assigned to the Criminal Division. The detectives in his Division did not have MVRs in their vehicles. Beu learned of the MVR livestreaming from either O'Neill or Armstrong, and he was concerned. It was serious. Beu went to Codispoti, who told him it was already shut down. Beu told Armstrong and O'Neil that the Chief was aware of it and shut it down. Beu felt that the matter became elevated after Austino was identified as being involved.

On December 14, 2016, when Pacitto filed a grievance about the alleged unlawful order by Austino, Codispoti was chief. (R-5.) Because Codispoti never replied to the grievance, Beu responded on January 4, 2017, by stating that the order had been rescinded by Codispoti on December 14, 2016. (R-6.) Pacitto did not appeal Beu's

determination to the public safety director. Beu believed Pacitto's grievance about the order to activate was moot.

After the CCPO determined there was no criminality involved with the activation of the microphones, the matter was referred to Beu for an administrative review. According to Beu, the only officer in VPD who understood the MVR system was Fulcher. Beu sat in on the IA interview with Fulcher to gain a better understanding of the MVR system because he did not understand how the system worked.

Beu agreed with Riordan's recommendation after his IA investigation of no discipline for Austino. There were no violations of any Department Rules or Regulations. There was no evidence of any improper monitoring of the livestream. According to Beu, the evidence was clear and convincing that Austino did nothing wrong. There was no need for an interview of Austino.

As to the phone, it was determined to be malfunctioning. There was no evidence to suggest that the phone was used to spy on the officers in the Lieutenant's Office.

As Chief, Beu discarded the MVR system in favor of a new system. Effective June 1, 2017, Beu issued a Special Order discontinuing the use of the MVRs. (R-123.)

On June 14, 2017, Beu received a letter from PBA attorney, Long, asking for an investigation into the invasion of the members' privacy rights and to address retaliation. (R-10.) Beu met with Long and discussed concerns. Beu maintained that there was never any retaliation.

### **ADDITIONAL FACTUAL FINDINGS**

When assessing credibility, inferences may be drawn concerning the witness's expression, tone of voice, and demeanor. MacDonald v. Hudson Bus Transportation Co., 100 N.J. Super. 103 (App. Div. 1968). Additionally, the witness's interest in the outcome, motive or bias should be considered. Credibility contemplates an overall assessment of

the story of a witness in light of its rationality, internal consistency, and how it “hangs together” with other evidence. Carbo v. United States, 314 F.2d 718 (9<sup>th</sup> Cir. 1963).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App Div. 1958).

The testimony regarding Austino’s order to activate the microphones on December 12, 2016, was consistent, despite the different perspectives and motives of the witnesses. Although Wolf was called as a rebuttal witness to impeach Austino’s testimony, his testimony showed that the motivation for Austino’s order was to find a solution for the problems caused by the lack of audio for recorded events. Wolf’s role was unique because he was the only eyewitness to Austino’s activation order. Moreover, because Wolf was never implicated by the CCPO, IA, the PBA, or the Gelfand Report as being complicit, there was no motivation for his testimony to be self-serving. As the only witness to Austino’s activation order, Wolf’s testimony was persuasive in exonerating Austino of any wrongdoing, ulterior motive, or invasion of privacy.

I was equally persuaded by the testimony of Fulcher. Fulcher is retired after a lengthy career with VPD. He had no apparent bias against either party. None of the witnesses accused him of retaliation or favoring Beu. Fulcher testified without embellishment, exaggeration, or emotion. His testimony, while needing to be refreshed after six years, remained consistent. Most compelling was Fulcher’s statement to Detective Henry of CCPO that he found nothing amiss when Wolf came to him and told him to activate the microphones on Austino’s order. Fulcher was the only witness who had direct and personal involvement with Codispoti’s deactivation order, yet he never hesitated before obeying the verbal order delivered by Wolf. He never questioned it as a contrary order to Chief Codispoti. Fulcher’s lack of a reaction to Wolf’s message from Austino showed in a most compelling way that this activation order was viewed by Fulcher as reasonable under the circumstances. It was part of the continuing process of trying to find the right balance with the MVR software.

The testimony from Wolf and Fulcher showed that Beu's exoneration of Austino was not based on favoritism or differential treatment because Austino was the target.

Accordingly, I **FIND** based on the compelling testimony of Wolf and Fulcher, that Austino's order that resulted in the reactivation of the live audio feed was not intended for any improper purpose.

As directly relating to the alleged retaliation by Beu against Pacitto, Armstrong, and O'Neill for whistleblowing by filing complaints of wiretapping with the CCPO, there is no evidence of any retaliation for that protected act. Pacitto mentioned retaliation in his Grievance filed on December 14, 2016. That retaliation was not directed against Bue who was not involved until he became chief on January 4, 2017. Moreover, when given the opportunity to explain the retaliation component of his grievance, Pacitto was vague in his response and provided no details of any retaliation. Armstrong and O'Neill both expressed concerns about Finley's conduct but made no mention of any retaliatory conduct by Beu. O'Neill was promoted to sergeant in January 2017 and Pacitto was promoted to sergeant on June 1, 2017.

Accordingly, I **FIND** nothing in the record to show that Beu was responsible for retaliation against the whistleblowers of the wiretapping complaint.

After the CCPO found no evidence of any criminal conduct by Austino, the PBA members were not satisfied with the IA investigation conducted by Riordan under Chief Beu. As D. Cavagnaro testified, the PBA members involved their lawyer, who contacted Beu in June 2017 about their privacy concerns. Pacitto, Armstrong, O'Neill, and D. Cavagnaro testified about their feelings of betrayal and shock upon learning within the same week that IA could listen to conversations within their vehicles and their office without their permission or knowledge. Not discounting the officers' feelings, the evidence showed that the Administration took steps to address the officers' valid privacy concerns. Austino's activation order was immediately rescinded by Codispoti, despite the competing need for audio evidence. Finley removed the telephone until Fulcher determined that the converter caused the malfunction. Eventually, the MVR and telephone system were replaced. Most importantly, there was never any support for the allegations in the "draft

complaint” that the MVR and the telephone were used to spy upon the officers and PBA members. Accordingly, I **FIND** that reasonable steps were taken during Beu's time as chief to address the privacy concerns of the PBA members regarding the MVR and the telephone in the Lieutenant's Office.

