STATE OF NEW JERSEY

In the Matter of Kevin Lafferty
Department of Transportation

CSC DKT. NO. 2014-2978
OAL DKT. NO. CSV 06789-14

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 13, 2020 BW

The appeal of Kevin Lafferty, Safety Service Patrol Operator, Department of Transportation, removal effective April 24, 2014, on charges, was heard by Administrative Law Judge Elia A. Pelios, who rendered his initial decision on April 5, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of February 12, 2020, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Kevin Lafferty.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 12TH DAY OF FEBRUARY, 2020

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
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Christopher S. Myers
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 06789-14
AGENCY DKT. NO. 2014-2978

IN THE MATTER OF KEVIN LAFFERTY,
DEPARTMENT OF TRANSPORTATION.

Jeremiah J. Atkins, Esq., for appellant (Hoffman DiMuzio, attorneys)

Nonee Lee Wagner, Deputy Attorney General, for respondent (Christopher S. Porrino, Acting Attorney General of New Jersey, attorney)

Record Closed: October 29, 2015 Decided: April 5, 2017

BEFORE **ELIA A. PELIOS,** ALJ:

STATEMENT OF THE CASE

Respondent, the State of New Jersey, Department of Transportation (NJDOT), removed Emergency Service Patrol Operator Kevin Lafferty (appellant, Lafferty) for violations of: N.J.A.C. 4A:2-2.3(a)6 Conduct Unbecoming a Public Employee and N.J.A.C. 4A:2-2.3(a)12, Other Sufficient Cause, specifically, NJDOT Guidelines for Employee Conduct and Discipline, Section III I—Willful Damage to State Property, Property of Employees or Visitors on State Premises, or the Traveling Public on Highways. The matter arises from two separate incidents occurring on November 10, 2012, and June 6, 2013.

PROCEDURAL HISTORY

On April 24, 2014, appellant received a Final Notice of Disciplinary Action (J-1) sustaining the above-referenced charges, dismissing others, and removing the appellant. On May 14, 2014, appellant requested a hearing. On June 3, 2014, the Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL) where it was filed as a contested case. The matter was heard on August 20, 2015, and October 8, 2015. The record was left open to permit the parties to submit post-hearing briefs. The record was closed on October 29, 2015. Orders of extension were entered to extend the time for filing the initial decision in this matter.

FACTUAL DISCUSSION AND FINDINGS

On July 24, 2013, the respondent notified the appellant of the charges at issue, among others which were not ultimately sustained, specifying that: On November 10, 2012, appellant allegedly tailgated and harassed another motorist in a NJDOT truck over a distance of several miles, and then proceeded to follow the motorist into a residential neighborhood; and On June 6, 2013, appellant allegedly threw road debris at a passing vehicle (J-1). The preceding statement is not in dispute and is hereby **FOUND** as **FACT.**

Officer Daniel Pachuta (Pachuta) of the Mansfield Township police was called to testify by the respondent. He is a patrolman and testified under subpoena. He noted that parts of Interstate 295 are within the borders of Mansfield Township, but are patrolled by the State police. He identified a dispatch involving a woman who had called saying that she was being followed by a NJDOT employee inside her senior community homestead (A-1). No charges were filed as a result of the incident. The date was November 10, 2012. Pachuta's vehicle was equipped with a dashboard cam, and at that time the video was played. Camera one was looking forward, camera two was facing the rear of the vehicle. The appellant did speak to the officer, and complained that while getting on a ramp, the woman had passed him on the right. The woman stated that he was running his engine, and leaning on his horn, and kept chasing her and trying to box her in. The woman got off at Exit 47 to see her mother, and to go to her mother's community to get away from the appellant. She was told to file the matter in Burlington Township. It was noted that the audio on the recording was spotty. Pachuta stated that the appellant thought that the victim

was driving erratically, and was possibly under the influence. No field sobriety test was performed, and the video ended. Pachuta stated that he advised the parties that they could file complaints in Burlington Township, but did not know if anyone did.

On cross-examination, Pachuta's recollection was refreshed that it was the appellant who called in to dispatch. The appellant called dispatch after calling the State police. His demeanor was initially calm. Pachuta stated that the woman driving the car was upset, but not aggressive. There was no indication that anyone was under the influence, and no field test was needed.

