STATE OF NEW JERSEY

In the Matter of Kevin Norton,
Wanaque, Police Department

CSC Docket No. 2023-1362
OAL Docket No. CSR 11413-22

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 28, 2024

The appeal of Kevin Norton, Police Officer, Wanaque, Police Department, removal, effective December 1, 2022, on charges, was heard by Administrative Law Judge Thomas R. Betancourt (ALJ), who rendered his initial decision on January 18, 2024. Exceptions and replies were filed on behalf of the appellant and appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and reply, the Civil Service Commission (Commission), at its meeting on February 28, 2024, adopted the ALJ's Findings of Facts and Conclusions. However, it did not adopt his recommendation to modify the removal to a 45 working day suspension. Rather, the Commission imposed a six-month suspension.

In this matter, the ALJ found that the appellant was guilty of all of the infractions alleged with the exception of the falsification charge. It its exceptions, the appointing authority contends that charge should have also been sustained. The Commission disagrees. The ALJ explicitly detailed his reasons for finding that charge was not sustained. Upon its *de novo* review of the ALJ's determination in that regard, the Commission agrees with the ALJ's findings on the charges and finds nothing in the appointing authority's exceptions to demonstrate that the ALJ's findings on that charge was arbitrary, capricious or unreasonable.

The Commission also agrees that the dismissal of that charge warrants a lesser penalty than originally imposed. In this regard, similar to its assessment of the charges, the Commission review of the penalty is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper

penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). Even when a law enforcement officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense may nevertheless warrant the penalty of removal where it is likely to undermine the public trust. In this regard, the Commission emphasizes that a Police Officer is held to a higher standard than a civilian public employee. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied,* 47 *N.J.* 80 (1966). *See also, In re Phillips*, 117 *N.J.* 567 (1990).

In this matter, the ALJ performed an analysis of the penalty to be imposed. In that regard, the ALJ stated:

> The current matter constitutes major discipline. Appellant was found not to have filed a false report, the most egregious of the specifications. However, most of the specifications were sustained. Those sustained were directly related to appellant failing to follow departmental policy regarding the treatment of a prisoner, K.P., and for approving an incomplete police report. Both are serious violations of departmental policy. Appellant allowed his own opinion about K.P. to affect his treatment of him. He did not believe K.P. really needed medical attention and ordered Officer Cappello to transport K.P. to the jail. Further, he approved a report that did not contain the important information that K.P. said he would kill himself. Appellant did not believe K.P. That his assumption proved correct is of no moment. K.P. was obviously injured and appellant knew the same. Yet he failed to follow policy and call for the first aid squad. He compounded his actions by failing to include salient information in the report. He further compounded his actions by calling the jail to let them know that the eye injury was not an issue. He was the supervising officer for the incident with K.P. He merely should not have substituted his judgment and ignore departmental policy. Appellant's failure to abide by departmental policy has exposed the borough to liability for not calling for medical attention for K.P. when it was required.

> Given his rather minor prior disciplinary history, a suspension of forty-five days would be appropriate.

Initially, **all** the charges against the appellant are very serious. As such, the ALJ's assertion that the falsification charge was the "most egregious of the specifications" is not factually supported, as the sustained charges are at least as problematic. Here, the appellant allowed his opinions and assumptions to guide his misconduct and led to the arrestee being placed at risk of additional harm based on the appellant's failure to call for medical attention when required, and by not taking the arrestee's threat of self-harm seriously enough to further convey such information. This mishandling of the arrestee fortunately did not result in a more disastrous ultimate outcome. It is noted that, while the ALJ outlined the appellant's prior minor disciplinary history, he did not consider the additional 45 working day suspension and demotion in the appellant's record.[1] Nevertheless, upon consideration, and in no way condoning the appellant's actions, given the dismissal of the falsification charge, the reduction in penalty is warranted. However, the 45 working day suspension is insufficient in this cased. Given the upheld misconduct, the Commission finds that a six-month suspension, the maximum suspension permitted, will serve as a stern warning to the appellant that any further misconduct will likely result in his removal from employment.

Since the removal has been modified, the appellant is entitled to be reinstated with mitigated back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10 from six months days after the first date of separation without pay until the date of actual reinstatement. However, he is not entitled to counsel fees. *N.J.A.C.* 4A:2-2.12(a) provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in the disciplinary appeal is the merits of the charges. See *Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121,128 (App. Div. 1995): *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, charges were sustained, and major discipline was imposed. Consequently, as appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority.

