A-6

STATE OF NEW JERSEY

In the Matter of Dywon Kelsey
Mercer County
Sheriff's Department

CSC DKT. NO. 2013-1552
OAL DKT. NO. CSV 166708-12

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: November 6, 2014 PM

The appeal of Dywon Kelsey, a Sheriff Officer with Mercer County, Sheriff's Department, 90 working day suspension, on charges, was heard by Administrative Law Judge Linda M. Kassekert, who rendered her initial decision on August 26, 2014. Exceptions and cross exceptions were filed on behalf of the parties.

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, at its meeting on November 6, 2014 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 suspending the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Dywon Kelsey.

Re: Dywon Kelsey

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
NOVEMBER 6, 2014

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
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Henry Maurer
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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 16708-12
AGENCY DKT. NO. n/a
2013-1552

IN THE MATTER OF DYWON KELSEY, MERCER COUNTY SHERIFF'S DEPARTMENT.

Paul L. Kleinbaum, Esq., for appellant, Dywon Kelsey (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Stephen E. Trimboli, Esq., for respondent, for Mercer County Sheriff's Department (Trimboli & Pursinowski, attorneys)

Record Closed: July 21, 2014 Decided: August 26, 2014

BEFORE **LINDA M. KASSEKERT**, ALJ:

STATEMENT OF THE CASE

Appellant, Dywon Kelsey, appeals his suspension for ninety working days by respondent, Mercer County Sheriff's Office (MCSO) for Conduct Unbecoming a Public Employee and violations of MCSO Rules and Regulations. Appellant contends that he did not commit the infractions with which he is charged and even assuming he did, the suspension for ninety working days is not the appropriate penalty. Appellant also

argues that respondent's action is in retaliation for his filing of a civil rights complaint against the respondent.

PROCEDURAL HISTORY

By an amended Preliminary Notice of Disciplinary Action (PNDA), dated May 14, 2012, respondent proposed to suspend appellant from employment at the MCSO. Appellant requested a departmental hearing which was held on October 22, 2012. On December 7, 2012, appellant was served with a Final Notice of Disciplinary Action (FNDA) sustaining all charges and suspending him for ninety working days. On December 12, 2012, appellant filed a timely appeal to the Civil Service Commission.

This matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case on December 17, 2012. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A hearing was held on May 12 and 13, 2014, and the parties requested to file post-hearing submissions. Thereafter, upon receipt of parties' filings, the record closed on July 21, 2014.

TESTIMONY

For Respondent

Detective Thomas Armitage

Detective Thomas Armitage (Armitage) has worked in Internal Affairs (IA) since February or March of 2012. Prior to that, he worked at the Trenton Police Department on patrol, and in that IA department. He identified the MCSO IA policy (R-2) which was in effect in May of 2012 and is still in effect at the present time. He also identified J-5, the IA Policy and Procedures published by the Office of the New Jersey Attorney General. He has been involved in approximately one hundred IA investigations and has received training in this area.

Armitage was involved in an IA investigation regarding the appellant. Also involved were Sergeant Carol Nolan (Nolan) and Investigator Michael Winget (Winget). On April 25, 2012, he wrote an investigative report which was identified as R-6. R-6 begins on April 25 with entries continuing until May 8, 2012. The report dealt with an allegation against the appellant that he attended Municipal Court on April 25, 2012, on a work-related matter but was not in uniform, as required. Lieutenant Scott Schoellkopf advised the Armitage that he told the appellant that he had to wear his uniform; the appellant told him that he was not required to do so. Armitage observed the video surveillance recordings that showed the appellant was not in uniform. The appellant was wearing a "non-uniform black silk looking short sleeve shirt with no Mercer County Sheriff patch on the left sleeve and dark pants with no stripe down the side." Armitage also interviewed other individuals who observed the appellant that day. On April 27, 2012, he notified the appellant that there was an IA complaint pending against him. The appellant was provided with written notification, (R-4), which the appellant refused to sign.[1] R-4 stated:

> You are hereby notified that an internal affairs complaint has been made again you. This complaint involves an allegation of an Administrative Complaint regarding violation of Departmental Rules and Regulations which occurred on or about 4-26-12.
>
> You will be contacted by the investigator when you will be needed for an interview.

On May 7, 2012, Armitage was going to interview the appellant. The appellant was to have been the last person interviewed, which is typical in these types of investigations. Nolan contacted the appellant's superior, Sergeant Patykula (Patykula) and told him to have the appellant report to IA at 2:00 p.m. The appellant reported at 2:20 p.m. Initially, he would not come in the office and stood in the doorway. Armitage, Nolan and Winget were in the common area of the office. They advised the appellant of the charges and presented him with an IA form, called an Administrative Advisement

[1]All excerpts of memos, letters and other documents have been typed verbatim into this decision. It should be assumed that any typographical, grammatical and spelling errors are the products of the respective authors of these materials. Therefore, terms such as sic have not been utilized.