The charge against Beu is that he “aided and abetted a retaliatory environment by shutting down any further administrative review of Austino or Finley” to send a message. (R-1 at 3.) The basis for this charge was that Beu exonerated Austino of any wrongdoing, without a thorough investigation. Namely, IA never interviewed Austino. As to this issue, I weighed Gelfand's testimony against R. Cavagnaro's testimony and Webb McRae's testimony. Gelfand stated he was trying to find a legitimate reason why Austino was never interviewed. Based on the responses Gelfand received when he interviewed Austino and Beu, he determined there were none.

Gelfand wrote in his report that Austino's order should have been a cause for discipline. He noted violations of VPD Rules: 2:1.2 - “failing to exercise proper use of his command within the limits of his authority;” 3:1.6 - “insubordination by issuing a directive contrary to a directive by Chief Codispoti;” and 3:7.4 - “violating the officers civil rights.” He also surmised that Austino's actions were cause for discipline under N.J.A.C. 4A:2-2.3(a)(b)(f)(g) and (i). (R-1 at VDIS000113.)

The Attorney General has determined the County Prosecutor has the exclusive authority to investigate IAPP violations. Accordingly, I put much greater weight on the analysis by R. Cavagnaro, which was adopted by Webb-McRae, than on Gelfand's opinions, pertaining to violations of the IAPP. I accept as reasonable and persuasive R. Cavagnaro's analysis of why Austino's interview was not required or necessary. Accordingly, I **FIND** that IA's decision during its administrative investigation of the MVR critical incident complaint not to interview Austino was not an indication of discrimination or an attempt to shut down the investigation.

I further note that Armstrong and D. Cavagnaro believed they were targeted because of their actions during the CCPO investigation, the IA administrative review, and for being outspoken on behalf of the privacy rights of the members of the PBA. They

claimed they were passed over for assignments and subjected to shift changes. However, issues pertaining to shifts and assignments are discretionary management decisions. I **FIND** there was nothing presented in the testimony that showed discriminatory intent by Beu pertaining to discretionary management decisions.

D. Cavagnaro testified about the Grievances that he filed for acts which he believed were discriminatory. D. Cavagnaro appealed Beu's decision claiming Beu discriminated against him for his union affiliation status and personal relationships when he did not get the assignment to the Detective Bureau. Public Safety Director Alicea found no violation and stated, "it would be out of the scope of my authority to make determinations on Day-to-Day operations of the police department including how the Chief of Police assigns and deploys his officers." (P-43.) As argued during the testimony, the inconsistency is that Beu's actions were deemed retaliatory, but Director Alicea's actions were not.

I **FIND** that none of the witnesses attributed any acts of retaliation in the form of disciplinary action or unequal treatment to Beu. There was no indication that Beu ever sustained any complaints against any of these witnesses for actions stemming from the wiretapping complaint to the CCPO or the IA investigation.

Based on the above, I **FIND** that no evidence has been presented by respondent to support the allegations in Count I, Paragraph 6 of the FNDA, that "Beu aided and abetted a retaliatory environment with respect to his handling of a series of officer complaints relating to the activation of a live-stream audio feed in VPD offices and in the Lieutenant's Office."

### **Tyrell Cox Arrest**

In paragraph 8 of Count I, Respondent alleged that "Beu aided and abetted improper retaliation against Pacitto and Landi by assigning the internal affairs investigation to Captain Finley and Lt. Riordan, both of whom promptly exonerated Austino without any interview, and instead converted the investigation into one against

Pacitto and Landi themselves for improperly questioning Austino's authority and fabricating their complaints." (J-1, at 4.)

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

On June 10, 2017, the night of the annual car show, multiple patrol units were dispatched to the scene of a fight involving three subjects. There was a report that one of the suspects dropped a knife. Austino was the supervising officer on the scene. The officers detained a male, later identified as Tyrell Cox, as a possible suspect. While being questioned, Cox gave a false name and shouted profanities. After the officers were satisfied that Cox was not involved in the incident, Austino gave the order that Cox was free to go. Cox started to walk away but then turned around and yelled "fuck you, you bitch ass cops". Austino gave the order to arrest Cox for Disorderly Conduct.

Officer Dennis, who was on the scene, drafted the Complaint-Summons for Disorderly Conduct. Pacitto, as Dennis's supervisor, reviewed the draft. Dennis wrote:

Within the jurisdiction of this court, purposely create the risk of public inconvenience, annoyance or alarm, by engaging in tumultuous behavior, specifically by screaming "Fuck You You Bitch Ass Cops!" After being advised multiple times to leave the immediate area.

[R-41, VDIS 001352]

After reviewing it, Pacitto did not feel the Disorderly Conduct charge was appropriate.

Pacitto discussed this arrest with Sergeant Landi, who was on the scene, and Sergeant Shaw. Together they reviewed the Body Worn Camera (BWC) footage from Officer A.J. Santiago. The video showed Cox walking away, turning back and yelling, "Fuck you you bitch ass cops." Immediately after the comment, Austino placed Cox under arrest for Disorderly Conduct.

On June 13, 2017, Pacitto filed a Critical Incident against Captain Austino and a Request for Electronic Evidence Preservation. (R-41, at VDIS 00316-18 and 20.) Pacitto



stated in the Critical Incident that he spoke with Landi and Shaw, who also felt “the charge and arrest did not coincide with what happened.” Id. On June 14, 2017, Riordan gave a Complaint Notification to Austino advising him that the complaint involved an allegation of Other Rule Violation – Performance of Duty. (R-41, at VDIS 001319.)