---

[1] The ALJ presumably did not consider that discipline since it was still pending a final decision by the Commission on appeal. However, it is noted that the Commission has made a final decision on the prior discipline in *In the Matter of Kevin Norton* (CSC, decided February 28, 2024). In that decision, the Commission upheld the 45 working day suspension and demotion. Thus, the Commission has considered that discipline in determining the proper penalty in this matter. However, for the reasons set forth above, it finds the reduction of the removal to a six-month suspension to be appropriate.

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 are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore modifies that action to a six-month suspension.

The Commission orders that the appellant be granted back pay, benefits, and seniority from six months after the first date of separation without pay to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned, and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The parties must inform the Commission, in writing, if there is any dispute as to back pay 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 28TH DAY OF FEBRUARY, 2024

Allison Chris Myers

Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 11413-22

AGENCY DKT. NO. 2023-1362

IN THE MATTER OF KEVIN NORTON,
BOROUGH OF WANAQUE.

Wolodwmyr Tyshchenko, Esq., for appellant Kevin Norton (Caruso Smith Picini, LLC, attorneys)

Sean Dias, Esq., for respondent Borough of Wanaque (Dias Law, LLC, attorneys)

Record Closed: November 20, 2023 Decided: January 18, 2024

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Kevin, appeals a Final Notice of Disciplinary Action (FNDA), dated December 1, 2022, providing for a penalty of removal.

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on December 21, 2022.

A prehearing conference was held on January 10, 2023, and a prehearing order was entered on January 11, 2023.

The hearing was held on June 19 and 21, 2023.

The record remained open for the parties to obtain transcripts of the proceedings and to file closing briefs. Appellant filed his closing brief dated October 10, 2023. Respondent filed their closing brief dated October 6, 2023. Respondent was permitted to file a supplemental brief, which was received on October 27, 2023.

The undersigned did not receive transcripts of the hearing until November 20, 2023, whereupon the record closed.

ISSUES

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

SUMMARY OF TESTIMONY

Respondent's Case

John Galinus testified as follows:

He is employed by the Borough of Wanaque as police officer. He holds the rank of Detective Sergeant. He described his prior experience and his duties.

He was assigned to investigate an internal affairs complaint regarding the petitioner. The basis for the complaint was failure to render medical aid.

He began his investigation by reviewing body worn cameras and audio regarding an individual, Kurt Petsch (K.P.), who was arrested on February 19, 2022. K.P. is the individual who filed the complaint. After his arrest, K.P. was transported to Wanaque

Police Department headquarters by Officer Fiorito. Other officers involved in the arrest were Sergeant Norton (the appellant), Officer Cappello and Officer Fiorito. Appellant was in command of the scene.

He then reviewed the Preliminary Notice of Disciplinary Action (PNDA, R-1) and stated there was evidence to support the specifications contained therein. He observed K.P. ask for medical attention.

Sergeant Galinus prepared an internal affairs report as to his investigation. (R-5) He reviewed his report and described his investigation. He described his review of the audio and video. He described how K.P. asked to go to the hospital due to an eye injury.

The audio and video of K.P. in a patrol car about to be transported to the Passaic County Jail is then played. The video is from Officer Cappello's body camera. Audio is from Officer Capello's patrol car. (R-6 a and b)

An audio recording of a telephone conversation petitioner had with Passaic County Sheriff's Corrections was then played. (R-6c)

Appellant directed Officer Capello to transport K.P. to the Passaic County Jail.

Sergeant Galinus then reviewed a photograph of K.P. (R-7), which showed the condition of K.P.'s left eye. The photograph was taken during the processing of K.P. after his arrest.

As part of his investigation Sergeant Galinus reviewed the police report completed by Officer Fiorito (R-8). He noted that appellant had made entries in the report. There were no entries in the report regarding K.P.'s medical complaints. It also did not state that K.P. stated he wanted to commit suicide. This was stated by K.P. on the audio that was played.

Regarding the allegation of failure to provide medical aid to K.P. Sergeant Galinus stated that a call should have been made to the Wanaque first aid squad.

He noted that appellant asked Mr. Murata, the victim in a domestic violence incident with K.P., if he needed medical attention.

He also noted that K.P. was placed in a cell at Wanaque Police headquarters, and referred to procedures for arrested individuals (R-12). The policy requires that reports of injury or illness be promptly attended to. Appellant did not call the first aid squad for K.P.

