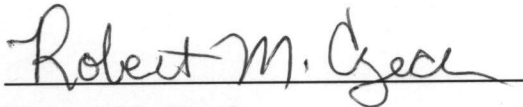


Re: Antonio Martinez

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
DECEMBER 16, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals and Regulatory Affairs
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attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 11666-15

AGENCY DKT. NO. N/A 2016-542

**IN THE MATTER OF ANTONIO MARTINEZ,
CITY OF ASBURY PARK.**

Leonard C. Schiro, Esq., for appellant Antonio Martinez (Mets Schiro & McGovern, LLP, attorneys)

Steven S. Glickman, Esq., for respondent City of Asbury Park (Steven S. Glickman, LLC)

Record Closed: October 27, 2015

Decided: November 20, 2015

BEFORE **LAURA SANDERS**, Acting Director and Chief ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Police officer Antonio Martinez (appellant) appeals the action by the City of Asbury Park (the City, or respondent) terminating his employment on grounds of conduct unbecoming and other sufficient cause for becoming involved in an improper relationship with a female facing drug charges, and lying to the County Prosecutor's Office about the relationship. Officer Martinez acknowledges the relationship, but contends he was truthful and did nothing to impede the drug charges.

On June 8, 2015, the City served the appellant through personal service with a Preliminary Notice of Disciplinary Action (PNDA) dated June 4, 2015. The appellant waived a departmental hearing, and by Final Notice of Disciplinary Action dated July 1, 2015, and served on July 9, 2015, he was terminated, effective July 1, 2015. Officer Martinez appealed the termination to the Office of Administrative Law (OAL), where the appeal was filed on July 24, 2015. N.J.S.A. 40A:14-202(d). The hearing was held on October 8, 2015, and the record left open for receipt of closing briefs. The record then closed.

FACTUAL DISCUSSION AND FINDINGS

While the parties disagree on the factual significance and legal importance of events, the evidence supports the following timeline, which is found as **FACT**. On September 4, 2014, E.B., then twenty-two years old and a heroin user, was arrested by two patrolmen, one of whom was Officer Martinez, and charged with possession of a controlled dangerous substance and possession of drug paraphernalia. They took her to the police station, where discussion about her becoming a confidential informant ensued. At first she agreed, but the next day, she called to say that she no longer wished to take that role. However, E.B. and Officer Martinez continued to communicate, and over time, the relationship took a personal turn. At one point, E.B. contacted Officer Martinez by text, telling him she had a needle stuck in her arm and asking for help. Appellant took her to the hospital, made sure she was treated, then left to start his shift.

Regular communications continued and appellant loaned her money (an amount of \$40 to \$60), which she eventually repaid. In November, while off-duty, he met her at a Walmart parking lot, where they became intimate in his truck. On a later occasion, they met similarly at the beach in Belmar.

E.B.'s charges were heard in court on December 14, 2014, resulting in probation. At some point not long after that, the relationship ended. E.B. never complained about appellant's conduct; all evidence indicates the intercourse was consensual. Somehow

an aunt became aware of the relationship and complained to authorities. The officer was twice interviewed about the events surrounding the relationship—first by detectives at the Monmouth County Prosecutor’s Office on May 28, 2015, and then by the City’s Internal Affairs Unit, on June 20, 2015.

The DVD and transcript of the Prosecutor’s Office interview show that after the investigators were asked what the interview was “dealing with,” and whether it related to work, detective Daniel Newman responded that it was “a matter of whether or not [the officer] is gonna to talk to us,” followed shortly with, “This is . . . strictly . . . criminal.” (R-6 at 4.) A bit later, the actual interview session opened with the statement, “[T]his is a matter . . . surrounding your relationship with [E.B.]” (Id. at 6.) Later, in response to Officer Martinez’s remark, “I still don’t know why I’m here. That’s why I’m asking,” Detective Newman repeated, “this is about [E.B.]” (Id. at 17.) Much later, when Officer Martinez asked whether E.B. was alleging they had sex and whether that is why he was being questioned, he received no response. (Id. at 24.) Finally, as they all prepared to leave, Officer Martinez asked, “Can you tell me what’s going on?” to which the investigator replied, “Nope.” (Id. at 29.)

During that interview, Officer Martinez was asked whether E.B. was a friend and nothing more, to which he replied “Correct.” (Id. at 18.) He said that at one point E.B. reached out to him, asking for a loan for school, and he loaned her something like \$40, which she later returned. (Ibid.) Another time, while on patrol, he noticed her car coming out of the neighborhood in which he knew she previously had been purchasing drugs, followed her, and then made contact, demanding to know if she had fallen off the wagon, after she had been telling him that she was cleaning up her life. (Id. at 19–20.) He specifically told her that they had to separate the friendship from work; he did not want anything to tie into his work. (Id. at 21.) Later in the Prosecutor’s Office interview, Officer Martinez said he also met E.B. in Belmar, where they spent five to ten minutes talking about her private life in his truck. At three different points in the interview, asked directly whether he had sex with E.B., he replied in the negative. (Id. at 23–24.) He also said that his concern about her as a human being in need of a friend never moved into creation of a different kind of relationship. (Id. at 26.)