The IA investigation was assigned to Captain Finley. In his report, Finley wrote:

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, at VDIS1324.]

IA never issued target notification letters to Pacitto, Landi, and Shaw. After reviewing Finley's report, Beu assigned Riordan to review Finley's findings so he could make an informed decision about whether to take disciplinary action. (R-41, at VDIS001326.) Riordan recorded Beu's response in pertinent part as follows:

Upon his review he concurred that Captain Austino be exonerated of the allegation lodged against him by Sergeant Pacitto.

Chief Beu did not find enough substantiation by the preponderance of evidence standard to warrant disciplinary action against Sergeant Pacitto for his role in this incident.

Chief Beu's review of Lieutenant Landi's involvement in this incident led him to proclaim that the allegation of untruthfulness is unfounded, however, Chief Beu did find that Landi failed perform his duties as a supervisor. . . .

Chief Beu expressed his concern that the department created delay would be problematic in the issuances of any disciplinary action in regard to a Department Rule or Regulation Violation. As such Chief Beu ordered that any potential charges against Lieutenant Landi be Administratively Closed.

[R-41, at VDIS 001339.]

On March 21, 2018, Riordan issued a Complaint Disposition to Austino advising him that he was exonerated. (R-41, at VDIS 001382.) On May 18, 2018, Riordan issued a Complaint Disposition to Landi advising him that a collateral issue discovered by the investigation was his "failure to perform his duties as a supervisor." It was noted that Landi was "verbally counseled on May 18, 2018." (R-41, at 001381.) IA did not issue a Complaint Disposition to Pacitto and Shaw.

On July 11, 2017, Cox pled guilty in Municipal Court to a violation of N.J.S.A. 2C:33-2a(1), a petty disorderly offense for Disorderly Conduct. (P-38.)

### TESTIMONY

**Pacitto** testified as a witness for respondent. On June 7, 2017, Pacitto was promoted to sergeant. In this new position, Pacitto was responsible for reviewing the reports of the officers under his supervision. In reading a report from Dennis on a Disorderly Conduct arrest on June 10, 2027, Pacitto recalled immediately thinking that there was not enough in the report to justify the arrest. Cursing at a police officer is not a Disorderly Conduct offense. After Dennis confirmed that his report contained what happened and there was nothing more to add, Pacitto reviewed BWC footage. He did not like what he saw and did not think it was a good arrest. He asked other supervisors to review the footage and they agreed with him that the arrest did not look good.

The BWC footage from Officer Santiago was played at the hearing. (R-7.) The video showed Dennis telling Cox he was free to go. Cox confirmed that he was free to go and started walking away but turned and cursed at the officers. Cox was placed under arrest.

On June 13, 2017, Pacitto wrote up a Critical Incident report for Austino for a possible false arrest. (R-8.) He also filed a request for electronic preservation of the body camera videos. (R-9.) Pacitto stated that he erred on the side of caution when writing this Critical Incident report, because supervisors had just been disciplined for

approving reports in a recent investigation involving a strip search. With that incident on his mind, Pacitto decided to red flag this arrest and bring it to the attention of IA.

After Pacitto filed the Critical Incident with IA, he expected to be interviewed. However, Riordan told him that there was no need because Austino provided case law that cleared up any issues. Pacitto thought it odd that Austino supplied information exonerating himself before there was even an investigation.

IA never informed Pacitto that he was a collateral target of this investigation.

As part of his job as a supervisor, it is a common occurrence for him to correct a charge in an officer's report. These corrections do not usually result in the filing of a Critical Incident. Pacitto never discussed the arrest with Austino.

**Christopher Landi** is a twenty-five-year veteran with the VPD. In 2017, Landi was a patrol supervisor. The night that Cox was arrested, June 10, 2017, Landi was on patrol. Captain Austino was the supervisor assigned to the car show event. When Landi arrived, Cox was in custody, so Landi's role was to keep everyone else on the scene calm. Landi approached Cox's friend. Landi's BWC was activated. (R-120.) Landi is heard stating to the friend that Cox was asking to be arrested. The BWC footage showed Austino speaking to Sergeant Shelby and stating that "he squared up, he wouldn't walk away," referring to Cox.

At some point thereafter, Pacitto approached Landi about a report he was reviewing on the Cox arrest. Pacitto stated that Cox was arrested for cursing at the police officers. Shaw was in the office, so he joined with Landi and Pacitto to review BWC footage to try and get the best vantage point of the arrest. What they saw on video did not match up with the arrest complaint. If a suspect takes a fighting stance that gives rise to a Disorderly Conduct offense. It did not appear from the video that Cox "squared up," or took a fighting stance.

Several months later, in November 2017, Landi was interviewed by Finley, as a witness, not a target. Finley never mentioned a collateral issue with Landi's truthfulness.

Landi was promoted to lieutenant in December 2017. Landi did not hear anything else until he was called back into IA by Riordan in May 2018. At this time, Riordan advised him that he was sustained for failure to supervise or perform his duty. Landi was caught off guard and had no idea what he had done wrong.

Beu saw that Landi was upset. They had a brief conversation and Beu stated that it was no big deal, but Landi needed to get a "little spanking" for his role. Landi was very upset and concerned how this impacted his reputation. He filed his grievance out of time, so it was denied.

In September of 2019, Beu assigned Landi to IA, replacing Riordan. Landi recalled Beu telling him he needed him in IA because Beu had confidence in him. In IA, Landi had access to the files, so he reviewed the investigation packet on the Cox incident. Landi had the opportunity to review Finley's report (R-42) and Riordan's supplemental report. (R-43.) Landi was outraged. He had not known that Finley and Riordan investigated him for providing false information. They attacked his credibility when it was Finley, who was being dishonest.