Sergeant Galinus then reviewed Regulation 4.3.3 regarding falsification of any office report; and, Regulation 311.2(j) regarding investigation and reporting. In his investigation he determined that appellant violated these regulations. He came to this conclusion by reviewing the audit log, which is a record of any changes or entries made in a police report. He reviewed the entries made in the report. Sergeant Galinus stated it was inaccurate to enter in the report that K.P. only wanted to go to the hospital as he did not want to go to jail. He further thought it false that appellant placed in the report that K.P. confirmed that K.P. claimed his eye hurt because he was going to jail.

Sergeant Galinus noted that officers can login and change a report. The audit log reflects where appellant made changes to the report.

Sergeant Galinus then noted the body worn camera policy and stated appellant violated the policy by not wearing his body worn camera when he was outside speaking with K.P. when he was in the police car.

The three officers present at the scene of K.P.'s arrest were appellant, Officer Fiorita and Officer Cappello. All three officers were wearing their body worn cameras for the duration of the call.

He noted in his report that K.P. was asked if he was injured at the scene and responded he was not. Appellant inquired of all three individuals on scene if they were injured.

K.P. was transported from the scene to Wanaque Police headquarters by Officer Fiorito, who was the only officer with K.P. in the vehicle. The transport to the jail was by Officer Cappello and Special Officer Olivieri. This is policy for two officers when doing transport to the jail.

Officers Fiorito and Olivieri escort K.P. to the sallyport and he is secured in the rear of a patrol car. At this point K.P. stated he wanted to go to the hospital. Officer Cappello radioed appellant as he was exiting the sallyport into the parking lot. Petitioner arrives. Appellant was not wearing his body worn camera. Sergeant Galinus offered that he may have left it in the charger.

Appellant, in his statement to Sergeant Galinus for his investigation, stated he did not know why he was being summoned, and he thought it may have been car trouble with the police vehicle. Sergeant Galinus stated that appellant would not be required to activate his body worn camera under these circumstances.

Sergeant Galinus discussed the difference between transport of prisoner procedures and procedures while a person is in the municipal detention facility.

Appellant, during his investigative interview, advised that he was a combat medic in the army and an EMT.

K.P. was triaged upon arrival at the jail and admitted. He denied being suicidal during triage. When interviewed by Sergeant Galinus he admitted his claim of being suicidal was not genuine.

In reviewing K.P.'s mug shot Sergeant Galinus noted his left eye appeared red and the eyelid was swollen.

Due to this incident, with the multiple changes to the incident report, the policy was changed. If additional information is to be noted it requires a supplemental report.

The police report for the incident in this matter was closed on February 20, 2022 at 8:13 a.m. K.P. filed his complaint the same day at 9:13 p.m.

Appellant's Case

Appellant Kevin Norton, testified as follows:

After high school, appellant joined the army and served as a combat medic in Iraq. He returned from Iraq in 2009. He began his service with the Wanaque police department in 2013 after transferring from the Clifton police department. Prior to that he served shortly with the Passaic County Sheriff's Department.

He is currently certified as an EMT. Wanaque has a volunteer first aid squad. Appellant does training for the first aid squad. He is a Basic Life Support (BLS) trainer.

When he first encountered K.P. at the residence appellant was aware that K.P. had an injury to his eye, stating "it was pretty obvious." K.P. was transported to Wanaque police headquarters. He was then transported to the Passaic County Jail. K.P. did not complain of an eye injury. To his knowledge K.P. did not complain to anyone about an eye injury until he was in the sally port.

Officer Cappello had radioed him to come to the sally port. He did not know why. In the sally port he had a conversation with K.P., who complained about his eye.

Appellant stated he did make an assessment of K.P.'s physical condition at headquarters. He stated he did so by observing his movements. He noted nothing observable.

The investigative report notes a sentence written in the incident report: "Kurt then confirmed to Sergeant Norton his eye now hurts only because he is going to jail." He

could not recall if he placed this sentence in the report. He did approve the report. There was no intention to deceive anyone by having this sentence in the incident report.

When the report was locked out he did not know K.P. had filed a complaint.

When the report was locked out he was aware that there were body worn camera footage of the incident.

He heard K.P. state he needed to go to the hospital for his eye when he spoke to him in the parking lot. He was aware that K.P. told him his head was slammed into a table. He also knew this from speaking with Mr. Marata at the scene of the incident.