Form (R-5), which indicated he was to be questioned about a violation of the Rules and Regulations and Policy, specifically:

> Uniform Policy V1C13: Failure to wear uniform to Trenton Municipal Court on April 25, 2012
>
> 4.1.10(a) Insubordination: Failure to wear your issued Mercer County Sheriff's Office uniform to Trenton Municipal court after you were ordered to by a Superior Officer on April 25, 2012.

The appellant stated that he had "no comment" and refused to speak about the investigation. He told them to "do what you got to do." Armitage asked if he wanted PBA union representation, which he declined. The appellant indicated he wanted an attorney and Nolan gave him twenty-four hours to return with one.

The appellant stood in the doorway and began to argue over the difference between a statement versus an interview. He was speaking over the other individuals in an argumentative tone and his voice was loud. The interview was supposed to be conducted in the office but the appellant would not enter. Nolan told the appellant to report to IA the next day (May 8) at 10:00 a.m. Nolan then consulted with county counsel who told her if the appellant did not appear with an attorney on the next day, and still wished to have one, to give him an additional hour.

The next day the appellant reported at 10:15 a.m. He was up front beside a desk. There was no attorney with him, he was asked and refused PBA representation. At the meeting were Armitage, Nolan, PBA Representative Bezek and the appellant. The appellant became argumentative, began speaking over Nolan and refused to sit. Nolan began to proceed with the interview. The appellant continued to say "no comment" and leaned over her desk. He continued to be loud and yelled and kept mentioning the PBA contract. Armitage felt that the appellant was disrespectful; he felt charges for insubordination were warranted. He was asked if Nolan raised her voice and he indicated that he did not believe so. The appellant finally sat down, while he did not cooperate and continued to say "no comment", he had stopped yelling.

Nolan showed the appellant R-5, the Administrative Advisement Form. He was unresponsive and would not sign the advisement form. Nolan attempted to serve him and advise him of what R-5 was and he again began talking over her. Armitage noted that it was the duty of personnel to cooperate with IA investigations and the appellant refused to cooperate.

Nolan indicated that she was charging the appellant with insubordination and that he should leave the office. Armitage escorted him out. He told the appellant what the charges were about. The appellant asked if Nolan was going to charge him with insubordination and kept going on about the contract. Armitage told the appellant that they were "done". He stated again that the appellant was disrespectful. The appellant should have obeyed the orders he was given and grieved the matter later.

Armitage identified J-10, a memorandum from the appellant to Patykula dated April 27, 2012. The memorandum stated:

> I am submitting this memo to meet with the Sheriff Kemler to discuss a current unjust investigation.

Armitage stated that it would not have been appropriate for the sheriff to respond as this was an on-going investigation. Armitage was asked if he handled an investigation regarding a Gloria Anderson, he answered that he did not and that her investigation was not discussed.

On cross-examination, Armitage stated that he had been in the MCSO since February or March 2012, and by April 2012 had done a couple of investigations. He stated that Patykula told the appellant to report to IA, he does not know if the appellant knew why he was to report. He stated that the appellant could have brought an attorney to the proceeding. He stated that Nolan did not ask the appellant why he was late on both May 7 and May 8. Armitage did not ask the appellant why he did not want a PBA representative or where his attorney was. On May 8, the appellant was not asked to identify his attorney; he did state that he was in court. The appellant did not indicate why he was leaning over Nolan or why he was yelling. Armitage agreed that

there were no direct orders that the appellant refused to comply with on May 7 or on May 8.

Armitage stated that the appellant was issued a Reprimand Notice (J-6) on May 8, 2012. The notice stated:

> On April 25th, 2012, you were lawfully ordered by Lieutenant Schoellkopf to wear your department issued Mercer County Sheriff's Office uniform to Trenton Municipal Court. Where you were subpoenaed to appear as a witness to an incident which occurred on February 28th, 2012, while you were on duty.
>
> As a result of your failure to comply you are in violation of the following:
>
> V1C13 Uniform Policy IV.J1: Officers subpoenaed to appear in court shall wear their standard uniform of the day, or a dark navy blue or black business suit, white dress shirt and conservative necktie for males, conservative dress blouse for females and polished dress shoes.
>
> Rules & Regulations
> 4.1.10(a) INSUBORDINATION. The failure of deliberate refusal to obey a lawful order.

At the bottom of J-6 is a written notice "Refused to sign" signatures, and the date "5-8-12." Armitage stated that he did not recall giving J-6 to the appellant.

The appellant was given a departmental hearing on May 8. Also in attendance was Undersheriff James Taylor, Chief Brian Amantia, Nolan, Assistant PBA Vice President Pablo Santiago, PBA Representative Bezek and Armitage. The appellant was suspended without pay, advised to turn over his departmental issued duty belt, handgun, identification, badge and keyless entry card and was escorted out of the building.

On re-direct, Armitage testified that Winget advised the appellant of the underlying charges. He identified J-5, the IA Policy and Procedures issued by the Attorney General's office. He noted that Figure 1 found on page 39, indicated that the

right to counsel is only available for a criminal investigation, not an administrative investigation and as a result the appellant had a right to representation but not counsel. He stated that there is no right to remain silent, unless the matter was a criminal investigation and he was asserting the Fifth Amendment and noted the language on page 43 which states:

> . . . While the Sixth Amendment right to counsel does not extend to administrative investigations, an officer shall be permitted to choose an attorney as their representative if he or she so desires.
>
> If it appears that the presence of counsel or another representative requested by the subject will not disrupt or delay the interview, there is no reason to prevent his or her presence as an observer.