The respondent next called Maged Gabriel (Gabriel), an administrative analyst at the NJDOT. Gabriel assists the Assistant Commissioner, and was here to discuss training of employees. Gabriel noted that NJDOT drivers are issued cell phones, and noted that with the use of a cell phone versus dispatch radio, discretion resides with the operator of the vehicle to determine whether to call the dispatcher or to call 911 directly. He identified the NJDOT manual (A-3), and referred to specific provisions in the manual which train employees how to act when there is debris in the roadway (R-3, Section 2.2, situation 9). If the debris is too large, the manual states that the procedure is to contact law enforcement, but if it is not an emergency, to call a supervisor to call dispatch. If it is an emergency, i.e., a hit-and-run, call 911. For a perceived traffic infraction, the driver can call law enforcement, but still has to call a supervisor and/or dispatch. Gabriel identified a document concerning a description of video surveillance on Route 295 signed by the appellant (A-4). He stated that the public or law enforcement can request the video, if it is available, for up to one week.

On cross-examination, Gabriel was asked if calling the State police would be appropriate if the driver thought that a motorist was driving impaired, and he stated that he believed it would be. He noted that peak traffic is from 5:30 a.m. until 10:00 or 11:00 a.m., and from 3:30 to 7:30 p.m. He stated that an operator may assess if a lane can be cleared without calling for a slowdown. However, the NJDOT does not play "chicken," and, if the operator states he is going to run into the lane and retrieve a piece of debris, that is playing "chicken." Gabriel believes it is important to avoid actions that lead to secondary incidents.

The respondent then called Robert Crusen (Crusen), an investigator for NJDOT. He had twenty-five years prior experience in law enforcement, and noted that he had two investigations with the respondent that were being heard at this time. Crusen first addressed the incident involving the removal of debris from the roadway. At that time a video was reviewed of an incident occurring on June 6, 2013, at 17:15 hours. The camera shows southbound traffic as oncoming, and northbound traffic moving away. Once the report was called in, the camera swiveled and reversed its vantage points, allowing one to observe debris in the center and right lanes, as well as on the shoulder, in what appears to be heavy traffic. A truck driven by the appellant arrived, the arrow board is activated and directing traffic to the left. The driver can be seen exiting the vehicle, walking into the lane, and retrieving the first piece of debris. The appellant then walks into the center lane, a car comes into the right lane from the center lane, and almost hits the appellant. The appellant appears to throw debris, and the truck that almost hit him pulls over and discussion ensues. The driver of the pick-up vehicle exits the vehicle, and the appellant can be seen back in the roadway removing debris. At this time, a second truck with flashing lights enters the scene. Lafferty signals that everything is okay, and the truck moves on. Lafferty is back in his vehicle, and the sign changes from an arrow. At this point, the State police and Lafferty's supervisor arrived at the scene.

Crusen stated that he spoke to both the owner of the truck and to Lafferty after this incident. The owner of the truck was a gentleman named Richard Fabrizio (Fabrizio). He told him that he was driving in the center lane when the car in front of him slammed on the brakes. Fabrizio moved into the right lane to avoid impact, and Lafferty appeared in the roadway. Lafferty threw debris at Fabrizio's vehicle, causing Fabrizio to sustain a cracked windshield. Crusen memorialized the interviews in a report; the interview with Fabrizio was done by telephone. When Crusen spoke with Lafferty, it was with his union representative present. Crusen believed that the video showed that a tire tread was being carried by Lafferty which was thrown at Fabrizio's pick-up truck, and not up in the air, and that Lafferty was already out of the road when it was thrown. Crusen stated that the video showed that Lafferty was on the side of the road, not in the middle of the road, when he threw the tire tread. Appellant's arm never rose above his shoulder; he threw it at the vehicle, not up in the air. Crusen believes that it was intentional, and that there was damage to the right-center windshield on Fabrizio's truck.