He admitted that he called the jail to advise them K.P. had a black eye, and that there was no issue with it. He did not advise them of K.P.'s specific complaints of headache, dizziness and seeing colors.

He is aware of the body worn camera policy.

FINDINGS OF FACT

I **FIND** the following **FACTS**:

Appellant was employed by the Borough of Wanaque as a police sergeant.

On February 19, 2022, appellant, and Officers Cappello and Fiorito responded to a domestic violence call. Appellant was the supervising officer on scene. Three individuals were found on the scene: Kurt Petsch, Michale Moratto and Brianna Degeorge. It was determined that Mr. Moratto was the victim and K.P. was the aggressor and was charged with Domestic Violence-Simple Assault. It was also determined that Mr. Moratto had a cut on his right hand. K.P. had an injury to his eye, sustained by striking his head on the kitchen counter. Both Mr. Moratto and K.P. were asked if they were injured. Mr. Moratto replied in the affirmative. K.P. denied any injury. K.P. was then transported to police headquarters and placed in a cell. (R-8)

The injury to K.P. was evident to appellant while on scene. (R-7) Appellant also was aware of the mechanism of that injury. It later was discovered that K.P. suffered a fractured occipital bone. (R-4, R-5 and R-9)[1]

At some point after being placed in a cell, K.P. was taken to the sally port for transport to the Passaic County Jail. While in the police vehicle K.P. began to complain about his eye injury. He had not previously complained about it. Officer Cappello and Special Officer Olivieri were the transport officers. After pulling the vehicle out of the sally port Officer Cappello stopped in the parking lot and radioed for petitioner, who was the supervising officer. Appellant did not know the reason he was summoned. He was not wearing his body worn camera at the time. Appellant then engaged in a conversation with K.P. regarding his eye injury, and that he wanted to be transported to the hospital. K.P. also told appellant that he wanted to kill himself. Ultimately, petitioner determined that K.P. was merely trying to avoid going to jail and ordered he be transported to jail. (R-6 a and b, R-5)

Appellant then telephoned the Passaic County Jail to apprise them of K.P.'s complaint, and stated "... he's got a black eye, no issue with it, but he doesn't want to go to jail in the worst way." He did not apprise the jail that K.P. stated he wanted to kill himself.

Wanaque Police Department maintains policies and procedures which govern the police department. Cell Block, Prisoner Procedures and Juveniles in Custody provides, at General Guidelines A.12: "Reports of injury or illness will be promptly attended to by dispatch of the Wanaque First Aid Squad. If transport to a medical facility is mandated, and the prisoner cannot be released on bail or their own recognizance, they must be accompanied to the medical facility and returned after treatment."

Petitioner failed to comply with the above noted guideline.

[1] That K.P. suffered an occipital bone fracture did not factor into the conclusion that petitioner violated Wanaque police policy regarding prisoner procedures.

K.P., on February 20, 2022, entered the Wanaque police headquarters and filed a complaint regarding the incident of February 19, 2022. This prompted an internal affairs investigation, which was conducted by Sergeant Galinus. Sergeant Galinus issued his report, dated May 4, 2022. (R-3, R-4 and R-5)

As a result of that report appellant was issued a Preliminary Notice of Disciplinary Action (PNDA), dated May 20, 2022. (R-1) The specifications set forth in the PNDA are several violations of Wanaque Police Department rules and regulations and policies, as follows:

3.11.16 Did not take responsibility for the proper treatment of a prisoner taken into custody and did not adhere to all applicable laws, rules, regulations, guidelines, policies and procedures were not strictly adhered to and obeyed.

Cell Block, Prisoner Procedures, and Juveniles in Custody (88-2). (Procedure A12, B1c, C5, and C6)

4.3.3 Did knowingly falsify an official report by entering inaccurate, false and improper information records of this department.

Mobile in Car Video Recordings (2006-2). (Procedure III.A.6 and III.A.6).

Body Worn Cameras (2021-001) (Procedure III.B.18, III.G, and III.P)

4.1.1 Failed to promptly perform his duties as required and directed by law and department rules and policy.

4.1.3 Disobeyed polices and procedures of the department.

3.11.2c Did not communicate to his co-worker all information necessary to achieve maximum department objectives.

3.11.2a Did not exercise authority consistent with the obligations imposed by his oath of office and in conformance with policies and procedures of the department.