Armitage believes that the appellant was trying to delay the process by asking for an attorney. He stated that it was not necessary to give an officer a direct order when one is implied and that one should "follow the order." He identified R-2, Sheriff's Office policy regarding Internal Affairs and stated that this policy was the one in effective in May 2012. He noted that Section IXE7c(3) provides:

> Each employee of the Sheriff's Office is required to answer pertinent questions regarding the matter which is the subject of investigation. All employees of the Sheriff's Office are obligated to answer questions and provide full and complete information to the investigator(s) during internal investigations. Less than complete candor during any statement may lead to serious disciplinary sanctions, which may include suspension or termination.

On re-cross examination, he agreed that he did not cite this provision in his report. Armitage was shown A-2, PBA Local 187's contract with the respondent. He was directed to Article 27, the Bill of Rights, Section 27.2a which provides that:

> The law enforcement officer shall be entitled to the presence of his counsel or any one person of his choice at any interrogation in connection with the investigation.

Armitage agreed that the term "implied order" was not in the Sheriff's Office Policies nor the Attorney General Guidelines. On redirect he stated that there was nothing in A-2 which required IA to adjourn an investigation until an attorney was available. He again stated that he found appellant's behavior disruptive and disrespectful and that he was insubordinate.

Sergeant Carol Nolan

Nolan has worked in IA for the last seventeen out of eighteen years and is a supervisor. She handles background and IA investigations. She has done about two hundred investigations and has received training in this area. She identified R-3 which is a memorandum she sent to Undersheriff Taylor, dated May 8, 2012, regarding the appellant's actions on May 7, and May 8, 2012. The appellant was called to her office on May 7, 2012, in order for him to give a statement regarding the Administrative complaint filed against him. When the appellant arrived, his response to Nolan regarding this matter was "no comment" and he told her that he did not wish to speak to her and that "she should do what she had to do". The appellant was asked if he wanted PBA representation, which he declined. The appellant became very agitated and began to speak loudly. He stated that IA "did not do things right" and kept talking about the difference between a statement and an interview. Ultimately he requested an attorney. Nolan granted the request and told him to return the next day (May 8) at 10:00 a.m. After the meeting, Nolan spoke with two representatives from Mercer County Counsel who told her she had provided ample time for the appellant to get an attorney and that if he came the next day without one, she could give him one more hour to get one. If he still was not represented, she was to proceed with the interview with a PBA representative. Nolan indicated that no attorney entered an appearance on behalf of the appellant, if they did so and had requested an adjournment she would have granted this request.

The next day, the appellant came to her office, again without an attorney. He told her he did not have a reasonable amount of time to get an attorney and that his attorney was in court and was not going to answer his phone. Nolan offered a PBA

representative which was refused. She stated that the interview was confrontational from the beginning. The appellant became very agitated and loud. He refused to sit down. She wanted to proceed with the interview. The appellant remained standing over her desk, waiving the PBA contract in her face and telling her to look at it.. He would not look R-5 and would not sign the form. He did not let her get a word in. Nolan told the appellant that this was an administrative investigation and he was obligated to speak. She stated in R-3 that the appellant "continued to rant about the procedure." Ultimately she told him she was going to write him up for insubordination and he should leave.

After the appellant left her office, he asked to speak with Armitage. He asked Armitage if Nolan was really going to write him up. The appellant asked to speak to Nolan but Armitage told him that they were "done".

Nolan was asked if Gloria Anderson was present in this matter. She said she was not, and was not a witness. Issues related to Gloria Anderson were not discussed at that time.

On cross-examination, she agreed that R-4, did not specify the basis of the administrative complaint and that the appellant did not know why he was called to IA. On May 8, she did not order him to sit, she told him to sit and it was an implied order. She agreed that R-2 and the Attorney General Guidelines (J-5) did not specifically deal with implied and inferred orders. In R-1, the MCSO Rules and Regulations, the policy on insubordination found in Section 4.1.10, and states:

> INSUBORDINATION: Members and employees shall not commit acts of insubordination. This section prohibits the following specific acts:
> a) The failure or deliberate refusal to obey a lawful order.
> b) Any disrespectful, mutinous or abusive language or action.

A Loudermill hearing was conducted later on May 8. The appellant was given a Reprimand Notice regarding the uniform issue (J-6). He was immediately suspended without pay (J-7). J-7 states:

> An immediate suspension is necessary to maintain safety, health, order or effective direction of public services.

The facts in support of this reason were:

> On this date you failed to cooperate with Internal Affairs during an administrative investigation.

The form is signed by Nolan and the form indicates that the appellant refused to sign it.