With regard to the second incident which occurred November 2012, Crusen noted that he became the investigator on the matter in January 2013. Crusen received an email from Stephanie Wyochozowycz (Wyochozowycz), and a review of a log which showed that the appellant was issued the truck identified by Wyochozowycz, and that he was working in that area. Crusen also reviewed a GPS report to confirm. He met with Wyochozowycz at her home, and created a memorandum of the interview. Wyochozowycz stated that she went to Homestead Village because her mother lives there, and believed that the guards would not let the appellant in.

Crusen also interviewed Lafferty with regard to the incident, and his statement was consistent with what he told the local police department, and the GPS report. Crusen did not know if Lafferty used his personal or State cell phone, and his conclusion was that Lafferty should have contacted the dispatcher rather than undertaken pursuit. He stated it is okay to call 911, but an employee also should call the dispatcher, seeing that this is not an emergency where a 911 call is expected. What matters to Crusen is that the victim was scared, noting this was a weekend day, around mid-day. He believed that the appellant violated department policy by pursuing the woman, and leaving the road.

With regard to the debris incident, Crusen believes that Lafferty did not follow procedures for safety to himself and others. The appellant should not have entered the road the way he did. He created a hazard by doing so. Even after the incident with Fabrizio, appellant again reentered the road. With regard to the pursuit incident, Crusen did not attempt to interview the woman's mother, nor her friend, and did not observe any of the proceedings himself. He only knew what was described to him.

On cross-examination, Crusen acknowledged that he was not present for the debris incident. His knowledge is based on the video review and interviews with the participants in the incident. Crusen stated that the controller of the camera sits in the Cherry Hill Traffic Operations Center. He stated that Lafferty was assigned to respond to the debris in the road, and was not acting on his own. Crusen believes that the camera angle changed due to the debris in the roadway. He proceeded to describe the location of debris. There was one piece on the shoulder, and two large pieces in the center and right lanes, which he noted had to be removed over the course of time due to collisions with traffic. About thirty-three minutes into the video, Lafferty's truck arrived. Lafferty entered the center lane, and

the truck veers into the lane. The appellant turned right, threw debris with his right hand, which was an underhand toss. He believes that the time that the truck swerved to the time that debris was thrown, was approximately three to four seconds, and believes that is enough time to deliberately throw debris. Crusen did not know if Lafferty intended to cause damage, but he should have known that such action could cause damage.

Crusen noted that Fabrizio did not describe the physical action of throwing, but believed it was deliberate. Fabrizio told Crusen that he called the police crews, and Crusen did not physically see damage to the car, just read it as described in the police report. He noted that Lafferty was charged with willful damage. He believed that the appellant caused the incident by entering the roadway. With regard to the second incident, Crusen stated that he cannot independently verify the statements given by the complainant that Lafferty was chasing her at ninety-five miles per hour, but the GPS report indicated that his top speed was sixty-six miles per hour. He acknowledged that Lafferty did call 911, and that the State police transferred the matter to local police. He believes that Lafferty called the police crews, and did not try to get a recording of the 911 call. Crusen did recall Lafferty saying that the complainant was taking pictures of him while driving, and does recall hearing on the police video appellant saying that she had scared him. There is no independent evidence that Wyochozowycz was taking pictures. Many of the aspects of what Wyochozowycz claimed could not be independently proven, but many were admitted by Lafferty. He did not review Lafferty's evaluations as he was not interested in his work history, only the facts of the incidents at-hand. Crusen is not aware of any charges from the debris incident.

Crusen does not make discipline recommendations; he just performs fact-gathering and findings of violation. He stated that it is not possible to verify the shouting, tailgating, and weaving, as there were no cameras in the area. Crusen believes the pursuit lasted about five and one-half miles on Route 295, plus an additional mile after exiting, maybe one and one-half miles. He noted that NJDOT drivers are not allowed to leave the roadway to follow motorist with regards to an incident. With regard to the debris incident, he noted that Lafferty claimed that the truck hit the debris, not vice-versa.

Crusen had the GPS records before he spoke with the complainant, and there was no discussion of speed. He noted that it was a construction zone, so the speed limit was forty-five miles per hour, but acknowledged that there is no proof beyond what

Wyochozowycz said that there was a construction zone. He does believe that leeway exists in some instances for leaving the road, but is not entirely clear what they are.