3.11.2f Failed to conduct himself within accordance of a high ethical standard while on duty.

3.11.2j Failed to report clearly and concisely all the facts concerning the incident which he had knowledge during his tour of duty.

3.11.15 Failed to document appropriately.

3.2.2 Failed to exercise proper use of his command within the limits of his authority to assure efficient performance by his subordinate.

3.2.4 Failed to guide subordinate to gain effectiveness in performing their duties.

3.9.1e Failed to closely supervise the activity of his subordinate and did not correct when it was necessary.

3.9.1g Did not exercise direct command in a manner to assure good order.

4.2.1c As a supervisor, knowingly issued an order which was in violation of department rules, policies and procedure.

The charges in the PNDA were N.J.A.C. 4A:2-2.3(a) 1. Incompetency, inefficiency or failure to perform duties; 6. Conduct unbecoming; 7. Neglect of Duty; 12. Other sufficient cause. Also, violation of rules and regulations. Misconduct.

All charges were sustained in the Final Notice of Disciplinary Action. (R-2)

Wanaque Police Department maintains policies and procedures which govern the police department. Cell Block, Prisoner Procedures and Juveniles in Custody provides, at General Guidelines A.12: "Reports of injury or illness will be promptly

attended to by dispatch of the Wanaque First Aid Squad. If transport to a medical facility is mandated, and the prisoner cannot be released on bail or their own recognizance, they must be accompanied to the medical facility and returned after treatment."

Appellant failed to comply with the above noted guideline and the specifications relating to 3.11.16 and Cell Block, Prisoner Procedures, and Juveniles in Custody (88-2) (Procedure A12, B1c, C5, and C6).

The next specification is 4.3.3 Did knowingly falsify an official report by entering inaccurate, false and improper information records of this department. I do not find that respondent has demonstrated by a preponderance of the credible evidence that this occurred. I find the opposite. There was no falsification of an official report. I do find that a fair reading of the incident report does not demonstrate any false statements. It does not contain one glaring omission: that K.P. told appellant he wanted to kill himself.

The two most serious specifications are the failure to properly care for a prisoner, K.P., by requesting medical attention for him; and, falsification of an official report. I have made findings of fact as to these, as noted above. All other specifications stem from these two main specifications. I will address them in the order presented in the PNDA.

Mobile in Car Video Recordings (2006-2). (Procedure III.A.6 and III.A.6). There was no evidence presented regarding a violation. Accordingly, respondent has not met its burden as to the same.

Body Worn Cameras (2021-001) (Procedure III.B.18, III.G, and III.P) I find appellant was in violation of this rule. However, it is a de minimus violation. Appellant did not know why he was summoned to speak with Officer Cappello, and the conversation with K.P. was recorded and preserved. Sergeant Galinus conceded in his testimony that the circumstances herein did not require appellant to wear his body worn camera. (Tr. 6/19/23, 112:1-5)

4.1.1 Failed to promptly perform his duties as required and directed by law and department rules and policy. Respondent has met its burden as to this specification. Appellant did not comply with the regulations regarding prisoner procedures by failing to obtain medical care for K.P.

4.1.3 Disobeyed policies and procedures of the department. Respondent has met its burden as to this specification. Appellant did not comply with the regulations regarding prisoner procedures by failing to obtain medical care for K.P.

3.11.2c Did not communicate to his co-worker all information necessary to achieve maximum department objectives. No testimony was offered as to this specification. I am unable to determine what, if anything, appellant did, or did not do, that would constitute a violation of this regulation. Respondent did not carry its burden as to this specification.

3.11.2a Did not exercise authority consistent with the obligations imposed by his oath of office and in conformance with policies and procedures of the department. Again, No testimony was offered as to this specification. I am unable to determine what, if anything, appellant did, or did not do, that would constitute a violation of this regulation. Respondent did not carry its burden as to this specification.

3.11.2f Failed to conduct himself within accordance of a high ethical standard while on duty. Respondent did not carry its burden with respect to this specification. There was no testimony offered as to what ethical standard appellant allegedly breached.

3.11.2j Failed to report clearly and concisely all the facts concerning the incident which he had knowledge of during his tour of duty. Respondent has met its burden herein. The incident report (4-8) failed to note that K.P. stated he wanted to kill himself. Appellant was the supervisory officer and approved the report. I do note that it was highly unlikely that K.P. was serious when he made the statement. Appellant knew K.P. as a "frequent flyer", as noted by Sergeant Galinus, and therefore assumed K.P. was merely trying to avoid jail. In fact, K.P. admitted as much when he was interviewed for

the internal affairs investigation. (R-5) Further, K.P. denied being suicidal to the jail nurse upon his arrival. (R-13) Nonetheless, this statement by K.P. was material and relevant to his arrest and transport to the jail and should have been noted.