A decision on Loudermill hearing was provided to the appellant on May 11, 2012, (J-8). On that same day, Nolan sent the following memorandum to Undersheriff Taylor:

> A Loudermill Hearing was held today, Friday, May 11, 2012 for Sheriff's Officer Dywon Kelsey regarding I/A Case #IA12-013.
>
> As a result of the hearing, Officer Kelsey was reinstated to return to work on Monday, May 11, 2012[2]. A Disciplinary Hearing has been scheduled for May 23, 2012, in the Sheriff's Office Conference Room.
>
> Officer Kelsey should receive pay for the following days:
> May 9, 2012
> May 10, 2012
> May 11, 2012

Investigator Michael Winget

[2] The date should have read Monday, May 14, 2012.

Winget has been an investigator for ten years, previous to that, he was a sheriff's officer for ten years. He works in IA. He has been trained by the Division of Criminal Justice and the Rogers Group in all aspects of investigation.

Winget is familiar with this matter. He and the appellant had a working relationship, they were not friends. He was not involved in this investigation, but did serve the appellant with R-4. This notification form lets the recipient know that there a complaint and an on-going investigation. He gave R-4 to the appellant on April 27, 2012. He noted that the appellant refused to sign the form, so he initialed it. He recalls that the PBA representative was there, he cannot recall why, but stated that this was not unusual. He stated that he has never had anyone refuse to sign a complaint notification. When he presented the form to the appellant, the appellant stated that he "knew the rules" and this "wasn't right."

On May 2012, Winget was on duty in the IA office and was present when the appellant arrived. He recalls that the appellant stated that he "didn't know what this was about" and that he had been here a while and that "there was a difference between a statement and an interview" and that "he needed to contact an attorney." Winget had no further interaction with the appellant.

For Appellant:

Officer Gloria Anderson

Officer Anderson (Anderson) has been with the Sheriff's office for twenty-one to twenty two years. She knows the appellant. In September 2001, she was disciplined because she complained about a page six centerfold picture from a local newspaper which had been placed on her machine. She went to her sergeant and he told her to write a memorandum which she gave to Patykula. She had to go to IA several times. They wanted her to rewrite what happened. Ultimately she was charged with filing a

false report but these charges were latter dismissed. She did not have any involvement in the appellant's matter and has no personal knowledge and was not a witness.

Officer Dywon Kelsey

Appellant has been a sheriff's officer since March 1, 1999. At the MCSO he provided security at the County Clerk's Office and the Courthouse. While at the Clerk's Office he filed a cause of action regarding harassment and a hostile work environment. This claim was settled in December 2011.

The appellant first saw R-4, the administrative complaint notification on April 27, 2012. He was called down by Patykula. Present were PBA Representatives Santiago and Bezch as well as Winget. Winget told him he thought the matter dealt with the uniform issue and Lieutenant Schoellkopf. The appellant stated two senior citizens had subpoenaed him to testify about an issue regarding handicapped parking. He was called to Trenton Municipal Court. That day he was at the gun range, so he was not wearing his uniform. He refused to sign R-4 because he was not aware of what it was. He did not ask the PBA representative to advise him because he had a strained relationship with them.

The appellant testified that he wrote J-10 to Patykula on April 27, 2012, asking for a meeting with the Sheriff because he felt that this was an "unjust investigation." He believes the request was denied by Chief Piotrowski. He wrote a second memo on May 7, 2012, to Patykula (A-5) which stated:

> I am submitting this memo to meet with Sheriff Kemler to discuss a current unjust investigation. This is my second memo, first one was denied by CSO Piotrowski. If the Sheriff is aware of this investigation and does not want to meet with me please inform me. This would make it clear that the Sheriff isn't concern if the investigation is unjust.

The second request was also denied. No one discussed this with him and he did not contact an attorney.

On May 7, 2012, he was instructed to go to IA by Patykula. He had to wait for his relief and had to get the bus. He left as soon as the relief came. When he arrived he asked why he was there. He was concerned as to whether this was an interview or if he was making a statement, he felt the two were different but the administration said they were the same. Nolan asked him if he wanted a union representative and he indicated he wanted an attorney. He denied he was speaking loudly or was being argumentative. Nolan told him he had until 10:00 a.m. the next day to get an attorney.

The appellant testified that he contacted an attorney who called him back at 7:55 a.m., on May 8, and told him he was in court. When he returned to IA, Armitage asked if he had an attorney, when he told him no, Armitage made a face. He went in to Nolan's office where he was told to "sit down" in a raised voice. He indicated that he would rather stand. Armitage told him to "please have a seat." He sat down and took the PBA contract out and put it on his leg. He denied learning over the desk. Nolan told him he had ample time to get an attorney. He told them his attorney was called to court. He had the contract in his hand and read Section 27, the Bill of Rights A-2. When he refused to do the interview, Nolan became angry and raised her voice. She told him if he did not comply she would write him up. He felt this was in violation of Sect. 27.2(a) of the contract which requires that questioning occur in a non-coercive manner.