At this time the respondent called Richard Fabrizio. Fabrizio is self-employed in a Philadelphia, Pennsylvania, company called Eastern Scaffolding. He currently lives in Patchogue, New York, and appeared voluntarily, not under subpoena. He is regularly on Route 295, as that is his way home after work. Fabrizio described that on the date of the incident, he was going home and had just gotten onto 95 North. He noticed a NJDOT truck on the right, so he moved into the center lane. The center lane stopped abruptly, and so Fabrizio veered into the right lane to avoid hitting the car in front of him. The truck was not in the right lane. He saw someone throw the tire at his windshield. Fabrizio was driving a 2001 Sierra pick-up. He saw a gentleman on his right, in the front of the truck, he said a piece of tire flew in front of his windshield and hit center of the windshield. It was about fifteen to twenty inches long, and came from the right side.

Fabrizio pulled-over and called the police. He stated that the tire did not strike his hood or fender, but struck his windshield. Fabrizio stated that the appellant was holding the tire, leaned back, and threw it up in air. Fabrizio did not speak with Lafferty face-to-face. The police came, and took a report. There was damage to his truck and he had to replace the windshield. Fabrizio referred to four photographs (A-18) that were taken the day after the accident, showing a cracked windshield. He gave the pictures to the NJDOT, who then contacted him. Fabrizio gave a statement over the phone, and believed that the memorandum of his interview (A-11) is a true and accurate description of what he told the NJDOT. He believes the tire was thrown intentionally, and not likely accidentally, given its size and weight.

There were no other cars in the right lane; Lafferty was already in the shoulder when Fabrizio saw him. Fabrizio stated that the second page, last paragraph of the State Police Report (A-8), is an accurate depiction of what he saw at the scene. He stated that the cracks did not change from the time of the accident to the time of photography of the incident. He did see tire debris in the road in the right lane and center lane.

Fabrizio remembers testifying in an earlier proceeding, but he does not remember saying that he did not see the appellant throw the tire. The windshield was not cracked

prior to the incident, and the photographs depict the condition immediately following the accident. Fabrizio called the police because he wanted to make a report. He yelled through the window, only words were exchanged. Fabrizio does concede that someone in Lafferty's shoes would be startled, and estimated that he was moving at fifty to sixty miles per hour when he swerved.

Kevin Lafferty testified on his own behalf. He stated that he lives in Logan Township, New Jersey. He has been employed by the NJDOT for over ten years. He described his job duties briefly before discussing the June 6, 2013, incident involving debris in the roadway. Lafferty stated that he was working on Route 295 that day when he received a call to remove the debris, to which he responded. He found the debris in the middle and right lanes. Lafferty pulled into the shoulder, activated his arrow telling traffic to move left, and called in the location to the department. He described the debris as four to five pieces of tire in the right lane, and on the line between the right and center lane. His job was to remove the debris in that incident. Lafferty was trained to do it, and does it practically every day. He described the procedure utilized to remove the debris: call it in, report the location and direction. He was not given further instruction. Based on his training, he believes it is in his discretion to make the call to remove the debris; he was not specifically trained to walk backward, and just does it to keep an eye on traffic.

While getting the second piece on the line, between the right and center lanes, Lafferty saw a truck veer into the right lane, so he ran backward. Startled, he threw the tire piece up in the air. He did not know how fast the driver was going, but described it as a violent swerve, and believes the car was moving at least fifty miles per hour. Lafferty described himself as being scared, as he has been hit doing the exact same thing, and he thought the truck was going to hit him. He did recall the debris leaving his hand, and believes it hit the truck, although he did not see it. Lafferty stated that Fabrizio pulled over, and said "look at what you did." Lafferty responded by saying "you almost hit me, stay here, I will call the police." Lafferty notified the NJDOT headquarters, and called the police because Fabrizio almost hit him. The police arrived, and he spoke with a State Trooper. He did not recognize the State Police Report (A-8), and while not remembering specifically, he believes it accurately reflects what he said in giving that interview. With regard to his statement to his supervisor (A-6), he believes that document accurately reflects what occurred. He did not intentionally throw the tire at the truck, and did not intend to damage

the truck. He was startled and put his hands up as if to brace for impact. Lafferty stated the timeframe was a split second, and there was no time to even consider damaging the truck, his only thought was to avoid being hit.