Although Beu found the allegation of truthfulness to be unfounded, Landi was not appeased because of the multiple pages in the report where Finley and Riordan accused him of untruthfulness. Although Riordan wrote that "Chief Beu ordered that any potential charges against Lieutenant Landi be administratively closed," Landi was still wrongfully sustained.

Admittedly, Landi did not question the legality of the arrest while on the scene. At the time, he did not view the arrest of Cox as either unlawful or improper as ordered by Austino. None of the officers on the scene voiced an objection to the arrest. Landi did not doubt that the officers on the scene believed they had probable cause for the arrest. However, after viewing the BWC footage from multiple officers, Landi believed that once Cox was told to leave, there was no basis for the arrest.

Landi has served in IA from September 2019 until the present. Landi acknowledged that IA investigations can be administratively closed, as an authorized

disposition. It is sparingly used. IA investigators only make recommendations to the Chief, they do not have the ability to sustain any charges. The truthfulness charge was not sustained. Riordan was responsible for recording it correctly. Riordan was also responsible for correctly recording that Chief Beu ordered the investigation to be administratively closed.

Landi considered Beu a friend.

**Gelfand** testified for the respondent in accordance with his report. (R-1.) Gelfand characterized the Critical Incident as whistleblower's complaint. Finley should have been investigating Austino for ordering the arrest of Cox, instead Finley retaliated against Pacitto and Landi for bringing the complaint. (R-42.)

Gelfand noted that Pacitto's Critical Incident was dated June 13, 2017, and IA notified Austino on June 14, 2017. Thereafter, on June 30, 2017, Austino drafted a CEPA complaint for retaliation for this incident, the wiretapping allegation, and other acts of retaliation by the PBA and former members of the SCU. (R-37.) Austino presented his CEPA complaint to Beu, his supervisor.

Gelfand had noted several major deviations from the IAPP during his investigation. He distinguished his investigation from the CCPO investigation conducted by R. Cavagnaro (P-35) because he focused on the motive and the circumstances surrounding the IAPP violation. His conclusions differed from R. Cavagnaro because Gelfand uncovered deferential treatment depending on whether an officer was favored by Beu. He phrased it as an A team versus B team mentality. Austino and Finley were part of Beu's A team, and they were protected, which was why Austino was exonerated without a thorough investigation.

**Austino** testified on behalf of the appellant. Austino recalled that the night Cox was arrested the scene was chaotic due to the car show. Cox was agitated, loud, uncooperative, and unruly. He seemed intoxicated. Cox was detained for questioning. He gave a false name and shouted profanities. Cox's friend was also detained but he was calm. It appeared to Austino that Cox was trying to provoke his friend. When Cox

was cleared to leave, he started to walk away but abruptly turned, and yelled more profanities. Austino gave the order to arrest him. Despite giving him numerous chances, Cox would not stop, so he was arrested. According to Austino, Cox was provoking a disturbance on the street. There was probable cause for the arrest.

IA notified Austino that a Critical Incident was filed about his decision to arrest Cox. It was highly unusual that no one called him before filing a Critical Incident report to discuss the arrest. Austino believed this was retaliatory. Pacitto and Shaw had documented animosity towards him about management decisions and dissolving the street crimes unit. In December 2016, Pacitto had filed a criminal complaint against him for wiretapping in connection with the MVR issue. On June 30, 2017, Austino provided a CEPA notification to Beu documenting retaliatory action taken against him by Pacitto, and other officers. (R-37.)

After being notified of the Critical Incident regarding the arrest, Austino gave a copy of the decision in State of New Jersey v. Oleg Shtutman, (Docket No. A-0812-15T) to IA, as justification for the Disorderly Conduct charge against Cox. (P-16, at VDIS 000915-919.) Austino also noted that no officer on the scene questioned the arrest.

**Beu** testified about the Cox matter. The Critical Incident was brought to Beu's attention because it was against an upper command staff member. Beu thought it was odd that it was filed as a Critical Incident rather than rectified at shift level.

The investigation was assigned to Finley, because of his rank. Beu agreed with Finley's investigation pertaining to Austino because he believed the arrest was lawful. He disagreed with Finley's recommendation as to Pacitto, Shaw, and Landi. There were problems with Finley's recorded interview of Landi and Beu had other questions. He assigned further investigation to Riordan. Riordan recommended that Pacitto be disciplined. Beu disagreed and determined that charges were unfounded, no discipline. He also disagreed that Landi should be disciplined. There was a substantial delay in reviewing Landi's recorded interview with Finley. Months had gone by, putting this decision well beyond the forty-five-day rule. Beu ordered that any potential charges against Landi be administratively dismissed. Riordan argued his case for discipline, but

Beu wanted nothing sustained. Beu was not shown the disposition page in this matter or other matters. The disposition for Landi was an error.

Beu accepted responsibility for the error, although he never saw it and he was not aware of it. Beu recalled talking to Landi who was visibly upset.

Beu understood that target notices were required to be sent by the IA investigators. However, he did not personally review target notices. There is no dispute that Pacitto, Landi, and Shaw should have been notified.

Beu noted that the CCPO had briefly taken charge of the VPD IA Department. Prosecutor Webb-McRae inserted Retired Chief Richard Necelis, as officer in Charge of the VPD, Internal Affairs Unit, on March 11, 2020. Necelis identified and corrected deficiencies and provided guidance to current VPD personnel. Beu was aware that deficiencies were found before, during, and after his tenure as chief. Notifying targets was found to be a major concern. One of the changes, which Beu agreed was necessary to prevent what had happened with Landi, was for the chief to sign the disposition page. That was not the practice when Beu was chief.

Beu accepted responsibility for the errors but maintained that he never retaliated against anyone. He considered Landi to be a good friend.