In the June 20, 2015, interview with the Asbury Park Internal Affairs investigators, which is in DVD and in transcript form, Officer Martinez was advised by Lt. Mary Bulsiewicz that the absolute truth was needed “[b]ecause your job will depend on it.” (R-7 at 4.) He told investigators he communicated with E.B. sporadically. (Id. at 15.) Asked how often, whether it was ten, one hundred, or two hundred times, he said he could not remember but thought “maybe a little more than twenty times.” (Ibid.) He estimated that he contacted E.B. two or three times a week. (Id. at 44.) At one point, he acknowledged, “We did become intimate, where I kissed her” during a meeting at a Walmart. (Id. at 20.) Asked directly in a follow-up question about whether the two had sex, he replied yes. (Id. at 21.) Then in response to an indirect question about the Belmar encounter, he also responded affirmatively. (Id. at 45.) Told by Sgt. Michael Barnes that his subpoenaed phone record showed four hundred calls from him to E.B., the officer replied, “Wow,” then allowed, “We definitely spoke a lot.” (Id. at 42, 43.)

A primary factual and legal issue centers on whether Officer Martinez was truthful. Sergeant Barnes of respondent’s Internal Affairs Unit testified that he took over the investigation after the Monmouth County Prosecutor’s Office determined that no criminal charges were warranted. Sergeant Barnes saw the subpoenaed phone records, but conducted no detailed personal analysis of them. He testified that E.B. never alleged that Officer Martinez had suggested any kind of quid pro quo. Additionally, no one alleges that appellant failed to take any action in relation to E.B. that he should have taken in regard to the charges.

With regard to truthfulness, Sergeant Barnes said that Officer Martinez did tell the City the truth about the sexual incidents, but downplayed the level of communication between E.B. and him, telling interviewers that E.B. initiated it, and that the calls and texts were sporadic. Sergeant Barnes said the phone records show that the officer made the first contact, and that it was only when faced with the number of contacts shown by the subpoenaed records that appellant conceded they were far more frequent. Sergeant Barnes acknowledged that it would not be unusual for an officer who was trying to develop a confidential informant to exchange phone numbers with that person, and to reach out proactively to build the relationship. He also said that he had not personally done anything to separate out texts from phone calls or to determine

whether multiple contacts via text message amounted to the equivalent of a single phone conversation.

Captain Anthony G. Salerno, Jr., the City's acting chief of police, testified that lack of truthfulness is very serious because police officers are routinely called upon to testify in court. If an officer has been shown to have been untruthful in some proceeding, all a defendant has to do is produce evidence of that lack of veracity and the officer's credibility is damaged irretrievably. Further, in order to secure a search warrant, a police officer has to swear that the information provided to a judge is truthful. Finally, honesty is crucial to maintaining the credibility of the police force as a whole, since officers have the power to arrest people, depriving them of their liberty.

Captain Salerno acknowledged that Officer Martinez was more honest with the City's investigators, but expressed deep concern about his interview with the Monmouth County Prosecutor's Office. The captain also testified that the relationship with a known heroin user who had pending charges was damaging in and of itself to the community perception of the police force. Even though there is no evidence that Officer Martinez did anything to impede the process concerning E.B.'s charges, the relationship creates the perception that something inappropriate and unjust could be going on. Moreover, the captain's experience is that heroin users are easily victimized because of their own, self-induced problems.

Officer Martinez testified that when he met with the Monmouth County Prosecutor's Office, the interviewers would not tell him why he was being asked to come. When they asked him about having intercourse with E.B. he felt uncomfortable, which was why he denied it. The officer, who has a wife and five children, said that when the investigators pressed him, he was ashamed and embarrassed. At the time of the relationship, he and his wife were in a rough patch, now resolved. With regard to the charges, he was not called to testify at the court proceeding, and he made no effort whatsoever to intervene in any way. He also noted that in the spirit of cooperation, he

agreed to meet with the County Prosecutor's Office against legal advice, and agreed to have the investigators read him his Miranda rights.¹

With regard to Officer Martinez's responses to the Monmouth County Prosecutor's Office, I **FIND** that he gave answers he knew to be untrue with regard to the level of his relationship with E.B. I also **FIND** that he did give a truthful response to the City Internal Affairs Unit's direct questions regarding the relationship. Further, I **FIND** that in the City interview, he said contact was "sporadic," and maybe somewhere above twenty times, and it was only after being confronted with the report of the subpoenaed record and the hundreds of contacts that he acknowledged that they contacted each other frequently. The actual phone records were not offered at the OAL, so the sole evidence in that regard is the representations in the interviews, and Sergeant Barnes's testimony.