Regarding the November 2012 incident, Lafferty recalled that he was working in Burlington, New Jersey, on Route 295. He stated that the bottom turnaround on his route was Exit 47, the top was Route 195, and he also worked two miles off of every exit.

Lafferty stated that he was removing a yard sign off of an exit; he pulled onto the grass and activated his lights at Exit 47, the entry ramp to Route 295 north. The ramp was to his right, he called and retrieved the sign, and went about his business. As he was reentering the ramp, he was going slowly to avoid damage as he came off the curb. He put the right front tire off the curb, then the right rear, then the left front. Lafferty's lights were still on and he was going through a slow procedure. He noticed a car speeding up on his right, constantly honking the horn. He believed that the vehicle was going faster than the twenty-five mile an hour speed limit for the ramp, noting this was six months after he had been hit. He was startled and upset, describing the driver of the vehicle as blowing by him.

Lafferty checked for other cars and entered onto the highway. He called the police because he thought she was impaired due to her speed, and the reckless nature of her driving. While on the phone he described the car. He sped up to get the license plate, but did not exceed seventy miles per hour. He then dropped back and was never closer than four car lengths. The police asked where she went. Five miles up she left the road, the dispatcher did not instruct him to follow, just asked where she was. He noted that the woman maintained her lane, but was weaving back and forth slightly, and he believes she was on the phone. They both exited at Exit 52, and Lafferty was still following and still on the phone with the police. The police never advised him to fall back.

Wyochozowycz pulled into a gated community. Lafferty stopped at the gate. He was no longer on the phone with the police. He was about a mile off the highway, and still in what he believed to be his territory. He stated that the woman continued in, and that he spoke with the guard telling the guard what he was doing. Within five- to ten-minutes the police arrived, Lafferty informed them what happened, and he had no further interaction with the woman. He did not recall ever yelling at her, and does not recall using the bullhorn

on his truck. She did not stop and he did not cut her off diagonally. He never exited the vehicle until he got to the guard shack. He was never in front of her, and could not cut her off. He never ordered her out of the vehicle. He does not know what she meant by saying that he almost made her crash. He denies ever honking his horn or riding her bumper, and denies ever going ninety miles per hour. It was never his intention to harass and intimidate. Lafferty just wanted to inform the police.

Lafferty does recall speaking with Crusen, and acknowledged that he called the police, and told Crusen he had done so. He identified a picture of the ramp that he took the day after the incident (A-2). The ramp speed limit is twenty-five miles per hour and he is quite certain she was moving faster. With regard to the rules prohibiting pursuit (A-4), he initialed it and remembers it. He was not following to pursue, he never intended to or tried to stop her. He has been called in before, and has never received an unsatisfactory review. He has one minor discipline in his history.

Lafferty spoke with a supervisor who did not take any issue with his conduct. He spoke to his supervisor after the incident, and never called dispatch during the incident. He wanted to notify the police, and did not use his work phone but used his personal phone because it was close and within reach. Lafferty believes that State police informed dispatch and notified his supervisor. He took pictures in case he needed evidence, because he heard what the complainant had told the officer about his cutting her off. His supervisor called him. He did not see the complainant coming up the ramp as he was paying closer attention to the tires and the curb. Lafferty concedes that drivers sometimes just honked their horns. At four car-lengths he was able to read the license plate and see her do something with her phone. He stayed at the gate to see if police were going to come. Lafferty does not believe he was pursuing, and only advised the supervisor of the incident after it occurred. He does not recall telling Crusen during his interview, which was given seven and one-half months after the incident, about her speeding and beeping, and he assumes he did.