3.11.15 Failed to document appropriately. Respondent has met its burden herein for the reasons stated in the preceding paragraph.

3.2.2 Failed to exercise proper use of his command within the limits of his authority to assure efficient performance by his subordinate. I am unable to determine what, if anything, appellant did, or did not do, that would constitute a violation of this regulation. Respondent did not carry its burden as to this specification.

3.2.4 Failed to guide subordinate to gain effectiveness in performing their duties. I am unable to determine what, if anything, appellant did, or did not do, that would constitute a violation of this regulation. Respondent did not carry its burden as to this specification.

3.9.1e Failed to closely supervise the activity of his subordinate and did not correct when it was necessary. I am unable to determine what, if anything, appellant did, or did not do, that would constitute a violation of this regulation. Respondent did not carry its burden as to this specification.

3.9.1g Did not exercise direct command in a manner to assure good order. I am unable to determine what, if anything, appellant did, or did not do, that would constitute a violation of this regulation. Respondent did not carry its burden as to this specification.

4.2.1c As a supervisor, knowingly issued an order which was in violation of department rules, policies and procedure. I find respondent has met its burden as to this specification. Appellant ordered Officer Cappello to transport K.P. to the jail knowing he was injured. That order should not have been given, as appellant should have requested the first aid squad prior.

Appellant has extensive medical training. He became an EMT at the age of seventeen. He joined the army after high school graduation and became an army medic, serving in combat in Iraq. He remains an EMT and provides training to the Wanaque First Aid Squad. I note this as it is in the record. Appellant's medical training did not affect the finding that he violated policy for failing to obtain medical attention for K.P. While his training would have alerted him to the fact that K.P. was injured, any officer would have noted the same without medical training. The eye injury was obvious. This alone should have been the catalyst to contact the first aid squad in accordance with department policy.

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a civil service employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2 2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the judge must "decide

in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). This burden of proof falls on the agency in enforcement proceedings to prove violations of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987).

This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, in accordance with a reasonable probability of truth. Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). The burden of proof falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The respondent must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson, supra, 37 N.J. 143. The evidence needed to satisfy the standard must be decided on a case-by-case basis.

An appeal to the Merit System Board[2] requires the Office of Administrative Law to conduct a de novo hearing and to determine appellant's guilt or innocence as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987).

There is no constitutional or statutory right to a government job. State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, which should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J.

[2] Now the Civil Service Commission.

500 (1962). In this matter, the City of Newark bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

The sustained charges in the FNDA in the instant matter, are as follows:

N.J.A.C. 4A:2-2.3(a)1 – Incompetency, inefficiency or failure to perform duties
N.J.A.C. 4A:2-2.3(a)6 – conduct unbecoming a public employee
N.J.A.C. 4A:2-2.3(a)7 – neglect of duty
N.J.A.C. 4A:2-2.3(a)12 – other sufficient cause

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

Police officers are held to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

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

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

In the instant matter respondent has failed to carry its burden regarding appellant filing a false police report. However, the charge is sustained herein for appellant's other actions: failing to obtain medical attention for K.P., and approving an incomplete official report.

In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980).

This charge was sustained in the FNDA. I sustain it herein. Appellant failed to perform his duties by failing to obtain medical attention for K.P. and for approving an incomplete official report.

Appellant is charged with "neglect of duty," N.J.A.C. 4A:2-2.3(a)(7). "Neglect of duty" has been interpreted to mean that "an employee . . . neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009), adopted, Civil Service Commission (March 27, 2009), http://njlaw.rutgers.edu/collections/oal/. The term "neglect" means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" means conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job.

The charge of neglect of duty is sustained. Appellant failed to obtain medical attention for K.P., for approving an incomplete official report.

The FNDA also has a sustained charge of Other Sufficient Cause, N.J.A.C. 4A:3(a)(12). There is no definition in the New Jersey Administrative Code for other sufficient cause. Other sufficient cause is generally defined in the charges against respondent as all other offense caused and derived as a result of all other charges against appellant. There have been cases when the charge of other sufficient cause has been dismissed when "respondent has not given any substance to the allegation." Simmons v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm'r (April 26, 2006), <http://njlaw.rutgers.edu/collections/oal/final/csv9122-99.pdf>. In the instant case the charge of Other Sufficient Cause.

