



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Odalys Rastatter,
City of Passaic

CSC Docket No. 2016-3319

Request for Reconsideration

ISSUED: **NOV 23 2016** (DASV)

The City of Passaic, represented by Philip G. George, Esq., requested reconsideration of the attached initial decision of the Administrative Law Judge (ALJ), which was deemed adopted as a final decision on March 11, 2016, reversing the removal of Odalys Rastatter, a Police Lieutenant with the City of Passaic, effective December 7, 2012. At its meeting on October 19, 2016, the Civil Service Commission (Commission) granted the City of Passaic's request for reconsideration, but ordered that the appointing authority submit the transcripts of the hearing at the Office of Administrative Law (OAL) for the Commission's further consideration. A copy of that decision is attached and incorporated herein. *See In the Matter of Odalys Rastatter* (CSC, decided October 19, 2016).

Having considered the record, including the ALJ's initial decision, the exceptions and cross exceptions previously submitted by the parties, and the relevant testimony and evidence presented before the OAL, and having made an independent evaluation of the record, the Commission, at its meeting on November 23, 2016, did not adopt the ALJ's recommendation to reverse Rastatter's removal. Rather, the Commission upheld the removal.

DISCUSSION

As set forth in the Commission's October 19, 2016 decision, the Commission lacked a quorum at the time of the ALJ's initial decision. As such, the ALJ's recommended decision was deemed adopted as the Commission's final decision pursuant to *N.J.S.A. 52:14B-10(c)*. Subsequently, the City of Passaic petitioned for

reconsideration. In the meantime, Rastatter filed an emergent motion in the Superior Court of New Jersey, Appellate Division, which, among other things, ordered that the Commission render a decision on the reconsideration request within a set date, notwithstanding that it lacked a quorum. An extension for the Commission to render a decision was granted. Upon its review, the Commission granted reconsideration of the deemed adopted decision since it did not have an opportunity to review Rastatter's appeal in the first instance. Rastatter had been removed from employment on various charges based on allegations that she had been absent for three days in 2012 during Super Storm Sandy, failed to notify her supervisor, and lied about being present at work. She was also charged with instructing a subordinate officer to cover up her absence and failing to properly supervise her subordinates. Initially, the Commission found no merit regarding Rastatter's procedural claims, finding that she was given a proper pre-termination hearing and a delay in holding a departmental hearing did not warrant a dismissal of the charges. Agency records also did not indicate that Rastatter filed a request for interim relief regarding these issues. Rather, Rastatter filed an appeal of her removal and was granted a hearing at the OAL, thereby curing any procedural defects that may have occurred at the local level. Regarding the merits, the Commission was unable to make a determination of the charges, as the record presented insufficient information as to whether the credibility determinations of the ALJ were supported. Accordingly, the Commission ordered that the City of Passaic submit the transcripts of the OAL hearing to the Division of Appeals and Regulatory Affairs, which would then prepare the information for the Commission's consideration.

CONCLUSION

The Commission has reviewed the record, including the exceptions and cross exceptions submitted by the parties as set forth in the Commission's prior decision, and the relevant testimony and evidence presented before the OAL, and disagrees with the ALJ's assessment of credibility and finds that the testimony of former Deputy Police Chief Matthew E. Paz was credible and the testimony of Rastatter was not credible. In this regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 N.J. 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record on reconsideration, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by the credible

evidence. With regard to the standard for overturning an ALJ's credibility determination, *N.J.S.A. 52:14B-10(c)* provides, in part, that:

The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.

See also N.J.A.C. 1:1-18.6(c); Cavalieri v. Public Employees Retirement System, 368 *N.J. Super.* 527 (App. Div. 2004). The Commission finds that in this case, this strict standard has been met.

Therefore, based on its review of the relevant testimony and the record, the Commission makes the following findings:

1. Unless pre-approved for time off, all police personnel, including the officers assigned to the Records Division of the City of Passaic Police Department, were required to report for duty during the declared state of emergency due to Super Storm Sandy.
2. Rastatter, as the commanding officer of the Records Division, was absent without authorization on Monday, October 29, 2012, and Tuesday, October 30, 2012, and did not report for duty on Wednesday, October 31, 2012, until ordered to do so by Paz.
3. Rastatter texted a subordinate Police Officer, Ruben Pagan, to mark her present at work on Monday, October 29, 2012, thereby requesting Pagan to submit a fraudulent record.
4. Rastatter permitted her subordinate officers in the Records Division to leave work early, notwithstanding the order from Paz, her superior officer, that all police personnel must report for duty.
5. Rastatter was untruthful to Paz and initially to the Internal Affairs (IA) officer that she was present at work on Monday, October 29, 2012.

As indicated in the initial decision, the ALJ found that Rastatter's witnesses were more credible than the appointing authority's witnesses. However, the ALJ's assessment of the credibility of Rastatter's statements is not supported in the record. Commencing from the beginning of the events, there is no dispute that Rastatter and Paz spoke to each other at approximately 6:30 p.m. on Sunday, October 28, 2012, when Paz advised her that civilian employees were off and police personnel were to report for duty under the state of emergency. Rastatter alleged

that during this conversation, she received permission from Paz to take off on Monday, October 29, 2012. However, there was no indication in her texts to her subordinate officers that was the case. Rastatter texted her subordinate officers on Sunday, October 28, 2012, at 8:30 p.m. after her conversation with Paz. Pagan, who testified at OAL, received the text which stated: "Hi guys, as u all no, we r in a state of emergency with this hurricane. Civilians all have off. No rush, get there when you can, but we r required to be there if u can make it. Thanks." Additionally, she sent a text to Pagan on Monday, October 29, 2012 at 9:02 a.m. that said, "Hi. How's it going? Crazy huh? My kids r home from school so I'm probably not coming in. Whoever is there, tell them 2 keep a low profile, then go home after lunch or so. Unfortunately, u should keep your radio in case stuff crashes." If Rastatter obtained approval from Paz to be off on that day, then it would not have been necessary to advise Pagan that she would "probably not [be] coming in." Pagan also testified that he and Paz had a conversation indicating that Rastatter was not at work. Although Pagan could not recall on which of the three days in question the conversation occurred, his testimony nevertheless corroborates Paz's testimony. Paz testified that on Tuesday afternoon he went to the Records Division looking for Rastatter. He explained that he went looking for her to set up additional phone lines through a command post. When he asked Pagan where Rastatter was, Pagan replied, "She is off." He then asked Pagan who approved her time off and Pagan gave him a look like he did not know. If Paz gave Rastatter approval for time off, he would not have been looking for her.