Ultimately Nolan threw him out of her office. He asked Armitage if Nolan was going to write him up. Armitage told him to report back to his post. He spoke to Patykula and he told the appellant to write a memo. He wrote the memo to Patykula; it was dated May 8, 2012, (A-1). The memo stated:

> I am submitting this memo to meet with an Under Sheriff to discuss possible violations by Sgt. Nolan and what actions that should be taken at this point.

The appellant never got a response and still has not gotten a response to this day. He denied that he was loud, belligerent, threatening or stood over Nolan at her desk.

Later that same day, at approximately 2:45 to 3:00 p.m., he was told to report to the roll call room. When he got there PBA President Santiago was there. He thought the meeting was about his memos. Undersheriff Taylor was there and read charges. He responded "I didn't do anything" and asked about his memos. He was being accused of screaming and waving papers. He asked about his memos and stated "don't I have any rights?" They took his gun, badge and escorted him out. He felt he was not being treated as a human being. He stated that he did not recall getting or refusing to sign J-6 and J-7. He does not recall receiving J-9 but knows he was reinstated and paid for three days. He stated that he had never seen R-5 and did not refuse to sign it. He stated that he never saw R-8, which was a memorialization of an oral reprimand from then Sheriff Larkin to Chief Piotrowski, dated January 8, 2010. He was reprimanded for a security breach but he did not understand why.

The appellant stated that he believes that all this is in retaliation for his lawsuit. The Sheriff ignored his memos. Nolan reports to the Sheriff. Chief Amentia was the hearing officer. This was retaliatory. He served a ninety working day suspension from May 8 to August 8, 2012. His annual salary at the time was $80,000 per year, so this resulted in a cost to him of $20,000.

On cross-examination, the appellant stated he filed the lawsuit in 2011. He agreed that Nolan, Armitage and Winget were not defendants in his lawsuit. He was asked if any of these individuals knew a lawsuit had been filed and he indicated that he suspected that Nolan knew.

The appellant was asked why no information about the altercation with Nolan was put in A-1, and he stated that background information was not supposed to be in. He was asked why he did not follow Article 13 of the PBA Contract and file a grievance.

He admitted he could have done this but that there were "other avenues" such as the Bill of Rights. If he had submitted a grievance it would have had to go through the PBA and he did not want to use the union. He could not have filed a grievance when he was being escorted out of the building. He agreed that there was no copy of a grievance in his exhibits.

The appellant stated that he asked for the meeting with the Sheriff in J-10 because he wanted to clear things up. He felt that he did not violate any rule. He felt that the uniform issue had nothing to do with his job. He could not get any clarification. He did not contact his attorney with respect to R-4.

The appellant was asked if he contacted his attorney after the May 8, 2012, meeting with Nolan and his being written up for insubordination. He responded that he did not. No attorney contacted the sheriff's office and no attorney was present at his department hearing. Regarding R-8, he stated he never saw it and does not know if it was in his personnel file. He felt that Sheriff Larkin left out key facts.

With respect to the May 8 meeting, he stated he had his folder in front of him, he was not waiving it. He did sign a document but does not remember what that was. With respect to the May 11, 2012, Loudermill hearing he stated that he did not ask about the memos to the Sheriff hearing.

On re-direct he stated that no one asked him for any details about what he wanted to discuss with the undersheriff in A-1. He stated he could not file a grievance because he was suspended and no one advised him that he should file a grievance. He had no reason to belief that the Sheriff would not meet with him. However he feels that there is "conspiracy everywhere" as a result of his lawsuit.

FINDINGS OF FACT

Based on the testimony and the reports and statements submitted, I **FIND** that the following occurred:

1. On May 7, 2012, the appellant was called to IA to discuss with Armitage and Nolan an administrative complaint that had been filed against him with respect to his failure to wear his uniform to a municipal court proceeding. Appellant was to be questioned about this matter.

2. The appellant stood in the doorway and indicated he had "no comment". He refused to speak about the investigation and told and told Armitage to "do what you got to do."

3. The appellant stood in the doorway and began to argue about the difference between a statement and an interview. He spoke over the other individuals there in an argumentative tone and his voice was loud. He refused to enter the office.

4. The appellant was asked if he wanted PBA representation, which he refused and asked for an attorney.

5. Nolan gave the appellant twenty-four hours to get an attorney and told him to report back to IA the next day, May 8, at 10:00 a.m.

6. The appellant returned the next day without an attorney. He became argumentative, he began speaking over Nolan and he refused to sit down. He leaned over her desk. He had the PBA contract in his hand and made reference to it. He continued to say "no comment."

7. The appellant refused to sign R-5, the Administrative Advisement Form. The appellant continued to speak over Nolan. Nolan advised the appellant that she was charging him with insubordination and asked him to leave the office.

LEGAL DISCUSSION

The Civil Service Act, N.J.S.A. 11A:1-1 et seq., governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to

public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Service Ass'n v. Gibson, 114 N.J. Super. 576, 581 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). The Act sets forth that State policy is to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). To carry out this policy, the Act authorizes the discipline (and termination) of public employees. N.J.S.A. 11A:2-6.

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. 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 relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); In re Polk, 90 N.J. 550, 561 (1982).

The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro Bottling Co., 26 N.J. 263, 275 (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. Delaware, Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933).