**R. Cavagnaro** was called to testify about his investigation relating to the IAPP for CCPO by appellant. (P-35.) The arrest of Cox for disorderly conduct was identified in the Gelfand Report. The Gelfand Report noted that Pacitto and Landi were never notified they were targets of a VPD IA investigation. (R-1 at 139.) There is no question about this being a violation of the 2014 IAPP. "Internal affairs shall notify the suspect officer in writing that an internal affairs investigation has been started, unless the nature of the investigation requires secrecy." (J-4 at 21.) In his random audits, R. Cavagnaro found that failure to give target letters was a continuing violation that occurred before Beu and continued after Beu.

In the Cox matter, due to the video evidence, additional interviews would be discretionary.

R. Cavagnaro disagreed with Gelfand about the nature of the collateral investigation. Anything identified as a collateral issue should be investigated to its logical conclusion for the good of the department. However, there were clear violations with the collateral investigation due to lack of notice. R. Cavagnaro viewed a disposition of administratively closed as an acceptable and allowable outcome under the IAPP. Riordan's actions in not properly recording the Chief's recommendations were improper.

R. Cavagnaro recommended to Webb-McRae that the disposition as to Landi be corrected. Cavagnaro did not opine on the objectivity of Finley or Riordan during their investigation because his assignment was to find violations of the IAPP.

### **ADDITIONAL FACTUAL FINDINGS**

I accept that the testimony questioning the legality of the arrest order was to provide a reasonable basis for Pacitto's Critical Incident and to discredit Austino's Disorderly Conduct arrest order.

Against that background, the clear and undisputed violation is the complete disregard by Finley and Riordan to provide notification to the collateral targets. Because they were not notified, Pacitto, Landi, and Shaw were denied the right to defend themselves and to challenge any disciplinary action if it was to occur. These are serious violations.

However, the issue before me is whether Beu "aided and abetted retaliation against Pacitto and Landi." For "aiding and abetting" respondent needed to show that Beu was complicit in the IA investigation. There is nothing in the record or from the testimony that showed retaliation by Beu against Pacitto and Landi for their roles in the Critical Incident. Beu exonerated Pacitto, found the charges of untruthfulness against Landi to be unfounded, and administratively closed the investigation with no sustained charges. Riordan correctly noted Beu's decision but failed to accurately record it. As the



Chief, Beu is ultimately responsible for the integrity of the IA dispositions. However, I do not **FIND** that Beu's actions in the Cox investigation equated to workplace retaliation.

I also **FIND** that Beu's exoneration of Austino for ordering the arrest of Cox for Disorderly Conduct was not shown to be against the weight of the evidence. No officer on the scene voiced any opposition to the arrest order. The probable cause for the arrest was shown by the tumultuous behavior of Cox in a public place during a crowded event as captured on numerous BWC footage. Beu testified that he believed the arrest was lawful. Moreover, Beu knew that Cox had been convicted on July 11, 2017, for this offense, lending credence to Austino's decision. Accordingly, I do not accept Gelfand's opinion that Beu exonerated Austino because of his favored status as part of the "A" team.

### **Gabrielle Untruthfulness**

As there was no testimony from Officer John Gabrielle or Riordan, I **FIND** the following to be uncontroverted **FACTS**, as established by documentary evidence.

On or about May 1, 2017, Gabrielle decided he no longer wanted to be utilized as a Field Training Officer (FTO) for VPD. On July 31, 2018, Gabrielle filed an IA complaint, wherein he alleged that General Order 2014-21 was violated as to his continued assignment. The language used within the General Order referenced a "willingness" of an officer and the officer's "avid desire to participate" which no longer applied to him. (R-1, at 152-153.) Gabrielle claimed that he had advised Lieutenant McCann in an email that he no longer wanted to be an FTO, but his request was denied.

During the IA investigation, there was confusion about the email. Riordan asked Gabrielle to provide IA with the original email that he authored. Gabrielle was unable to produce it.

From R. Cavagnaro's CCPO report, Riordan identified a collateral issue, whereby he believed Gabrielle was untruthful because the email Gabrielle claimed was sent to McCann was never located. (P-35, at 39.) Riordan determined that Gabrielle was untruthful due to conflicting statements he made about this email.

R. Cavagnaro testified that when the email was not located, it was proper for Riordan to investigate. It was not the investigation of a collateral issue, but Riordan's failure to notify Gabrielle that he was a target that violated the IAPP. Compounding the violation was Riordan's failure to provide Gabrielle with a complaint disposition letter, notifying him of the outcome of the investigation.

Reflected in Riordan's report was that the untruthfulness was sustained, but "[p]er Chief Beu no discipline issued." The Gelfand Report indicated that the lack of information in the IA file of how Beu reached his decision was entirely inconsistent with the IAPP. (R-1, at 157.) R. Cavagnaro in his report noted there are no clear guidelines in the 2014 IAPP, however, the IAPP requires that the investigations entire work product be included. (P-35 at 41-42.) In this matter, there was a lack of information as to how Beu reached his decision.

As noted in R. Cavagnaro's report, Prosecutor Webb McRae issued a directive correcting Gabrielle's IA file to reflect that the allegations of untruthfulness were unfounded. (P-35 at 42.)

During his testimony, R. Cavagnaro stated that the untruthfulness charge was discovered during a routine investigation by the CCPO of officers with sustained complaints of untruthfulness in their IA files. Due to the irregularities in the file, Gabrielle was notified of this charge.

Consequently, on March 17, 2020, Gabrielle filed a Critical Incident against Riordan for his failure to give disposition on a sustained IA Investigation. (R-115, RIORDAN\_OAL 000197.) After an investigation, IA recommended a sustained finding against Riordan for failing to give Gabrielle his complaint disposition outcome letter. The IA investigation was reviewed by Chief Necelis on October 19, 2020. Chief Necelis concurred with the sustained finding and recommended counseling be issued to Riordan. (R-115, RIORDAN\_OAL 000217.)

### ADDITIONAL FACTUAL FINDINGS

In Count I, paragraph 9, responded alleged that in 2019, VPD Officer John Gabrielle was disciplined without notice and his IA record "was marked with a 'sustained' finding of untruthfulness." (J-1 at 5.) The allegation against Beu was that he "aided and abetted this retaliation by approving Riordan's finding yet not issuing any charges in order to prevent Gabrielle from having any opportunity to respond." Id.