Moreover, Paz indicated that he confronted Rastatter on Wednesday stating that she was needed because the City was in distress, there were power and personnel shortages, and the civilians in the Records Division needed to be supervised, to which she replied that she was sorry. Paz reprimanded her about being absent on Tuesday and Wednesday, and when he asked her about Monday, she said that she was there and worked until about 2:00 p.m. Paz instructed Rastatter to write a report, wherein she admits that she took unauthorized leave (Exhibit R-22C). The report, dated October 31, 2012, is signed by Rastatter and states, in pertinent part:

On Tuesday, October 30th, 2012, I took a Vacation Day without prior authorization from D.C. Paz. I apologize for doing so, but I had no power at home and no one to care for my young children.

Thus, Rastatter's testimony that she received authorization for Tuesday, October 30, 2012, is clearly rebutted by her Operation Report, while Paz's testimony is corroborated with Pagan's testimony and contemporaneous documentary evidence. Additionally, Rastatter's testimony does not "hang together" given her text messages to her subordinates and for the following reasons. First, Rastatter testified that Paz told her at approximately 10:30 a.m. to go to work on Wednesday and therefore she estimated she got to work around 11:00 a.m. Paz's phone records

indicate that it was actually 11:06 a.m. when he contacted Rastatter and Rastatter's October 31, 2012 report indicated she arrived at 11:30 a.m. Moreover, except for Rastatter's unsubstantiated assertion, there is no evidence that Paz lied because he did not want to get into trouble for allegedly approving Rastatter's leave request. In this regard, there is absolutely no evidence to support this base allegation, and logically the Commission can see no basis to conclude that Paz would have been in "trouble" if he approved her alleged request for leave as other pre-approved leave requests were not problematic during that time period. Additionally, although Rastatter testified that various texts were exchanged with Paz, she did not present any record of those texts. The Commission does not find her convenient explanation that her cell phone carrier did not have phone records from 7:00 p.m. Sunday through Wednesday to be believable given that other witnesses had text messages and phone records. Furthermore, Rastatter maintained her belief that the Records Division police personnel were non-essential. If this were the case, she would not have needed to ask for time off once the state of emergency was declared since non-essential personnel, such as the civilian staff, had been authorized off from work. Additionally, other police personnel, such as Pagan, believed that he was required to report for duty. It is noted that although the schools were closed, Rastatter's husband, who is a school resource officer was also required to work. Therefore, the Commission finds that ALJ's credibility determinations regarding Rastatter and Paz are arbitrary and unreasonable and not supported by competent evidence.

Moreover, the Commission is troubled by Rastatter's directive to Pagan to mark her "present" on Monday, October 29, 2012. Regardless of whether she was "working" at home, Rastatter was not at work on October 29, 2012 and she was not justified in advising her subordinate to mark her present. Indeed, the ALJ noted his concern that it was questionable that Rastatter would be mistaken about working from home when she first reported that she was at work. The testimony revealed that Rastatter had stated in the IA interview that she was in the office from 9:00 a.m. to 11:30 a.m. on Monday, October 29, 2012. However, no one saw her and police headquarter cameras had no record of her entering. Then, when confronted, she said she was mistaken on the dates. However, there was no other relevant day where she came in from approximately 9:00 a.m. to 11:30 a.m. for her to be confused. It is clear that Rastatter was caught in an outright lie to the IA officer and to Paz, who testified that Rastatter told him she was at work on Monday until 2:00 p.m. Rastatter's contention that she was working from home was an afterthought to cover her lie. Regardless of whether police personnel are allowed to work from home, it is clear that Paz did not authorize it and expected that Rastatter and all police personnel to come to work. Moreover, the ALJ found that Rastatter received approval for a vacation day on Monday, October 29, 2012. If that was actually the case, Rastatter's directive to her subordinate officer to mark her present when she had a vacation day would have been inconsistent.

Additionally, Rastatter was charged with failing to properly supervise her subordinates. The record indicates that Rastatter did not give her subordinate officers proper instruction regarding Paz's order and dismissed her staff early, as there "was nothing to do." Rastatter texted her subordinate officers on Sunday, October 28, 2012, that they were required to be at work on Monday, October 29, 2012, "if u can make it." However, it is clear that Paz ordered that all police personnel be at work on Monday, October 29, 2012. In her own words, Rastatter gave her subordinate officers a discretionary choice, when clearly there was a direct order from Paz. Moreover, given Paz's order, Rastatter did not have the authority to permit her staff to leave early on that day. While the ALJ found that Rastatter was the commanding officer of the Records Division, as Deputy Police Chief, Paz was her superior officer. Thus, regardless of whether the officers in the Records Division were "non-essential" or not needed during Super Storm Sandy, Rastatter no longer had the discretion to permit her subordinate officers to leave when there was a standing order from Paz. Therefore, the Commission disagrees with the ALJ's assessment of the above charge and finds that Rastatter violated the Rules and Regulations of the Passaic Police Department by failing to properly supervise her subordinates.

Based on the above, the Commission finds that the City of Passaic has met its burden of proving the charges against Rastatter, *to wit*, that she had been absent without authorization, failed to notify her supervisor, lied about being present at work, inappropriately instructed a subordinate officer to cover up her absence, and failed to properly supervise her subordinates.

Given that the charges have been upheld, the Commission must now determine the appropriate penalty to be imposed. The Commission's review of the penalty is *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 N.J. 571, 580 (1980). It is settled that the principle of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 N.J. 474 (2007). In this case, the Commission has upheld the charges. Further, Rastatter's disciplinary history does not mitigate her offenses, as it includes a 10 working day suspension issued in 1997 and written reprimands in 2007 and 2012. However, Rastatter emphasizes that she was employed with the City of Passaic since 1992, and despite the 10 working day suspension, she was promoted to Police Sergeant and Police Lieutenant. The Commission is fully aware that Rastatter was serving in a supervisory capacity.