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

This matter was transmitted as a police termination case. That was based upon respondent's assertion that appellant filed a false report and did so to cover up his wrongdoing to comply with K.P.'s request for medical attention. I found as fact that this did not happen. Appellant, when the report was closed out, did not know K.P. would file a complaint against him. Further, the report states most of what happened, including that K.P. complained about his eye while in the police vehicle prior to being transported to the jail. What the report did not contain was K.P.'s statement that he wanted to kill himself. This does not constitute a false police report, but rather an incomplete police report. Had I found that appellant did file a false report I would terminate his employment with the police department. I did not so find.

Although the focus is generally on the seriousness of the current charge as well as the prior disciplinary history of the appellant, consideration must also be given to the purpose of the civil service laws. Civil service laws "are designed to promote efficient public service, not to benefit errant employees . . . The welfare of the people as a whole, and not exclusively the welfare of the civil servant, is the basic policy underlining the statutory scheme." State Operated School District v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). "The overriding concern in assessing the propriety of the penalty is the public good. Of the various considerations which bear upon that issue, several factors may be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record." George v. North Princeton Developmental Center, 96 N.J.A.R. 2d. (CSV) 463, 465.

In West New York v. Bock, 38 N.J. 500, 522 (1962), which was decided more than fifty years ago, our Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Herrmann, 192 N.J. 19, 29 (2007) (citing Bock, supra, 38 N.J. at 522). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally

adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Bock, supra, 38 N.J. 523–24.

Appellant has three prior disciplinary matters, as follows: Minor discipline in 2014 resulting in fine equal to two working days; Minor discipline in 2016 resulting in a three day suspension; and, minor discipline in 2017 resulting in a five day suspension, reduced to four days via a settlement agreement.

The current matter constitutes major discipline. Appellant was found not to have filed a false report, the most egregious of the specifications. However, most of the specifications were sustained. Those sustained were directly related to appellant failing to follow departmental policy regarding the treatment of a prisoner, K.P., and for approving an incomplete police report. Both are serious violations of departmental policy. Appellant allowed his own opinion about K.P. to affect his treatment of him. He did not believe K.P. really needed medical attention and ordered Officer Cappello to transport K.P. to the jail. Further, he approved a report that did not contain the important information that K.P. said he would kill himself. Appellant did not believe K.P. That his assumption proved correct is of no moment. K.P. was obviously injured and appellant knew the same. Yet he failed to follow policy and call for the first aid squad. He compounded his actions by failing to include salient information in the report. He further compounded his actions by calling the jail to let them know that the eye injury was not an issue. He was the supervising officer for the incident with K.P. He merely should not have substituted his judgment and ignore departmental policy. Appellant's failure to abide by departmental policy has exposed the borough to liability for not calling for medical attention for K.P. when it was required.

Given his rather minor prior disciplinary history, a suspension of forty-five days would be appropriate.

I **CONCLUDE** that the respondent has proved by a preponderance of the credible evidence that that appellant was guilty of all sustained charges in the Final Notice of Disciplinary Action and that the FNDA should be upheld, with the modification of the penalty from termination to a forty-five day suspension.

ORDER

It is hereby **ORDERED** that the charges contained in the FNDA are sustained, and that the penalty is modified from termination to a forty-five day suspension.

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

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

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

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

January 18, 2024
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

APPENDIX

List of Witnesses

For Appellant:

Kevin Norton, appellant

For Respondent:

Detective Sgt. John Galinus

List of Exhibits

For Appellant:

None

For Respondent:

R-1 PNDA

R-2 FNDA

R-3 Wanaque PD letter dated 2/24/22 from Lt. Kershaw from Capt. Calabro

R-4 IA report form

R-5 Wanaque PD memo with IA investigation findings

R-6A BWC video

R-6B in car camera video

R-6C Norton call to county jail audio

R-7 KP mugshot

R-8 Investigation report

R-9 KP medical records packet

R-10 Rules and Regulations

R-11 Cell Block Policy Prisoner Procedures and Juveniles in Custody Policy

R-12 Acknowledgment form

R-13 KP receiving screening

R-14 Audit Log, Case 2204765

R-15 Body Worn Camera Policy