The county charged the appellant with violations of N.J.A.C. 4A:2-2.3(a)6, Conduct Unbecoming a Public Employee and with violations of Sheriff's Office Rules and Regulations 4.1.10 Insubordination, 4.1.3 Cooperation, 6.5.1 Discipline/Internal Investigations and V4CO2 Procedures A.1(f).

Unbecoming Conduct

One of the grounds for discipline of public employees is "[c]conduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). "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 this matter, appellant was charged with conduct unbecoming a public employee for an incident which occurred on May 8, 2012, in which he was:

> . . .ordered to Internal Affairs to provide a statement regarding violation of Rules & Regulations for an Administrative Investigation against you. When you reported to Internal Affairs you refused to cooperate. Specifically: you spoke over the Sergeant in a loud voice to who was attempting to conduct the interview/statement; you refused to answer any questions. As a result of your actions you are in violation of the noted charges.

Law enforcement officers are held to the highest standards of personnel integrity and dependability. In re Phillips, 117 N.J. 567, 577 (1990). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Bowden v. Bayside State Prison, 268 N.J. Super. 301 (App. Div. 1993), certif. denied 135 N.J. 469 (1994); Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64 (App. Div. 1971, certif. denied 59 N.J. 269 (1971). The appellant had a duty to

cooperate with the investigation. He refused to cooperate, refused to answer any questions, refused to sit so that he could be interviewed, and spoke loudly over Nolan. His behavior certainly constituted conduct unbecoming a public employee and was totally inappropriate and disrespectful.

The appellant argues that this matter was in retaliation for his having filed a lawsuit against the MCSO that was settled and subsequently dismissed in December of 2011. He produced the testimony of Anderson who had issues with the IA office, in support of this proposition. I can find no evidence that there was a link between his lawsuit and the matter at hand and thus there is no merit in this argument. The testimony of Anderson did nothing to advance appellant's claim tht the matter was the result of retaliation and was not relevant to this proceeding.

The appellant also argues that he was not given sufficient time to bring his attorney, and that his attorney was unable to attend because he was in Court. As this was an Administrative matter the right to bring an attorney appears to be an accommodation, although admittedly the PBA contract states that the officer shall be entitled to the presence of counsel. The Attorney General's polices with respect to IA and R-5, the Administrative Advisement Form, also provide that the subject of an internal affairs investigation has "...the right to consult with a representative of my collective bargaining unit or another representative of my choice and have him/her present during the interview." Appellant's attorney did not call or contact IA asking that the May 8 interview be changed so that he/she could attend.

Appellant's response to this was highly inappropriate. He began to speak loudly, refused to answer any questions, refused to sit and instead leaned over the Nolan's desk with the PBA contract in hand. Assuming he is correct, and entitled to legal representation, there were other avenues, such as having the attorney contact Nolan to request an adjournment or the grievance process which he could have utilized rather than the behavior he exhibited.

As a result, I **CONCLUDE** that the respondent has proven by a preponderance of the credible evidence that appellant's behavior on May 8, 2012, constituted a violation of N.J.A.C. 4A:2-2.3(a)6, conduct unbecoming a public employee.

Sheriff's Office Rules and Regulations

Appellant was also charged with violations of various Sheriff's Office Rules and Regulations (R-1) including:

MCSO 4.1.10 Insubordination
MCSO 4.1.3 Cooperation
MCSO 6.5.1 Discipline/Internal Investigations
V4CO2 Procedures A.1(f)

MCSO 4.1.10 provides:

> Members and employees shall not commit acts of insubordination. This section prohibits the following specific acts:
> a) The failure or deliberate refusal to obey a lawful order.
> b) Any disrespectful, mutinous or abusive language or action.

Clearly the appellant's actions on May 8, 2012, constituted insubordination. He was disrespectful to Nolan. He was loud, he spoke over Nolan. He refused to answer her questions and repeatedly said "no comment." He refused to sit down and instead leaned over her desk waiving his PBA contract in her face.

As a result, I **CONCLUDE** that the respondent has proven by a preponderance of the credible evidence that appellant's behavior on May 8, 2012, constituted a violation of MCSO 4.1.10- Insubordination.

MCSO 4.1.3 states:

> Cooperation between the ranks and units of the Sheriff's Office is essential to effective law enforcement. Therefore,

> all members are strictly charged with establishing and maintaining a high spirit of cooperation within the Sherriff's Office.

In this matter, appellant was not cooperative with the IA investigation. He refused to answer questions or repeatedly said "no comment." He refused to sign any of the accompanying paperwork. As a member of the Sheriff's Office he was charged with "establishing and maintaining a high spirit of cooperation" and he failed to do so.

As a result, I **CONCLUDE** that the respondent has proven by a preponderance of the credible evidence that appellant's behavior on May 8, 2012, constituted a violation of MCSO 4.1.3 – Cooperation.

MCSO 6.5.1 Discipline/Internal Investigations requires that:

> Every member and employee has a duty to answer truthfully and directly all questions and submit to any and all forms of investigative efforts when so ordered or questioned by a superior or commanding officer. Said duty only applies to questions and investigations which directly relate to one's official duties or directly bears on one's fitness for continued employment.