However, even when a supervisory law enforcement officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense may nevertheless warrant a significant penalty, including removal from employment, where it is likely to undermine the public trust. In the instant matter, Rastatter's offenses are sufficiently egregious to warrant her removal. She was not only absent without authorization during a state of emergency, she directed a subordinate officer to submit a false timesheet for her and permitted subordinate officers to leave work while there was an order to report to duty. Rastatter's attempt to cover up her offenses was the most egregious of her actions. The fact that such a supervisory law enforcement officer is guilty of such conduct compounds the seriousness of the offenses. The Commission emphasizes that a law enforcement officer is held to a higher standard than a civilian public employee. A law enforcement officer is constantly called upon to exercise tact, restraint and good judgment in his or her relationship with the public. The law enforcement officer represents 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. See *Moorestown v. Armstrong*, 89 N.J. Super. 560 (App. Div. 1965), cert. denied, 47 N.J. 80 (1966). See also, *In re Phillips*, 117 N.J. 567 (1990). See e.g., *In the Matter of Angel Reillo*, Docket No. A-1216-14T1 (App. Div. August 4, 2016) (Appellate Division affirmed the decision of the Commission, which upheld the removal of a Police Officer who was found to be untruthful in the IA investigation of his charges despite an unblemished 18-year record); *In the Matter of Michael Ferrarella and Donald Harvey, Borough of Oakland*, Docket No. A0874-11 (App. Div. October 4, 2012) (Appellate Division affirmed the removal of a Police Officer, agreeing with the Commission's determination that Police Officer's failure to accurately report the events surrounding a hit-and-run accident and his attempt to shield a firefighter would clearly be the type of actions which would tend to destroy public respect in the delivery of governmental services and that his falsification of a public record and the fact that he lied to hide what he clearly knew was improper conduct were unacceptable). The Commission is particularly mindful of this standard when disciplinary action is taken against a high ranking law enforcement officer in a police department. Accordingly, the only proper penalty to be imposed against Rastatter, a Police Lieutenant, is removal.

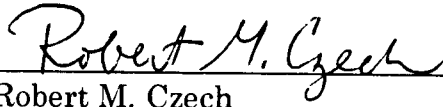
Therefore, on reconsideration, the Commission disagrees with the ALJ's conclusion that Rastatter's removal should be reversed. Rather, the Commission finds that the City of Passaic has proven the charges by a preponderance of the evidence and that Rastatter's removal was justified.

ORDER

The Commission finds that the action of the City of Passaic in removing Odalys Rastatter, effective December 7, 2012, was justified. The Commission, therefore, upholds that action and dismisses the appeal of Odalys Rastatter.

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 23RD DAY OF NOVEMBER, 2016


Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachments

c: Philip G. George, Esq.
Alex D. Blanco
Matthew Peluso, Esq.
Odalys Rastatter
Kelly Glenn
Records Center



STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Odalys Rastatter,
City of Passaic

CSC Docket No. 2016-3319

Request for Reconsideration

ISSUED: OCT 20 2016 (DASV)

The City of Passaic, represented by Philip G. George, Esq., requests reconsideration of the attached initial decision of the Administrative Law Judge (ALJ), which was deemed adopted as a final decision on March 11, 2016, reversing the removal of Odalys Rastatter, a Police Lieutenant with the City of Passaic, effective December 7, 2012.

Initially, it is noted that the Civil Service Commission (Commission) did not have a quorum at the time of the ALJ's initial decision. Rastatter did not consent to an additional extension of time for the Commission to render its decision. As such, the ALJ's recommended decision was deemed adopted as the final decision pursuant to *N.J.S.A. 52:14B-10(c)*. Additionally, on June 2, 2016, Rastatter filed an emergent motion for leave to appeal to the Superior Court of New Jersey, Appellate Division, requesting reinstatement to her Police Lieutenant position. On June 8, 2016, the court granted Rastatter's motion for leave to appeal but ordered that the matter be remanded to the Commission to decide the appointing authority's reconsideration request within 30 days. The court also enjoined the appointing authority from filling Rastatter's position pending the decision of the Commission.¹ The Appellate Division did not retain jurisdiction. However, given that the Commission did not have a quorum prior to the expiration of the 30-day time period, upon the appointing authority's motion, the court modified its June 8, 2016 order on July 8,

¹ However, the Appellate Division did not grant Rastatter's request to stay Police Lieutenant promotions.

2016 and directed that the Commission decide the matter within 90 days (or by October 8, 2016). Copies of the Appellate Division orders are attached.

By way of background, Rastatter was removed from employment, effective December 7, 2012, on charges of statutory misconduct and disobedience pursuant to *N.J.S.A. 40A:14-147*; incompetency, inefficiency, and/or failure to perform duties; insubordination; conduct unbecoming a public employee; neglect of duty; other sufficient cause; and violations of several Rules and Regulations of the Passaic Police Department as set forth in the initial decision, including failure to properly supervise subordinates. Specifically, the appointing authority asserted that Rastatter was absent without authorization on October 29 and 30, 2012, despite that her immediate supervisor, former Deputy Police Chief Matthew E. Paz,² had informed her that all police personnel should report to work on October 29, 2012, while civilian employees would be off on October 29 and 30, 2012. It was also claimed that Rastatter initially did not go to work on October 31, 2012. Rastatter eventually reported to work late on that day, after being ordered to do so by Paz. Additionally, it was alleged that Rastatter falsely told Paz that she was present at work on October 29, 2012 and left early. Rastatter also falsely advised the Internal Affairs officer during her interview that she was at work. However, she eventually stated that she "must [have been] mistaken" when she was informed that her subordinate officers did not recall seeing her on October 29, 2012, and video recordings confirmed that she was not at work that day. Rastatter later told Internal Affairs that she was working at home on October 29, 2012, communicating with several officers by telephone. Further, Rastatter claimed that she requested a vacation day for October 30, 2012. However, Paz never approved the request and the leave request was not drafted until October 31, 2012. Moreover, it was alleged that Rastatter inappropriately texted a subordinate officer on October 31, 2012 to submit leave requests for her for October 30 and 31, 2012, and to mark her present on October 29, 2012, thereby requesting an officer to submit a fraudulent record. She had also texted the officer on October 28, 2012, advising him that there was a state of emergency. However, this was in direct contradiction to her statement during her Internal Affairs interview that Paz never advised her of a state of emergency. Furthermore, the appointing authority maintained that Rastatter falsified her attendance records based on the above circumstances. Upon Rastatter's appeal of her removal to the Commission, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing.

In the initial decision, the ALJ set forth the charges against Rastatter, which were based on allegations that Rastatter had been absent for three days during Super Storm Sandy, failed to notify her supervisor, and lied about being present at work. She was also charged with instructing a subordinate officer to cover up her absence and failing to properly supervise her subordinates. The ALJ found that Paz issued an order that all uniformed officers were to report to duty on October 29 and

² Paz retired effective July 1, 2014.