Beu testified that Gabriel was the best FTO in the VPD. When it was brought to his attention by Austino and McCann that Gabrielle wanted to be released, Beu concurred with them, that Gabriel should remain an FTO. Beu testified that they needed Gabrielle to remain as an FTO to accommodate an influx of new recruits. After Gabrielle filed his Critical Incident report for not being released, Riordan's collateral investigation for untruthfulness was confined to a missing email. Fulcher testified that he was never able to locate the email on the server. Because Beu stated he did not trust the email search process, he disagreed with Riordan on the sustained finding. Despite Beu's disagreement, Riordan entered a sustained untruthfulness in the IA file, but also recorded no discipline.

Based on the testimony and the documentary evidence, I **FIND** that there is nothing in the record to suggest that Beu's decision not to release Gabrielle as an FTO was based on retaliation. As noted by R. Cavagnaro during his investigation, Riordan's collateral investigation due to the missing email was not the problem. The violation was Riordan's failure to give Gabrielle a target notice and a complaint disposition notice. While Beu was ultimately responsible for the integrity of the IA files, I **FIND** no evidence of workplace retaliation by Beu against Gabrielle for Riordan's IAPP violations, for which Riordan was disciplined.

### Gelfand's Report

In paragraph 10, of Count I, respondent alleged that Beu's identified actions as well as all the actions set forth in the Gelfand Report (R-1) "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."

Subject to the tribunal's discretion, hearsay evidence is admissible in the hearing of contested cases and shall be accorded whatever weight deemed appropriate considering the nature, character, and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability. N.J.A.C. 1:1-15.5(a). However, while hearsay evidence is admissible, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. N.J.A.C. 1:1-15.5(b). Our Supreme Court has found that the residuum rule, N.J.A.C. 1:1-15.5(a) and (b), permits hearsay evidence to corroborate or strengthen competent proof, so long as the final administrative decision is not based solely on hearsay evidence and contains "a residuum of legal and competent evidence in the record to support [the decision]." Weston v. State, 60 N.J. 36, 51 (1972).

In my Order dated April 17, 2023, I dismissed certain examples of alleged discriminatory conduct involving the Finley Take Home Vehicle Case, the Soda Fund, and the Amir El-Basir Bey matters. Specifically, I concluded that Gelfand's statements attributed to the officers involved regarding their alleged interactions with Beu and their particular allegations of his wrongdoing were not supported by a residuum of legal and competent evidence in the record. As a result, I granted appellant's motion to dismiss under R. 4:37-2(b), the allegations contained in paragraphs 4, 5, and 7 of Count 1.

Herein, I have also determined that respondent did not present credible proof that Beu aided and abetted a retaliatory environment or engaged in retaliation regarding his handling of the MVR and Telephone, Cox, and Gabrielle matters. Accordingly, the specific examples identified in Count 1, paragraphs 4 – 9, used by respondent as

examples of Beu's retaliation, disparate treatment, and the aiding and abetting of same were not supported by the weight of competent evidence.

In paragraph 10 of Count I, respondent incorporates by reference every matter contained within the Gelfand Report, without corroborating testimony or reliable documentary evidence. As such I **FIND** that the allegations contained in paragraph 10 of Count 1, must fail under the residuum rule.

### **LEGAL ANALYSIS AND CONCLUSION**

The New Jersey Supreme Court in West New York v. Bock, 38 N.J. 500, 522 (1962) stated that "[p]roperly stated charges are a *sine qua non* of a valid disciplinary proceeding." The charges are contained on Schedule "A" attached to the FNDA. (J-1.)

Respondent seeks the termination of Beu for his pattern of retaliatory conduct documented in the Gelfand Report. (R-1.) As an employer, respondent is responsible for ensuring that its workplace, including its police department, is free from improper employment practices.

Appellant raised multiple arguments why this matter should be dismissed and Beu reinstated to his position within the VPD. Starting with the "draft complaint" (R-11), appellant contended that its purpose was to force Beu's retirement as documented in the letter to Solicitor Tonnetta from PBA attorney Long. (P-48 ) The "draft complaint" from the PBA served as the basis for Gelfand's investigation to protect Vineland from CEPA and other employment lawsuits. However, the examples of retaliation were from 2016 and 2017, well beyond CEPA's statute of limitations. Appellant also raised his concerns about Gelfand's conflict of interest in conducting the investigation and Gelfand's bias during the investigation, which stemmed in part from a lawsuit filed against him by Beu. Appellant also maintained that Gelfand's investigation infringed on the exclusive authority of the County Prosecutor and the Attorney General to determine compliance with the IAPP. Under the guise of an employment investigation, Beu submitted that Vineland's disciplinary action was an attempt to usurp his discretionary decision-making ability,

reserved for the Chief of Police. Finally, appellant maintains that Vineland failed to produce credible evidence of retaliatory conduct and disparate treatment.

A civil service employee's rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an inducement to attract qualified individuals to public service positions and is to be liberally construed toward attainment of merit appointments and broad tenure protections. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576, 581 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972) (citing Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 145, 147 (1965)).

A civil service employee who commits a wrongful act related to their employment may be subject to discipline, which may be a reprimand, suspension, or removal from employment, depending upon the incident. N.J.S.A. 11A:1-2, 11A:2-20; N.J.A.C. 4A:2-2. Public entities should not be burdened with an employee who fails to perform their duties satisfactorily or engages in misconduct related to their duties. N.J.S.A. 11A:1-2(a). Thus, a public entity may impose major discipline upon a civil service employee, including termination/removal from their position. N.J.S.A. 11A:1-2; N.J.A.C. 4A:2-2.2.