In this matter, appellant was under investigation by IA for a violation of the uniform policy, that he failed to wear his uniform to Municipal Court after he was advised to by his lieutenant, a matter which directly relates to his official duties. He was called down to IA to answer questions for the investigation. He was uncooperative, refused to answer or answered the questions by saying "no comment," clearly in violation of this rule.

As a result, I **CONCLUDE** that the respondent has proven by a preponderance of the credible evidence that appellant's behavior on May 8, 2012, constituted a violation of MCSO 6.5.1 Discipline/Internal Investigations.

With respect to the final charge, a violation of V4CO2Procedures A.1(f), I was unable to find this specific citation in R-2. There is no A.1(f) in the Procedures section

of this document. Therefore, I am unable to **CONCLUDE** that the respondent has proven by a preponderance of the credible evidence that appellant's behavior on May 8, 2012, constituted a violation of this provision.

PENALTY

In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's 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. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983).

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 the individual's disciplinary history. Henry v. Rahway State Prison, 81 N.J. 571 (1980). Progressive discipline is not a "fixed and immutable rule to be followed without question." Carter v. Bordentown, 191 N.J. 474, 484 (2007). Rather it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished record. Ibid.

The question to be resolved is whether the discipline imposed in this case, a ninety-working-day suspension, is appropriate.

Appellant has been found guilty of unbecoming conduct, in violation of N.J.A.C. 4A:2-2.3(a)(6) and of violations of MCSO Rules and Regulations: 4.1.10 Insubordination, 4.1.3 Cooperation and 6.5.1 Discipline/Internal Investigations.

Appellant's past disciplinary record, submitted by respondent is as follows: a reprimand, dated April 1, 2012, (R-7); a letter, dated January 3, 2010, (R-8); an employee counseling form, dated May 3, 2007, (R-9); an employee counseling form,

dated March 30, 2007, (R-10); and a FNDA for a seven-day suspension, dated January 17, 2007.

The appellant argues that none of these disciplinary actions should be considered in determining the appropriate penalty in this matter. Appellant bases part of this argument on the PBA agreement, Section 24.2 which provides:

> Letters of reprimand shall be maintained in the Employee's personal file. However, if after six (6) months no further disciplinary action occurs, the letter of reprimand shall have no bearing on any future discipline.

Accordingly, it is his argument that R-7, R-8 and R-9 should not be considered since more than six months had elapsed between the reprimands issued on those dates.

Respondent argues that the prior disciplinary actions are admissible based on a Public Employee Relations Commission (PERC) decision, City of Hoboken PERC No. 2005-80, 31 NJPER 139, where PERC held that negotiated contract provisions regarding restrictions on the continuing effect of disciplinary actions in subsequent disciplinary hearings for police officers, are not enforceable. Appellant argues that Hoboken is not applicable in this case. Respondent counters that the Appellate Division has held that the Civil Service Commission "are not bound by disciplinary policies and penalty schedules adopted by a local employer or negotiated with a local employer's labor union". In re Rivera, Docket No. 2008-962, WL 5678663 (CSC, 2008); In re Wilson, DOP Docket No. 2002-4406 (MSB, 2005); In re Everingham, DOP Docket No. 2001-6378 (MSB, 2003). Further in In re Sienkiewicz, Jenkins and Jackson, Docket No.A-1980-99 (App. Div., 2001), the Appellate Division held that the Civil Service Commission lacks jurisdiction to "enforce or interpret items contained in any collective negotiations agreement between an appointing authority and a labor union."

In this matter, I agree with the respondent. Contractual disputes are not the jurisdiction of this tribunal nor of the Civil Service Commission and are best handled through the PERC process. As a result I **CONCLUDE** that appellant's disciplinary

actions contained in R-7, R-8 and R-9 shall be considered in the determination of the penalty.

The appellant also argues that a major disciplinary action which resulted in a seven day suspension on January 17, 2007, (R-11) should not be considered based on the principles enunciated in Bock. Appellant argues that this suspension, which occurred five and one half years prior to this matter, has become irrelevant to the consideration of any penalties in the future. Appellant had no other major disciplinary infractions between the 2007 incident and this matter. Appellant argues that while Bock established a standard of seven years with respect to the consideration of Bock's disciplinary record, this was not a "bright-line test" and applying these standards, this action should be barred. Again, I do not agree with the appellant. The 2007 matter dealt with charges related to insubordination and disobedience of orders. In this matter, appellant left his post at the airport without authorization and showed "unruly behavior by raising his voice, interrupting and walking away from his Supervisor while he was spoken to." Appellant also called his supervisor a "fool" and an "idiot" on the radio room Dictaphone tape. As a result, I **CONCLUDE** that the 2007 major disciplinary action should be considered in determining appellant's penalty in this matter.