30, 2012. On October 28, 2012, Rastatter had requested to be off on October 29, 2012 during a telephone conversation she had with Paz. The ALJ determined that Paz had given Rastatter approval, noting that high ranking officers used an informal procedure of receiving verbal permission from their supervisors to take time off from work. Paz and the Police Chief were also not at work on October 29, 2012. Additionally, the ALJ indicated that Rastatter was assigned to the Records Division and was considered "non-essential personnel." Rastatter texted her subordinate officers on October 28, 2012 that they were required to be at work on October 29, 2012 "if u can make it." However, the appointing authority alleged that Rastatter instructed her staff to "keep a low profile, and then go home after lunch or so." By the afternoon, the ALJ indicated that Rastatter had dismissed the staff early as there "was nothing to do." The ALJ stated that as the Police Lieutenant in the Records Division, Rastatter had the authority to dismiss her staff early. It was not necessary to have utilized the officers of the Records Division for support during the storm.

As for Rastatter's absences on October 30 and 31, 2012, the ALJ also found that Rastatter obtained approval from Paz. In that regard, the ALJ indicated that Rastatter telephoned Paz on the evening of October 29, 2012 and received permission to take vacation leave for October 30 and 31, 2012. However, Paz rescinded his permission after being confronted by the Police Chief about Rastatter being absent from work. Paz called Rastatter on October 31, 2012 and demanded that she report to work. Moreover, the ALJ did not find that Rastatter engaged in inappropriate conduct when she stayed home on October 29, 2012. Although the ALJ noted that it was questionable that Rastatter had mistaken going to work on that day rather than working from home, Rastatter had nonetheless substantiated she did in fact have several conversations with staff from home, albeit briefly. In addition, Rastatter's children were home from school due to the storm, and as such, the ALJ stated that it was more likely than not that Rastatter had requested leave. Further, the ALJ found the evidence regarding the alleged falsified attendance records to be "in equipoise" and that Rastatter could not get the leave request forms actually signed because she was not at work prior to when the allegations against her were asserted. With regard to the former, the ALJ stated that it was unclear as to whether the entry of "P" (present) for Rastatter's attendance record for October 29, 2012 occurred before or after she had been confronted by Paz on October 31, 2012 regarding permission to take off on October 29, 2012 as a vacation day. Moreover, in response to the claim that Rastatter inappropriately texted a subordinate officer to submit leave requests for her, the ALJ stated that "[t]here is no evidence that [Rastatter] was not permitted to retroactively submit time-off requests for verbally received time-off permission. Nor is there any evidence that [Rastatter] was not allowed to work from home when she was not present at work. Therefore, this allegation is without merit." In addition, the ALJ found that Rastatter's witnesses were more credible than the appointing authority's witnesses. Therefore, the ALJ concluded that the appointing authority did not meet its burden

of proving the charges against Rastatter and recommended reversing Rastatter's removal.

It is noted that the ALJ also set forth Rastatter's argument that the appointing authority failed to provide her with a pre-termination hearing and that her "17-month" suspension violated New Jersey law. The ALJ did not address the former argument, stating that no due process claim was filed. However, he noted that there was no evidence that a departmental hearing was actually held despite attempts to schedule one during Rastatter's separation. Additionally, the ALJ found that Rastatter's suspension exceeded the time allowed by law. In that regard, Rastatter was immediately suspended on December 7, 2012, but her Final Notice of Disciplinary Action (FNDA), which removed her from employment, was not issued until April 21, 2014.

In its request, the appointing authority maintains that the "deemed adopted" decision is invalid and should be reconsidered. It submits that the Commission did not have an opportunity to fully scrutinize the record, as it was without a quorum, and Rastatter had "vigorously" disputed the exceptions filed by the appointing authority. Moreover, the appointing authority argues that reconsideration is appropriate because the ALJ's credibility findings and his assessment of the testimony and record were flawed, inaccurate, and incomplete. In that regard, the appointing authority asserts that the ALJ paid "inadequate attention" to the entire record of Rastatter's failure to report to work during a declared state of emergency in response to a direct order from Paz. Additionally, clear material error was made because the ALJ did not set forth his findings as to why Rastatter's witnesses were more credible, in light of the evidence and the consistent testimony of the appointing authority's witnesses "and even [Rastatter's] witnesses." Specifically, the appointing authority argues that the ALJ failed to consider Rastatter's text messages to her subordinate officers, which was in contradiction to Paz's order that any officer not already scheduled for vacation had to report for duty. Paz had told Rastatter in a telephone call that all police officers were essential personnel and had to report to work during the storm. However, although she acknowledged the order from Paz, Rastatter texted her subordinate officers that "we r required to be there if u can make it." Thus, the appointing authority maintains that the ALJ erred in determining that Rastatter had the authority to let her staff off early, in light of the general order that all sworn officers had to report for duty. Further, the appointing authority maintains that, contrary to the ALJ's findings, Paz and the Police Chief were at work on October 29, 2012. Paz had a pre-approved vacation for October 29, 2012. However, Paz was called to report to work at approximately 7:30 p.m. that evening. Paz also worked on October 30 and 31, 2012. Regarding the Police Chief, he was seen by a subordinate officer at work on October 29, 2012. Moreover, considering the timing of telephone calls to her subordinate officer, the appointing authority maintains that Rastatter's story regarding her absences and leave requests do not "hang together." For instance, the appointing authority

claims that Rastatter's October 31, 2012 text message to her subordinate officer about her timesheet occurred hours before she was ordered by Paz to report to work on October 31, 2012, and when he allegedly told her how to mark her timesheets.