With regard to the debris incident, the appellant stated it is standard practice to remove debris from the highway at rush hour if the debris did not require him to enter the center lane, and noted that protocol is to respond, assess, and if you can, clear it on your own. He saw Fabrizio as soon as he entered the right lane, noting that he too was in the right lane at that time, and moved into the shoulder. He does not recall where he was when

he threw the debris. With regard to the pursuit incident, he believes that he is allowed to leave the roadway within two miles, and it is common practice for certain functions, i.e., turnaround, breaks, restroom. Lafferty is certain that he gave Crusen the details that he gave here, and it is not his fault that Crusen's report left out the details that he gave him. The appellant did not see the woman in the ramp due to her speed and believes that her beeping may have been what alerted him to her presence.

Credibility is best described as that quality of testimony or evidence which makes it worthy of belief. The Supreme Court of New Jersey considered the issue of credibility in In Re Estate of Perrone, 5 N.J. 514 (1950). The Court pronounced:

> Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.
> [Ibid. at 522]

See also, Spagnuolo v. Bonnet, 16 N.J. 546, (1954), State v. Taylor, 38 N.J. Super. 6 (App. Div.1955).

In order to assess credibility, the witness' interest in the outcome, motive or bias should be considered. Furthermore, 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).

In the present matter, respondent's witness Gabriel gave detailed, concise informative testimony regarding the policies and procedures governing the situation and training of employees. Similarly, Officer Pachuta's testimony was consistent with appellant's testimony and the documentary evidence of the incident. While Crusen's testimony overall did not seem unbelievable or extraordinary in any way, it must be noted that with regard to the November 10, 2012, incident, much of his information came from Wyochozowycz, who did not testify at the hearing. Such out-of-court statements, if offered to prove the truth of the matters stated, are hearsay. While the rules of evidence applicable to proceedings in the Judicial Branch permit certain hearsay to be accepted as competent

evidence under recognized exceptions to the general rule excluding hearsay, in administrative hearings the rule governing the admissibility of hearsay evidence is different. That rule is codified at N.J.A.C. 1:1-15.5:

> a. Subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.1(c) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.
>
> b. Notwithstanding the admissibility of hearsay evidence, 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) recites what is commonly referred to as the residuum rule, which was best described in Justice Francis' foundational opinion for the New Jersey Supreme Court in Weston v. State, 60 N.J. 36, 50-51 (1972):

> It is common practice for administrative agencies to receive hearsay evidence at their hearings. . . . As Judge Learned Hand said for the Court of Appeals for the Second Circuit in NLRB v. Remington Rand, Inc., 94 F.2d 862, 873 (1938), mere rumor would not support a board finding, "but hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs." And see, Goldsmith v. Kingsford, 92 N.H. 442, 32 A.2d 810 (1943) . . . . However, in our State as well as in many other jurisdictions the rule is that a fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it . . .

Any testimony by Pachuta as to what Wyochozowycz told him is similarly constrained. While there is no reason to doubt the credibility of Pachuta and Crusen in accurately

reporting what was said to them by Wyochozowycz, there is no proof that what she told them was true. In light of the foregoing, I **FIND**, that no legally competent evidence has been presented to contradict appellant's version of what occurred before the police responded to the scene on November 10, 2012, and what evidence does exist, specifically the GPS reports, seem to support appellant's version of the speed travelled.

Accordingly, I **FIND** that on November 10, 2012, while appellant was carefully re-entering an exit ramp on Route 295, a car came quickly up the ramp and startled him. Appellant followed the car, concerned about erratic driving and possible inebriation. He called the police and proceeded to follow the car for several miles, eventually exiting the highway and following the car to a gated community where he waited outside until the police arrived. I further **FIND** that the police did not instruct appellant to follow the car, and that NJDOT rules specifically prohibit pursuing a motorist for traffic infractions (A-4) stating:

> ESP Personnel is not authorized to pursue or stop a motorist(s) for committing traffic infractions. To allow an ESP employee to pursue and/or stop a motorist(s), an act only authorized by highly trained law enforcement officials, could prompt a severe or fatal accident and leave NJDOT confronting a lawsuit. Any attempt to pursue or stop a motorist(s) shall be considered an abuse of an ESP driver's official position and could lead to disciplinary action. If a motorist(s) is driving in an unsafe manner or has committed a traffic offense and is creating an unsafe situation, ESP Personnel does have the authority to contact the Police to relay this information, however, he/she must advise supervision of the situation. (A-4.)