The appointing authority employer has the burden of proof to establish the truth of the disciplinary action brought against a civil service employee. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is by a preponderance of credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); see Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

In Count 1, respondent charged appellant with violating N.J.A.C. 4A:2-2.3(a)(12), "other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. In this matter, the charge stems from allegations of improper employment practices, retaliation, and/or disparate treatment in violation of the following laws: "CEPA, N.J.S.A. 34:19-1; New Jersey Law Against Discrimination, (LAD), N.J.S.A 10:5-1; New Jersey Civil Rights Act (NJCR), N.J.S.A. 10:6-1; New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1; 42

U.S.C. Sec. 1983; City of Vineland Policy Nos. 1151(Whistleblower Act) and 1152 (Employee Complaints); and Similar such laws, regulations, and policies as set forth in Mr. Gelfand's Report." (J-1, page 6.)

Respondent alleged that Bue, "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." Respondent had not produced any credible evidence of retaliation by Beu for the allegations contained in Paragraphs 6, 8, and 9 of Schedule "A" Count 1. None of the officers were terminated, demoted, lost pay, or suffered discipline. The allegations against Beu stemmed from his discretionary management decisions over the day-to-day operations of the VPD, his decision-making authority in all IA matters, or errors that were made by IA investigations in failing to properly document IA investigations and comply with all applicable 2014 IAPPs.

Respondent cherry-picked past IA files to show that Beu's conduct created an "intolerable and unsustainable risk of future civil liability" under various Federal and State laws. (J-1, page 6.) These laws are designed to protect society and employees from discrimination in the workplace for protected activities. The difficulty with this matter was that respondent did not maintain that any of these statutes were violated. Instead, the argument was that Beu should be terminated because his conduct in handling various matters between 2016 and 2018, created a culture of discrimination that could lead to future violations.

Respondent failed to address the applicability of each of the anti-discrimination and anti-retaliation laws. For example, the LAD, N.J.S.A. 10:5-1 to -50, is designed to "protect society from the vestiges of discrimination." L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ., 189 N.J. 381, 399 (2007) (quoting Cedeno v. Montclair State Univ., 163 N.J. 473, 478 (2000)). As such, the LAD prohibits an employer from, among other things, discriminating against an employee "in compensation or in terms, conditions or privileges of employment" because of age, race, or gender. N.J.S.A. 10:5-12(a). There are no distinguishing characteristics in this matter and no allegations that such

discrimination occurred. Utilizing LAD under the facts and circumstances of this matter is an example of overreach by the respondent.

Policy 1151, Whistleblower Act, was based on CEPA, N.J.S.A. 34:19-1 et seq. (R-26.) There is no dispute that Pacitto and O'Neill had the right to bring the wiretapping complaint to the CCPO without fear of retaliation or reprisal. The whistleblower activity occurred when Codispoti was Chief. The administrative IA investigation occurred when Beu was Chief. Neither Pacitto nor O'Neill identified any acts of retaliation imposed by Beu for their protected activity.

Policy 1152 provides that "[n]o employee will be penalized in any way for reporting a complaint made in good faith." This policy protects officers who file Critical Incident reports from retaliation. There is no proof in any of the examples in Count 1, that any officer was disciplined by Beu for filing a Critical Incident. Moreover, Policy 1152 does not prevent collateral investigations. A collateral investigation is not retaliation. Herein, the wrongdoing occurred because of compliance failures by IA investigators with the notice provisions in the 2014 IAPP.

Because of these compliance issues with the IAPP, the CCPO took two important steps. County Prosecutor McRae appointed R. Cavagnaro to review the IAPP violations that were identified in the Gelfand Report. Notice violations were identified, and IA files were corrected. She also appointed an interim Chief of Police, Retired Chief Necelis, who instituted changes and training for the IA Department. Chief Necelis also imposed discipline on Riordan for his failure to provide proper notice to Gabrielle. These reasonable measures by Prosecutor McRae provided the safeguards needed to prevent future issues of the types of violations identified herein.

Accordingly, I **CONCLUDE** that respondent has failed to prove the charge that Beu violated N.J.A.C. 4A:202.3(a)(12) by engaging in improper employment practices, retaliation and or disparate treatment by a preponderance of the credible and competent evidence. Therefore, Count 1 is **REVERSED**.



In Counts III and IV, respondent charged appellant with Conduct Unbecoming a Public Employee, under N.J.A.C. 4A:2-2.3(a)(6) and the common law. "Conduct unbecoming a public employee" is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. at 140. It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. at 429).

Appellant's status, as a police officer, subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1980). Police Officers represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons, and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967).

Respondent supported the charge of unbecoming conduct with the same allegations of retaliatory conduct contained in Count 1. As I have determined that there was no retaliatory conduct or discrimination, there is no factual support for the claims of conduct unbecoming.

Accordingly, I **CONCLUDE** that respondent has failed to prove the charge that Beu's conduct was unbecoming a public employee in violation of N.J.A.C. 4A:202.3(a)(6) and the common law because there was no evidence that Beu engaged in improper employment practices, retaliation, and or disparate treatment. Therefore, Count III and IV are **REVERSED**.


**ORDER**

It is hereby **ORDERED** that the disciplinary action of the respondent, City of Vineland, in removing appellant from his position as Chief of the Vineland Police Department on November 15, 2021, is hereby **REVERSED**. The appellant's appeal is **GRANTED**.