In response, Rastatter, represented by Matthew A. Peluso, Esq., contends that the appointing authority's request for reconsideration is not warranted. Initially, regarding her due process claims, Rastatter maintains that she did not receive a pre-termination or departmental hearing. She asserts that the current Police Chief who signed the FNDA did not know that a hearing was not held nor the circumstances of her discipline. Thus, she submits that her removal should be reversed based on this procedural defect. Further, Rastatter states that this case involves the credibility of the witnesses, whom the ALJ was able to hear and observe. She argues that the Commission cannot reject or modify findings of fact as to issues of credibility of lay witnesses unless it is first determined from a review of the record that such findings were arbitrary, capricious, unreasonable or unsupported by the credible evidence in the record. She says that all of the disputed issues involved the testimony of the witnesses as to whether she had permission or at least believed that she had permission to take off from work; that she lied in her Internal Affairs interview or was temporarily mistaken as to the exact dates of her presence at work; and whether she intended or created false entries in her timesheet when she believed that she could indicate that she worked from home, even though that time was denied later. For instance, Rastatter submits that based on his credibility findings, the ALJ accurately found that she received verbal permission to be on leave for the three days in question from Paz and reported to work on October 31, 2012, as requested. Rastatter emphasizes that high ranking officers use an informal procedure of verbal permission to take time off from work. She also notes that Paz and the Police Chief were both absent from work on October 29, 2012. Moreover, Rastatter indicates that the ALJ correctly found that the Patrol Division had all the essential personnel needed for Super Storm Sandy and the Records Division, which is limited to non-essential administrative function, was not needed. Further, Rastatter contends that the ALJ's determination that neither Paz nor the Police Chief contacted her on October 29 or 30, 2012 to ask why she was not at work is "alone dispositive on the issue" that she had permission to be absent. Paz did not call Rastatter until October 31, 2012, after he was confronted by the Police Chief, and ordered her to report to duty, which she did. Moreover, Rastatter maintains that her removal is disproportionate to the underlying allegations against her and excessive considering her long-term employment with the City of Passaic and the work she has done. She began working as a Police Officer in 1992 and received promotions to Police Sergeant and Police Lieutenant, despite serving a 10 working day suspension in 1998. She emphasizes that she became the first woman in the City of Passaic Police Department to attain these ranks and has received numerous awards and commendations. Thus, Rastatter urges the Commission to deny the appointing authority's request for reconsideration.

In reply to Rastatter's alleged procedural violations, the appointing authority contends that Rastatter did not avail herself with interim remedies and cannot now claim due process violations. Moreover, the appointing authority reiterates its arguments and contends that witnesses, including Rastatter's witnesses, testified that confirmation must be received and paperwork immediately submitted upon return from leave in order to invoke the informal process of leave requests. In this case, the appointing authority maintains neither occurred. Moreover, it asserts that the witnesses "debunked and destroyed" Rastatter's argument that there was a "work from home" option which substitutes for actual attendance. Furthermore, the appointing authority contends that Rastatter texted a subordinate officer in her unit that she was "probably not coming in" on October 29, 2012. Thus, if she had permission to take off from work, there would not be a need to indicate that she "might" not go to work. Moreover, contrary to Rastatter's contention that neither Paz nor the Police Chief contacted her until October 31, 2012, the appointing authority indicates that the record reveals that on October 28, 2012, Paz ordered police personnel to be at work on October 29, 2012. It states that "[i]t was not [Paz and the Police Chief's] obligation to hunt for [Rastatter]; it was her obligation to have been on duty following the Order she was given on Sunday night." As to Paz and the Police Chief's absence on October 29, 2012, the appointing authority maintains that Paz had a pre-approved vacation and the Police Chief was at work. Nonetheless, it contends that their presence at work is irrelevant to the issue of whether Rastatter was present based on the order by Paz given on October 28, 2012 that all police personnel be present on October 29, 2012. Further, the appointing authority submits that the ALJ relied on speculation and conjecture as to what happened, finding that Rastatter was more likely to have requested and received permission to be off since her children were at home during the storm. Regarding the penalty, the appointing authority submits that removal of Rastatter was appropriate considering her disobedience to a direct order to report during a state of emergency and to cover up this insubordination with misrepresentations. Additionally, as to whether the Records Division was needed during the storm, once the storm arrived, the Police Lieutenant in charge of the Patrol Division was no longer in charge of who was deemed essential. Rather, Paz's order that all police personnel be on duty was the standing order.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which the Commission may reconsider a prior decision. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

Initially, it is noted that "[u]nless the head of the agency modifies or rejects the report within such period, the decision of the [ALJ] shall be deemed adopted as

the final decision of the head of the agency." See *N.J.S.A. 52:14B-10(c)*. Thus, the appointing authority's suggestion that a deemed adopted decision is invalid is without merit. Nonetheless, it is undisputed that the Commission at the time of the ALJ's initial decision was without a quorum and did not have an opportunity to review the record or the ALJ's assessment of the charges against Rastatter and the proper penalty to be imposed. Therefore, it is appropriate for the Commission to now review the matter on reconsideration.

Regarding Rastatter's procedural claims, the record reflects that the appointing authority complied with the requirements of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), and *N.J.A.C. 4A:2-2.5(b)* with respect to Rastatter's pre-termination. In a case addressing this issue, *In the Matter of Anthony Recine* (MSB, decided March 10, 1998), it was found that the Township of Hamilton did not provide a proper pre-termination hearing since Recine was not made aware of the charges and the general evidence in support of the charges at the time of his suspension. By contrast, Rastatter received written charges against her and the general evidence in support of the charges at the time of her immediate suspension. Specifically, Rastatter's Preliminary Notice of Disciplinary Action (PNDA) indicates that she was personally served with the notice on December 7, 2012, setting forth the charges and specifications for the charges regarding her immediate suspension. Moreover, pursuant to *N.J.A.C. 4A:2-2.5(d)*, a departmental hearing, if requested, shall be held within 30 days of the PNDA unless waived by the employee or at a later date as agreed to by the parties. An appointing authority's unilateral delay in holding a departmental hearing does not warrant a dismissal of the charges. See *Goodman v. Department of Corrections*, 367 N.J. Super. 591 (App. Div. 2004). Thus, Rastatter's argument for reversal on procedural grounds cannot be sustained. Nonetheless, an employee would be entitled to some form of relief for such a delay, which would ordinarily be the granting of back pay for the period at issue. See *In the Matter of Patrick Dunican*, Docket No. A-5937-99T1 (App. Div. November 9, 1999); *In the Matter of Edward Wise* (MSB, decided July 19, 1999); *In the Matter of Kenneth Hixenbaugh* (MSB, decided February 24, 1998). However, agency records do not indicate that Rastatter filed a request for interim relief regarding these issues with the Commission. Rather, Rastatter filed an appeal of the FNDA and was granted a hearing at the OAL. In addition, the effective date of Rastatter's removal was December 7, 2012, which is the same date as her immediate suspension. Therefore, the above circumstances cured any procedural defect that may have occurred at the local level. The Commission is mindful that procedural deficiencies are generally deemed cured through the *de novo* hearing received at the OAL. See *Ensslin v. Township of North Bergen*, 275 N.J. Super. 352, 361 (App. Div. 1994), *cert. denied*, 142 N.J. 446 (1995); *In re Darcy*, 114 N.J. Super. 454 (App. Div. 1971).