LEGAL ANALYSIS AND CONCLUSIONS

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; N.J.A.C. 4A:2-2.3. 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 (1962); In re Polk, 90 N.J. 550 (1982). Here, as a result of the incidents, Officer Martinez is charged with conduct unbecoming and other sufficient cause, specifically, breaking a list of City Police Department rules.

Officer Martinez's core contention is that he did not lie to the Prosecutor's Office, because the investigators never gave him a reasonable idea of why he was there, and he has a right to privacy. He notes that he cannot constitutionally be threatened with termination or terminated for refusing to give up his Fifth Amendment right against self-incrimination. Further, "If . . . a policeman had refused to answer questions specifically,

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, the privilege against self-incrimination would not have been a bar to his dismissal.” Gardner v. Broderick, 392 U.S. 273, 278, 88 S. Ct. 1913, 1916, 20 L. Ed. 2d 1082, 1086–87 (1968) (citing Garrity v. New Jersey, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967)). Here, at the outset, Officer Martinez was given no suggestion as to what matter the detectives were investigating, beyond that something criminal was involved. As counsel points out, given that E.B. was a heroin user, unspoken possibilities for criminal events included an escalation of her using and selling activities or some kind of harm related to those activities. Since his relationship with E.B. was not criminal, he could not reasonably have been expected to perceive that the investigation concerned the personal relationship with E.B., and also reasonably did not want to risk exposing his wife and children to such information without understanding the purpose for which the information was requested. Counsel contends that an intent to deceive is required to hold the appellant legally responsible for his statements to the Prosecutor’s Office, and that he had no intent to deceive the investigators about anything criminal. Further, Officer Martinez testified that had he understood the reason for the Prosecutor’s Office interview, he would have been forthcoming. This is underlined by the fact that he did answer straightforwardly in the respondent’s Internal Affairs interview, when he understood the issue.

In further support of the need for specific linkages before intrusions into an officer’s personal life become actionable, appellant cites In re Seliga, CSR 09410-13, Initial Decision (December 11, 2013), adopted, CSC (February 12, 2014), <<http://njlaw.rutgers.edu/collections/oal/>>. Seliga involved an officer who was terminated for saying during an Internal Affairs interview that he had a private, personal relationship with someone, when in fact it was sexual, and for ethical violations. No rule or regulation required the officer to report dating a civilian, and although this particular civilian happened to be the estranged wife of another officer, there was no other connection to work. The CSC dismissed the termination, as the employer lacked authority to discipline him in any way for the conduct.

With regard to the number of contacts, appellant contends that he did not lie, because multiple text messages can actually be the equivalent of a single voice conversation. Thus, when Officer Martinez said he had twenty or more contacts, it could have taken forty short exchanges to constitute the equivalent of a single full telephone conversation.

The difficulty with Officer Martinez's argument is that the relationship involved someone he had arrested, who had criminal charges pending at the time the encounters were occurring, and against whom he could have been called to testify. Therefore, it was not a private affair. Doubtless, he did hope to shield his family, but in plain language, he lied to the Prosecutor's Office, and by trying to minimize the extent of his involvement, he lied to respondent.

Conduct unbecoming is a term that encompasses actions adversely affecting the morale or efficiency of a governmental unit or having a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 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)).

The respondent appointing authority contends that both the relationship and the lying about it not only constitute conduct unbecoming, but also violate N.J.S.A. 40A:14-128, which makes continued employment of police officers "indeterminate and continuous during good behavior and efficiency." As the captain testified, the lack of truthfulness severely compromised the officer's position.

Additionally, respondent argues that the relationship itself violated three separate sections of the Asbury Park Police Code of Ethics. (R-4.) These are (1) Article VI, Section B, Number 1, "Standard of Conduct," which states: "Members . . . shall conduct their private and professional lives in such a manner as to avoid bringing the Department into disrepute"; (2) Article VI, Section D, Number 27, which states: "Members . . . shall not frequent places of bad reputation, nor associate with persons of

bad reputation, where the member's position could be compromised"; and (3) Article XII, Section B, Rule 19, which states: "charges and disciplinary actions . . . may be taken" for "[a]ssociating [or] fraternizing . . . at any time, or in any manner whatsoever with known criminals or persons engaged in unlawful activities." Violation of the rule carries a penalty for a first offense ranging from reprimand to dismissal. While certainly Officer Martinez has credibly addressed his humanitarian concern for a young woman who was trying to clean up her life, heroin purchase, sale, and possession is criminal, and police officers are expected to avoid creating personal relationships with criminals. Therefore, I **CONCLUDE** that respondent has carried its burden with regard to the charges of conduct unbecoming and other sufficient cause, specifically, breaking various rules.