Finally, appellant argues that the ninety working day suspension was unduly harsh and resulted in a loss of income of over $20,000 to the appellant. Appellant argues that because he was unable to get an attorney and should have been accommodated since this matter was not of an emergent nature, there was no need for Sgt. Nolan to proceed at that rate she did. Appellant again argues that this is all in retaliation due to the federal court action he filed, an argument which I have rejected. Even assuming that this is true, it in no way explains appellant's behavior towards the sergeant, raising his voice, talking over her, refusing to sign paperwork and leaning over her desk. Moreover, as held in Karins both the Appellate Division and the Supreme Court have held that for a law enforcement officer, "insubordination warrants a dismissal." Karins 152 N.J. at 555, City of Newark v. Massey, 93 N.J. Super., 317, 323 (App. Div. 1967). The appellant could have been dismissed for the conduct.

As a result, given appellant's past disciplinary record, and that he had already received a seven-working-day suspension for similar behavior in 2007, and given the facts in this matter and the level to which appellant's conduct rose in his behavior towards the sergeant, I **CONCLUDE** that a ninety-working-day suspension was appropriate.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the charges of conduct unbecoming a public employee and violations of the Mercer County Sheriff's Office Rules and Regulations, against the appellant, Dwyon Kelsey, are hereby **SUSTAINED**.

I hereby **AFFIRM** the decision of the MCSO and **ORDER** that the appellant be suspended for a period of ninety working days.

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.

8/26/14
DATE

Linda M Kassekert
LINDA M. KASSEKERT, ALJ

Date Received at Agency: 8/26/14

Date Mailed to Parties: 8/26/14

/lam

LIST OF WITNESSES

For Appellant:

Officer Gloria Anderson

Officer Dywon Kelsey

For Respondent:

Detective Thomas Armitage

Sergeant Carol Nolan

Investigator Michael Winget

LIST OF EXHIBITS

Joint Exhibits

J-1 PNDA, dated May 8, 2012

J-2 Hearing Request, Dywon Kelsey, May 10, 2012

J-3 PNDA Amended, May 14, 2012

J-4 Notice of Appeal, including FNDA, December 12, 2012

J-5 Attorney General's Internal Affairs Policies and Procedures

J-6 Reprimand Notice, Dywon Kelsey, dated May 8, 2012

J-7 Notice of Immediate Suspension Notice- May 8, 2012

J-8 Notice of Informal Pre-Termination Hearing May 11, 2012

J-9 Memorandum #M12-024, Regarding Kelsey Loudermill Hearing, May 11, 2012

J-10 April 27, 2012, Memorandum from Dywon Kelsey to Sergeant Patykula

For Appellant:

A-1 Memorandum from Officer Kelsey to Sergeant Patykula, dated May 8, 2012

A-2 Collective Negotiations Agreement between Mercer County and PBA Local 187, 1.1.09 through 12.31.12

A-3 Not in evidence- Stipulation of Dismissal with Prejudice- Kelsey v. Mercer County Sheriff's Office, et. al, Civil Action No. 10-5114

A-4 Not in evidence- Complaint- Kelsey v. Mercer County Sheriff's Office, et. al, Civil Action No. 10-5114

A-5 Memorandum from Officer Kelsey to Sergeant Patykula, dated May 7, 2012

A-6 Not admitted: Amended Complaint- Gloria Anderson v. Mercer County Sheriff Department et. al 3:11-CV-07620

A-7 Not admitted: Notice of Minor Disciplinary Action, Gloria Anderson, dated September 2, 2011

A-8 Not admitted Amended Hearing Officer's Report Disciplinary Action, Gloria Anderson

For Respondent:

R-1 Excerpted Portion of Mercer County Sheriff's Office Rules and Regulations

R-2 Mercer County Sheriff's Office Policy on Internal Affairs

R-3 Report from Sergeant Nolan to Undersheriff Taylor, dated May 8, 2012

R-4 Internal Affairs Complaint Notification to Officer Kelsey, dated May 27, 2012

R-5 Administrative Advisement Form, May 8, 2012

R-6 Report from Det. Armitage to Sergeant Nolan completed between April 25, 2012, and May 8, 2012

R-7 Reprimand, Dywon Kelsey, April 1, 2010

R-8 Memorialization of Oral Reprimand, January 3, 2010

R-9 Employee Counseling Form, Dywon Kelsey, May 3, 2007

R-10 Employee Counseling Form, Dywon Kelsey, March 30, 2007

R-11 Final Notice of Disciplinary Action, Dywon Kelsey, January 17, 2007

R-12 City of Hoboken, Docket No. SN-2005-42, 31 NJPER Para. 60 (2005)

R-13 Withdrawn Division of Criminal Justice Publication, Internal Affairs, Internal Affairs Policy and Procedures, Issued August 1991, Revised November 1992, relevant portions pertaining to consultation with counsel, available at www.state.nj.us/lps/dcj/agguide/internal.htm

R-14 Withdrawn- Audio Transcript of Dywon Kelsey Departmental Hearing in the Instant Matter, October 22, 2012, (identification only)

R-15 No exhibit

R-16 Order- Motion to Dismiss- Gloria Anderson v. Mercer County Sheriff's Dept. et. al, Civil Action No. 11-07620 dated February 28 2013