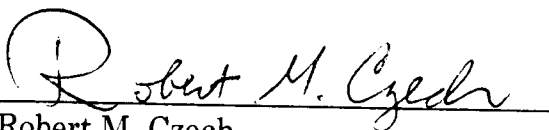
While the Commission dismisses Rastatter's procedural claims, it is unable to make a determination as to merits of the matter and whether the ALJ's decision

was proper. As Rastatter indicates, the determination of the charges against her depends on the credibility of the witnesses. In that regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. See *Matter of J.W.D.*, 149 N.J. 108 (1997). “[T]rial courts’ credibility findings . . . are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record.” See *In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999)). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ’s decision if it is not supported by the credible evidence. See N.J.S.A. 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004). In this case, the record presents insufficient information for the Commission to decide whether the credibility determinations of the ALJ are supported. While credibility findings need not be explicitly enunciated, *Id.* at 659 (citing *Locurto, supra*), the existing record does not make the findings clear. For example, the ALJ finds Rastatter’s statements credible that she had permission to take off but then finds her mistaken belief that she worked at home on October 29, 2012 “questionable.” However, Rastatter clearly texted a subordinate officer on October 31, 2012 and requested that he indicate that she was present on October 29, 2012. Moreover, the appointing authority presents concerns as to the accuracy of the ALJ’s review of the testimony. The ALJ found that the evidence as to whether Rastatter’s falsified her attendance record was in “equipoise.” He indicated that it was unclear as to whether the entry of “P” (present) for Rastatter’s attendance record for October 29, 2012 occurred before or after she had been confronted by Paz on October 31, 2012. However, the appointing authority maintains that Rastatter’s October 31, 2012 text message to her subordinate officer about her timesheet occurred hours before she was ordered by Paz to report to work. As such, it is appropriate that the Commission conduct a review of the testimony in the matter. The Commission cannot ignore the seriousness of the accusations against Rastatter, and as noted above, any “questionable” finding in the record. Therefore, it is ordered that the appointing authority submit the transcripts of the OAL hearing to the Division of Appeals and Regulatory Affairs, which will then prepare the information for the Commission’s consideration.

ORDER

Therefore, it is ordered that the request for reconsideration of the appointing authority be granted. It is further ordered that the appointing authority submit the transcripts of the OAL hearing to the Division of Appeals and Regulatory Affairs, for the Commission’s further consideration.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 19TH DAY OF OCTOBER, 2016



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachments

c: Philip G. George, Esq.
Alex D. Blanco
Matthew Peluso, Esq.
Odalys Rastatter
Kelly Glenn
Records Center



CHRIS CHRISTIE
Governor
Kim Guadagno
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

ROBERT M. CZECH
Chair/Chief Executive Officer

March 11, 2016

Matthew A. Peluso, Esq.
130 Carnegie Center Drive
Suite 300
Princeton, New Jersey 08540

Philip G. George, Esq.
Eric M. Bernstein & Associates
34 Mountain Boulevard – Bldg. A
P.O. Box 4922
Warren, New Jersey 07059

Re: *In the Matter of Odalys Rastatter* (CSC Docket No. 2014-2647 and OAL Docket No. CSR 05808-14)

Dear Messrs Peluso and George:

The appeal of Odalys Rastatter, a Police Lieutenant with the City of Passaic Police Department, of her removal, on charges, was before Administrative Law Judge Leland S. McGee (ALJ), who rendered his initial decision on January 11, 2016, recommending reversal of the removal. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

The time frame for the Civil Service Commission (Commission) to make its final decision was to initially expire on February 25, 2016. *See N.J.S.A. 40A:14-204 and N.J.A.C. 1:4B-1.1(d)*. Prior to that time the Commission secured a 15 day extension of time to render its final decision no later than March 11, 2016. *See N.J.A.C. 1:1-18.8*. Since the Commission does not currently have a quorum, it sought consent from the parties, as required, to secure a second 15 day extension. However, the appellant declined to consent to an additional extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A. 40A:14-204*.

Since the appellant's removal has been reversed, she is entitled to back pay, benefits and seniority for the period from the onset of her separation until she is actually reinstated. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Additionally, the appellant is entitled to reasonable counsel fees. Proof of income earned and an affidavit in support of reasonable counsel fees should be submitted to the appointing authority

within 30 days of said reinstatement. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2-2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and/or counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay and/or counsel fee dispute.

Sincerely,

A handwritten signature in cursive script, appearing to read "Henry Maurer".

Henry Maurer
Director

Attachment

c: The Honorable Leland S. McGee, ALJ (w/out attachment)
Kenneth Connolly
Joseph Gambino



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT NO. CSR 05808-14

**IN THE MATTER OF ODALYS RASTATTER,
CITY OF PASSAIC POLICE DEPARTMENT.**

Matthew Peluso, Esq., for Appellant Odalys Rastatter (Matthew Peluso, LLC,
attorneys)

Philip G. George
~~Anne Marie Rizzuto~~, Esq., for Respondent City of Passaic Police Department
(Eric M. Bernstein & Associates, LLC, attorneys)

Record closed: August 13, 2015

Decided: January 11, 2016

BEFORE **LELAND S. MCGEE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Odalys Rastatter (Appellant), was employed by the City of Passaic (Respondent) as a Lieutenant in the Passaic Police Department, and was served with a Preliminary Notice of Disciplinary Action (PNDA) and suspended without pay on December 7, 2012. Appellant was served with a Final Notice of Disciplinary Action (FNDA) and terminated on April 21, 2014. The FNDA charged Appellant with the following:

Specification #9, statutory misconduct and disobedience in violation of N.J.S.A. 40A:14-147.

Specification #10, incompetency, inefficiency and/or failure to perform her duties in violation of N.J.A.C. 4A:2-2.3(a)(1).

Specification #11, insubordination in violation of N.J.A.C. 4A2-2.3(a)(2).

Specification #12, conduct unbecoming a public employee in violation of N.J.A.C. 4A:202.3(a)(6)

Specification #13, neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7) and other sufficient cause in violation of N.J.A.C. 4A:202.3(a)(12).