This leaves the issue of penalty. The evidence makes clear that Officer Martinez had built a fine record, not just in overall productivity, but in developing specialized expertise that was valued by the City. He is the City's first drug-recognition expert, is a certified drill instructor at the Monmouth County Police Academy, and is fully bilingual. He has an unblemished disciplinary record in his eight years with the City.

When determining the appropriate penalty, the Board may consider an employee's past record, including reasonably recent commendations and prior disciplinary actions. Town of W. N.Y. v. Bock, 38 N.J. 500, 523 (1962). Typically, the Civil Service Commission considers numerous factors, including the nature of the offense and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. 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).

The appellant cites In re Voci, CSV 10060-09, Initial Decision (July 23, 2010), adopted, CSC (September 21, 2010), <<http://njlaw.rutgers.edu/collections/oal/>>, remanded on penalty, No. A-3026-10 (App. Div. April 25, 2012), <<http://njlaw.rutgers.edu/collections/courts/>>, as authority to impose a six-month penalty. There the Appellate Division remanded the removal on grounds that one of the three charges involved breaking a rule against outside employment that was "not 'sufficiently definite to inform those subject' that permission was required for unpaid

outside work.” Voci, supra, No. A-3026-10 (App. Div. April 25, 2012), <<http://njlaw.rutgers.edu/collections/courts/>> (citing In Review of Admin. Promulgation of the Health Care Bd., 83 N.J. 67, 82 (1980)). The determination regarding the rule was linked to a lack of adequate evidence to support a factual conclusion that the officer had been paid for his after-hours work at a strip club. (Ibid.) Nonetheless, two charges related to lying during the investigation were sustained. On remand, the Commission determined to impose a six-month penalty in light of the officer’s thirty-year, spotless record. Voci is akin to Seliga, in that both involved lying about personal activities that no clear, proper rule prohibited. Here, the personal activity was occurring at a time when criminal charges were pending—charges on which appellant could have been called to testify.

Thus, the situation is more akin to those cases where correction officers have been terminated for undue familiarity with inmates. See, e.g., In re Matlock, CSV 05341-11, Initial Decision (April 4, 2014), adopted, CSC (May 22, 2014), <<http://njlaw.rutgers.edu/collections/oal/>>.

Some infractions are so serious that termination is warranted, 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 police officer who refused drug screening as “fairly proportionate” to offense)); see also In re Herrmann, 192 N.J. 19, 33 (2007).

Police officers are held to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576–77 (1990). Both police officers and correction officers represent “law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public.” Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966).

Here, appellant’s misconduct did relate to “the implicit standard of good behavior which devolves upon one who stands in the public eye as the upholder of that which is morally and legally correct.” In re Emmons, supra, 63 N.J. Super. at 140. Therefore, I **CONCLUDE** that the City has demonstrated that termination is the appropriate penalty.

ORDER

For the reasons cited above, the termination is **AFFIRMED**.

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

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

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

November 20, 2015

DATE

Laura Sanders
LAURA SANDERS
ACTING DIRECTOR AND CHIEF
ADMINISTRATIVE LAW JUDGE

Date Received at Agency:

November 20, 2015

Date Mailed to Parties:

November 20, 2015

/caa

WITNESSES

For Appellant, Antonio Martinez

Antonio Martinez

For Respondent, City of Asbury Park

Michael Barnes

Anthony G. Salerno, Jr.

EXHIBITS

Joint Exhibits

- J-1 Final Notice of Disciplinary Action dated July 1, 2015, and served July 9, 2015
- J-2 Preliminary Notice of Disciplinary Action dated June 4, 2015, and delivered June 8, 2015

For Appellant, Antonio Martinez

- A-1 Summary, training and background; U.S. Marine Corps Honorable Discharge; curriculum vitae dated April 22, 2015; training certificates and commendations

For Respondent, City of Asbury Park

- R-3 Memorandum from Sgt. Michael Barnes to Lt. Mary Bulsiewicz dated June 25, 2015
- R-4 Articles VI and XII, City Code of Ethics
- R-5 Transcribed statement of E.B. from interview dated February 19, 2015
- R-6 Transcribed interview with Monmouth County Prosecutor's Office dated May 28, 2015
- R-7 Transcribed interview with City Internal Affairs Unit dated June 20, 2015

R-8 DVD of interview dated May 28, 2015

R-9 DVD of interview dated June 20, 2015