Regarding the June 6, 2013 incident, the testimony of Fabrizio and appellant does not appear to be in conflict, and is in-fact, largely in agreement. What is disputed is appellant's intent in throwing the debris. Was it in startled surprise or intentionally directed at Fabrizio's vehicle? While essentially analyzing split-second activities and decisions in the midst of a rapidly evolving situation, a review of the video offers the best depiction of what occurred. It is worth noting that at the time that appellant throws the debris, he has already cleared the immediate lane area where Fabrizio's truck was. This was not an act of merely throwing the debris up in the air in surprise, but directly projecting it away from and against the direction of his motion and momentum. I **FIND** therefore, that appellant deliberately and intentionally threw the piece of debris toward Fabrizio's vehicle. The debris struck Fabrizio's vehicle, causing damage which required the replacement of his windshield.

LEGAL ANALYSIS AND CONCLUSIONS

In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:-2.21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

In the present matter, respondent has charged appellant with violating N.J.A.C. 4A:2-2.3(a)6 Conduct Unbecoming a Public Employee and N.J.A.C. 4A:2-2.3(a)12, Other Sufficient Cause, specifically, NJDOT Guidelines for Employee Conduct and Discipline, Section III I—Willful Damage to State Property, Property of Employees or Visitors on State Premises, or the Traveling Public on Highways.

"Conduct unbecoming a public employee" is an elastic phrase, which 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 Atlantic City, 152 N.J. 532, 554 (1998); see also, In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 [quoting In re Zeber, 156 A.2d 821, 825 (1959)]. Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) [quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)]. Suspension or removal may be justified where the misconduct occurred while the employee was off duty. Emmons, supra, 63 N.J. Super. at 140.

In the present matter, the record reflects that on November 10, 2012, appellant conducted a pursuit of a motorist in his State vehicle after he felt she nearly struck him while he was entering the roadway. Although he stated he believed her to be operating her vehicle dangerously, and possibly under the influence, the record also reflects that his conduct was not the appropriate way in which to address those concerns, if sincere. Appellant is not authorized to conduct such a pursuit, and his actions are not terribly distinguishable from an act of "road rage" under the imprimatur of the Department of Transportation. Our roads have many drivers, and near misses and glitches are unfortunately more frequent than anyone would like. However, if the public were to expect that every non-incident or near miss were to be met with pursuit and harassment by State employees unauthorized and not properly trained to do so, it would cause serious damage to public respect in the Department's delivery of its governmental service. Appellant notified law enforcement of his concern, he should have left it to them from there. Appellant's argument that this, at most, constitutes a technical violation of the do-not-follow policy is unpersuasive. Accordingly, I **CONCLUDE** that the appointing authority has met its burden in proving, by a preponderance of credible evidence, that the charge of violating N.J.A.C. 4A:2-2.3(a)6 (Conduct Unbecoming a Public Employee) should be **SUSTAINED**.

Appellant has also been charged with a violation of N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause). Specifically, appellant is charged with a violation of NJDOT Guidelines for Employee Conduct and Discipline Section III I, which imposes Discipline for "Willful Damage to State Property, Property of Employees or Visitors on State Premises, or the Traveling Public on Highways." The policy states that the charge "includes damage which is intentional or deliberate."

The record reflects that appellant, while retrieving debris from the roadway in a manner not consistent with policy, was nearly hit by a car pulling into a lane he was occupying but had not properly closed. He then threw the piece of debris he was carrying at the driver's car, striking it, and causing damage to the driver's windshield. I **CONCLUDE** this was a deliberate act which caused damage to a member of the traveling public on a highway, within the contemplation of NJDOT Guidelines for Employee Conduct and Discipline Section III I. Accordingly, I **CONCLUDE** that the appointing authority has proven, by a preponderance of credible evidence, that appellant has violated N.J.A.C. 4A:2-2.3(a)12, Other Sufficient Cause, and that such charge must be **SUSTAINED.**

PENALTY

The Civil Service Commission's review of penalty is de novo. N.J.S.A. 11A:2-19 and N.J.A.C. 4A:2-2.9(d) specifically grant the Commission authority to increase or decrease the penalty imposed by the appointing authority.