Specification #14, Petitioner's conduct constitutes multiple violations of the Rules and Regulations of the Passaic Police Department including but not limited to, the following:

Article VI(A) – Code of Ethics

Article VI(B)(1) – Standard of Conduct

Article VI(C) – Responsibilities:

- (11) Be accountable and responsible to their supervisors for obeying all lawful orders;
- (14) Familiarize yourself with the area of authority and responsibility for your current assignment;
- (15) Perform duties promptly, faithfully, diligently.

Article VI(D) – Duty Responsibilities:

- (1) Neglect of duty;
- (2) Insubordination
- (4) Knowledge of Laws and Regulations;
- (5) Performance of Duty;
- (7) Obedience to Laws and Regulations;
- (10) Conduct toward Superior and Subordinate Officers and Associates.

Article VI(E) – General Conduct on Duty:

- (8) Reporting;
- (9) Absence from duty.

Article VI(J) – Investigations

7(d) No sworn member or civilian employee shall knowingly falsify any official report or enter or cause to be entered any inaccurate, false, or improper information on records of the Department.

Article VI(Q) – Judicial and Investigative Action

- (5) Truthfulness. Sworn members and civilian employees are required to be truthful at all times whether under oath or not.

Article XI(A) – Departmental Discipline:

- (6) Causes for Removal:

- a) Neglect of duty;
- b) Incompetency or inefficiency;
- d) Insubordination;
- g) Disorderly or immoral conduct;
- h) Willful violation of any of the provisions of the rules or regulations or other statutes relative to the employment of public employees;
- k) Conduct unbecoming a public employee;

Article XII – Disciplinary Code:

Rule 3 – Repeated violations of Departmental Rules & Regulations, or any other course of conduct indicating that a member has little or no regard for his responsibility as a member of the Department;

Rule 6 – Knowingly and willfully making a false entry in any Departmental report or record;

Rule 8 – Failure to comply with orders of superiors;

Rule 25 – Refusal to obey proper orders from a superior;

Rule 27 – Failure to properly supervise subordinates;

Rule 31 – Neglect of duty;

Rule 34 – Failure to properly patrol assigned sectors, posts, zones and neighborhoods; unauthorized absence from assignment; failure to respond to radio calls;

Rule 39 – Conduct subversive of good order and discipline of the Dept.

Rule 43 – Absence without leave for less than five (5) consecutive working days;

Rule 54 – Failure to submit properly written required report within a reasonable or prescribed period of time as per regulations; and,

Rule 57 – Unexcused tardiness.

These charges were based on allegations by the City of Passaic Police Department that during Super Storm Sandy, Appellant was absent for three days without leave, failed to notify her supervisor that she would be out, and lied about being present at work. Appellant was also charged with instructing a subordinate to submit her time-off requests and to falsify her time records to cover up her absence. Further, she was charged with failure to properly supervise her subordinates.

Appellant denied being absent for three days without leave, and asserted that she received verbal permission from her supervisor, Chief Deputy Paz, to take off Monday, Tuesday, and Wednesday, and that she reported to work on Wednesday as requested. Appellant indicated the Records Division where she was employed, was closed during Super Storm Sandy, and that neither Deputy Chief Paz nor Chief Richard Diaz reported to work during those three days. Appellant asserted further that she worked from home and communicated with police personnel on those days, and that her instruction to a subordinate officer to submit her time-off request was consistent with CPPD procedures for marking "comp" or "time/coming," vacation and work from home time.

Appellant asserted further that Respondent failed to conduct a statutorily required hearing prior to termination, that her 17-month suspension violated New Jersey law, and that both the suspension and termination were excessive and disproportionate to the alleged conduct. Appellant argued that her outstanding career of twenty-three years in law enforcement, exemplary promotions to Sergeant and Lieutenant, numerous service commendations and citations, mitigate against such excessive and disproportionate discipline.

This matter was transmitted to the Office of Administrative Law on May 8, 2014, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15. A prehearing telephone conference was held on June 19, 2014. A prehearing Order was issued on June 29, 2014. Hearings were held in this matter on October 27 and 30, 2014, November 17 and 18, 2014, and March 13, 23, and 24, 2015.

On December 15 and 22, 2014, and January 2, 2015, the parties submitted briefs regarding the admissibility of prior disciplinary actions. The undersigned issued a bench ruling granting admissibility. Appellant testified on direct on March 23, 2015, and Respondent sought to cross-examine her regarding her deposition testimony in a pending related Superior Court action. Appellant objected and the undersigned reserved decision pending the submission of briefs on the issue. On April 17 and 27, 2015, respectively, the parties submitted briefs on this issue. On May 13, 2015, the undersigned issued an order denying Respondent's motion to cross-examine Appellant,

concluding that such cross-examination regarding her deposition testimony concerning claims asserted in the prior-in-time Superior Court proceeding which are not asserted in the instant action, would overburden the record, constitute an undue consumption of time, and has no probative value as to culpability of the instant charges.

On July 1, 2015, Respondent filed a post-hearing brief. On July 2, 2015, Petitioner filed her post-hearing brief. On or about July 24, 2015, Petitioner filed an objection to statements made in Respondent's brief. On or about July 28, 2015, Respondent responded to Petitioner's objections. On August 11, 2015, Respondent filed a revised brief asserting that it omitted transcript references in the original brief. On or about August 13, 2015, Petitioner responded to the July 28th letter and the revised brief and the record closed. The parties have since exchanged various email correspondences which are not relevant to the substance of this case and are not considered herein.

FACTUAL DISCUSSION

Based upon the evidence presented, both testimonial and documentary, and having assessed the demeanor and credibility of the witnesses, I **FIND** the following to be the facts of the case:

On December 7, 2012, Respondent served Appellant, a City of Passaic Police Department (CPPD) Lieutenant with a PNDA and suspended her without pay on December 7, 2012. Subsequently Appellant was served with a FNDA and terminated on April 21, 2014. The FNDA charged Appellant with violating N.J.S.A. 40A:14-147, multiple sections of N.J.A.C. 4A:2-2.3(a), and multiple sections of the rules and regulations of the CPPD, and the Disciplinary Code. Respondent based the charges on allegations that Appellant was absent for three days without leave, failed to notify her supervisor that she would be out, and lied about being present at work. Appellant was also charged with instructing a subordinate to submit her time-off requests and falsify her time records to cover up her absence and failure to properly supervise her subordinates.