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

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

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



December 8, 2023  
DATE

\_\_\_\_\_  
KATHLEEN M. CALEMNO, ALJ

Date Received at Agency: \_\_\_\_\_

Date Mailed to Parties: \_\_\_\_\_

KMC/tat

**WITNESSES**

**For Appellant**

Jennifer Webb McRae, Cumberland County Prosecutor  
Christopher Fulcher  
Lieutenant Raymond Cavagnaro, CCPO.  
Captain Adam Austino  
Rudolph Beu

**For Respondent**

Lieutenant Brian Armstrong  
Detective Sergeant Scott O'Neill  
Captain Gregory Pacitto  
Officer David Cavagnaro  
Richard Tonetta, Solicitor of Vineland  
Michael Benson, Esq.  
Todd J. Gelfand, Esquire  
Lieutenant Christopher Landi

**Respondent's Rebuttal Witness**

Lieutenant Leonard W. Wolf

**Exhibits**

**Joint:**

- J-1 FNDA, dated October 21, 2022
- J-2 PNDA with Amended Schedule A
- J-3 PNDA

J-4 Internal Affairs Policy & Procedures – Revised July 2014

J-5 Internal Affairs Policy and Procedures – November 2022 Version

**For Petitioner:**

P-1 Vineland IA File 2015-12

P-2 Vineland IA File 2016-18

P-3 Vineland IA File 2017-35

P-4 Vineland IA File 2016-257

P-5 CCPO File PSU 16-99

P-6 Mr. Benson's billing records

P-7 Benson's Brief, dated October 31, 2017

P-8 Email String – August 24, 2017

P-9 CCPO letter dated July 20, 2016

P-10 Casiano's Initial PNDA, dated March 3, 2017

P-11 Benson Letter dated September 6, 2017

P-12 Casiano's Amended PNDA, dated January 29, 2017

P-13 Casiano Settlement Agreement, dated November 29, 2017

P-14 Casiano's FNDA, dated November 29, 2017

P-15 Madden FNDA, dated February 5, 2018

P-16 Vineland IA File 2017-112

P-19 Benson Letter, dated November 10, 2021

P-20 CCPO Email String, dated November 12, 2021

P-21 CCPO Complaint notification to Beu, dated November 16, 2021

P-22 Shapiro Letter, dated November 21, 2021

P-30 Pacitto interview by Gelfand

- P35 CCPO Report PSU-21-0145
- P36 Landi-Cox BWC (Video) – R-120
- P37 Selby-Cox BWC (Video)
- P38 Cox Case Disposition
- P39 IA Index
- P40 Collective Bargaining Agreement
- P41 May 21, 2019. Grievance and Email Trail
- P42 Alicea Letter re: May 21, 2019 Grievance
- P43 February 25, 2020, Alicea Decision on Grievance 2020-01
- P44 November 4, 2019, Tonetta Email re: IA conflict
- P45 January 3, 2020, Tonetta Email re: Hiring
- P48 Letter to Tonetta, dated January 16, 2019
- P49 Letter to Long, dated January 25, 2019
- P50 Letter to all Counsel, dated July 29, 202
- P51 Daily Journal Article, dated January 31, 2017
- P52 Critical Incident Sheet, dated March 12, 2020
- P53 Lt. Len Wolf Recorded CCPO Interview dated January 4, 2017

**For Respondent:**

- R-1 Gelfand Report of Investigation in the Matter of Vineland Workplace Harassment and Retaliation Investigation, November 22, 2021
- R-2A Exhibits to Gelfand Report (Tab 3 – Not in Evidence)
- R-2B Exhibits to Gelfand Report
- R-3 General Order Mobile Video/Body Worn Cameras, November 10, 2017
- R-5 Grievance No. 2016-05, dated December 14, 2016
- R-6 Letter dated January 4, 2015, Beu to Pacitto
- R-7 Video dated June 19, 2017
- R-8 VCPD Critical Incident Sheet, dated June 13, 2017
- R-9 Request for Electronic Preservation, dated June 13, 2017

- R-10 Letter from Long to Beu, dated June 14, 2017
- R-11 Draft Complaint
- R-13 Landi Metadata (Landi)
- R-26 Policy 1151 – Whistleblower Act
- R-27 VCPD Rules And Regulations, effective date May 7, 2018
- R-31 Safety Vision E-mails (1486087)
- R-32 Letter from Webb-McRae to Beu & CCPO IA Investigation Report
- R-33 Citizen Complaint compiled by Austino - Bey Report
- R-34 CCPO IA Investigation Report, dated April 5, 2017
- R-35 Email Chain, PSU-16-0099, June 15, 2017
- R-36 Critical Incident Sheet, dated June 22, 2017
- R-37 Written notification by Austino to Beu regarding CEPA, June 30, 2017
- R-41 Critical Incident Sheet, Case #2A2017-0112
- R-42 Critical Incident Continuation
- R-43 Critical Incident Continuation – compiled by Riordan
- R-47 Letter from Gelfand to Shapiro, HR Grievance/Cross-Complaints
- R-53 Email from Gelfand to Beu dated September 9, 2019
- R-59 Email from Alicea to Tonetta; Fanucci; & Dickenson - CEPA Notification  
R-82 Complaint Beu v. City of Vineland, et al.
- R-84 Email chain Shapiro to Benson Re: Release of VPD IA Files
- R-96 Transcript Interview Tuesday, dated June 1, 2021
- R-97 Transcript Continued Hearing of Beu, dated June 9, 2021
- R-102 Critical Incident Sheet IA Case # 2015-12, dated February 6, 2015
- R-110 Email from Scarpa to Pacitto regarding Patrol Vehicle Audio Issues
- R-113 Cox Incident – Report History

- R-115 Critical Incident Sheet OPS Case #IA2020-0026, dated March 12, 2020
- R-116 David Cavagnaro 2016 emails PBA
- R-117 PBA grievance, dated November 9, 2016
- R-118 PBA grievance, dated September 5, 2017
- R-119 Grievance response, dated September 14, 2017
- R-120 BWC Footage from Landi during Cox Incident
- R-123 Special Order- Interim MVR Procedures, effective date June 1, 2017
- R-125 Investigation file on the arrest and body cavity search of Amir El-Basir.
- R-126 Transcript Internal Affairs Investigation Case No: 2016-46 – Volume 1
- R-127 Transcript Internal Affairs Investigation Case No: 2016-46 - Volume 2
- R-128 Transcript Internal Affairs Investigation Case No: 2016-46 - Volume 3