General principles of progressive discipline apply. Town of W. New York v. Bock, 38 N.J. 500, 523 (1962). Typically, the Board considers numerous factors, including the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463.

"Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990).

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

Some disciplinary infractions are so serious that removal is appropriate, notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197–98 (1993) (upholding dismissal of a police officer who refused drug screening as "fairly proportionate" to offense); see also, In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who snapped lighter in front of five-year-old):

> . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the

> employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

The Commission has authority to increase the penalty beyond that established by the appointing authority's Final Notice of Disciplinary Action, but not to removal from suspension. N.J.S.A. 11A:2-19. The Civil Service Commission may increase or decrease the penalty imposed by the appointing authority, but removal shall not be substituted for a lesser penalty. See, Sabia v. City of Elizabeth, 132 N.J. Super. 6, 15–16 (App. Div. 1974), certif. denied, Elizabeth v. Sabia, 67 N.J. 97 (1975).

In the present matter, it is not in dispute that appellant has a fairly unremarkable disciplinary record. However, the conduct which has been sustained has been determined to be unbecoming to his position. On two instances, appellant has responded to a potentially hazardous situation inconsistently with his training, and in a manner which seems to be more borne of emotion and anger than concern for safety to himself and other motorists. The nature of his work puts him in close proximity to the traveling public on the State's highway, and already tense situation where simple missteps can, and far too often do, have catastrophic consequences. His default response, when startled while on the road, appears to be to act out in an aggressive manner toward motorists on the road. This cannot be countenanced. It is fortunate that no secondary incidents appear to have occurred as a result of these incidents.

Accordingly, I **CONCLUDE** that strict application of the principle of progressive discipline in this matter is contrary to the public interest, and that the appointing authority's penalty of removal should be **AFFIRMED**.

ORDER

The charges of violating N.J.A.C. 4A:2-2.3(a)6 (Conduct Unbecoming a Public Employee) and N.J.A.C. 4A:2-2.3(a)12 (Other Sufficient Cause) are hereby **SUSTAINED.** The penalty of removal is **AFFIRMED.** Appellant's appeal is **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

April 5, 2017
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: April 5, 2017

Date Mailed to Parties: April 5, 2017
nd

APPENDIX

WITNESSES

For Appellant:

Kevin Lafferty

For Respondent:

Robert Crusen

Richard Fabrizio

Maged Gabriel

Officer Daniel Pachuta

EXHIBITS

Joint Exhibits:

J-1 State of New Jersey, Civil Service Commission, Preliminary Notice of Disciplinary Action, dated July 24, 2013

J-2 State of New Jersey, Civil Service Commission, Description of Offenses

For Appellant:

A-1 County of Burlington Public Safety System Incident Report, dated June 5, 2013

A-2 Photograph

A-3 NJDOT Procedure Manual (updated June 5, 2013)

A-4 Work Rules/Ethics Acknowledgement Form, NJDOT Emergency Service Patrol (ESP) Employees, dated July 1, 2010

A-5 Video

A-6 Appellant's Hand-written Incident Summary, dated June 6, 2013

A-7 Statement

A-8 New Jersey State Police Operations Report C020-2013-00779R, dated July 17, 2013

A-9 NJDOT, Office of the Inspector General, Administrative Rights, dated July 24, 2013

A-10 NJDOT, Office of the Inspector General, Memorandum of Interview, Case Number 2013-0139, dated July 24, 2013

A-11 NJDOT, Office of the Inspector General, Memorandum of Interview, Case Number 2013-0139, dated July 17, 2013

A-12 NJDOT, Correspondence Unit, Memorandum to Motiani Dhanesh, dated December 11, 2012

A-13 Safety Service Patrol Cherry Hill, Weekend Shift Schedule, dated November 10, 2012

A-14 GPS Records

A-15 NJDOT, Office of the Inspector General, Memorandum of Interview, Case Number 2012-1122, dated June 3, 2013

A-16 NJDOT, Office of the Inspector General, Memorandum of Interview, Case Number 2012-1122, dated July 24, 2013

A-17 Photograph

A-18 Photographs

For Respondent:

None