The incident giving rise to this matter occurred during Super Storm Sandy, which reached the State of New Jersey on Monday, October 29, 2012. Deputy Chief Paz issued an order that all uniformed officers were to report for duty on Monday and Tuesday, October 29 and 30, 2012. Deputy Chief Paz had a telephone conversation with Appellant on the evening of Sunday, October 28, 2012, during which he communicated to her the "all hands on deck" order. Appellant asserts, and I am persuaded, that during this conversation she requested and received from the Deputy Chief, permission to take off Monday, October 29, 2012, as a vacation day. High ranking officers of the CPPD used an informal procedure of getting verbal permission from their supervisors to take off from work. Additionally, Deputy Chief Paz and Chief of the CPPD, Richard Diaz, were both similarly absent from work on Monday, October 29, 2012.

In October 2012, Appellant was assigned to the Records Division, and was considered non-essential personnel. The Records Division was limited to purely non-essential administrative functions, such as maintaining police reports and evidence, some technical services for computers and telephones, and issuing licenses and handling vehicle impoundment. As non-essential personnel, Appellant was less likely to be needed during the state of emergency than both Deputy Chief Paz and Chief of the CPPD, Richard Diaz. The commander of the Patrol Division of the CPPD during the Super Storm Sandy state of emergency, Lieutenant Sienkiewicz had all of the essential personnel needed to handle the state of emergency without having to utilize personnel from the Records Division.

Appellant acknowledged Deputy Chief Paz's order to report to work on Monday, when she texted her subordinate officers on Sunday evening, October 28, 2012, stating that "we r required to be there if u can make it." The Records Division personnel had nothing to do by Monday afternoon, October 29, 2012, and as non-essential personnel, were allowed to go home early by Appellant. As Lieutenant of the Records Division, Appellant had the authority to exercise her judgment to dismiss her staff early. Further, Lieutenant Sienkiewicz did not need the officers from the Records Division for support.

Appellant was absent Tuesday and Wednesday, October 30 and 31, 2012. Appellant telephoned Deputy Chief Paz on Monday evening, October 29, 2012, to request, and received, permission to take vacation days on Tuesday and Wednesday. Had she been absent without permission, her supervisor would have called to inquire about her absence. Yet neither Deputy Chief Paz nor Chief Diaz contacted Appellant on either Monday, or Tuesday, October 29 and 30, 2012 to ask why she was not at work or to order her to report to work. Appellant was not contacted by Deputy Chief Paz until Wednesday, October 31, 2012, and ordered to report to work. Appellant stated that Deputy Chief Paz rescinded his permission only after being confronted by Chief Diaz about Appellant being absent from work on Monday, Tuesday, and Wednesday, October 29, 30 and 31, 2012. This confrontation prompted Deputy Chief Paz to telephone Appellant on Wednesday, October 31, 2012, and demand she report to work.

Respondent asserts that Appellant lied to Deputy Chief Paz when asked about her whereabouts on October 29, 30, and 31, 2012, by stating she had been at work part of the day on Monday, October 29, 2012. Respondent alleged that Appellant repeated the lie to the Internal Affairs (IA) officer during her IA interview. Appellant asserts she was mistaken about being at work on Monday, October 29, 2012, that she had instead worked from home. Although it is questionable that Appellant would be "mistaken" about working from home, Appellant substantiated, and Respondent acknowledged that she made several telephone conversations from home to officers on her staff on that day, albeit brief conversations. Considering that Appellant's children were home due to the conditions created by Super Storm Sandy, I **FIND** that Appellant did not engage in inappropriate conduct when she stayed home on Monday, October 29, 2012..

Respondent charges Appellant with dishonesty, deceit and falsification of official records. Respondent asserts Appellant lied during her testimony when she claimed Deputy Chief Paz had given her permission to take a vacation day on Tuesday, October 30, 2012. Respondent points to Appellant's entry in her report dated October 31, 2012, that she "took a Vacation Day without prior authorization." The term "prior authorization" refers to signed time-off request forms and not to prior verbal permission. Appellant admitted and Respondent agreed, Appellant's time off request forms for Monday and Tuesday, October 29, and 30, 2012, were not signed. I **FIND** that Appellant could not

get the forms signed because she was not at work prior to when the allegations were asserted against her.

Respondent alleges Appellant falsified attendance records by marking herself present for Monday, October 29, 2012, and directed a subordinate, Officer Pagan to make false entries by texting him on Wednesday, October 31, 2012, to mark her present for Monday, October 29, 2012. As previously mentioned, high ranking officers of the CPPD used an informal procedure of getting verbal permission from their supervisors to take off from work, apparently marking the actual entries in the official records either before or after the subject date. There is no dispute that Appellant went to work on Wednesday, October 31, 2012, after being contacted by Deputy Chief Paz, but it is unclear whether the entry of a "P" into her attendance record for Monday, which indicates that she was "present" at work, occurred before or after she had been confronted by Paz regarding permission to take off Monday as a vacation day. Therefore, I **FIND** that as to whether Appellant falsified attendance records, the evidence is in equipoise.

In support of the charge that Appellant failed to properly supervise her subordinates, Respondent alleged that on Wednesday, October 31, 2012, she inappropriately texted one of her subordinate officers and requested that he submit time-off requests for her because she "would not be reporting to work on October 29, 30 and 31, 2012. Respondent contradicted this allegation by asserting that Appellant requested subordinate Officer Pagan to mark her present for Monday, October 29, 2012, that she requested that Pagan submit a request for time coming for October 31, 2012, and for him to submit a vacation request for October 30, 2012. There is no evidence that Appellant was not permitted to retroactively submit time-off requests for verbally received time-off permission. Nor is there any evidence that Appellant was not allowed to work from home when she was not present at work. Therefore, this allegation is without merit.

Respondent alleged that Appellant failed to properly supervise her subordinates, and encouraged their disobedience and disregard for authority because she instructed them to "keep a low profile, and then go home after lunch or so." The Record Division

was closed during Super Storm Sandy because there was no telephone service or power. Appellant's employees had nothing to do by the afternoon of Monday, October 29, 2012, and as Lieutenant of the Records Division, she had the authority to send them home early or allow them to decide for themselves whether they were otherwise needed as support within the department.

The current Chief of the CPPD, Rosario Capuana, signed the FDNA terminating Appellant without having any first-hand knowledge of the charges, or knowledge of Appellant's past disciplinary charges. He had not had any discussion with anyone from IA nor had he reviewed any testimony or written decision of a hearing officer. It appears from the record that his objective was primarily an effort to clear, and move forward, a stalled administrative process.

Competency of a Witness

It has long been established "as a general rule that all persons should be qualified to testify, and that disqualification should be the exception." Germann v. Matriss, 55 N.J. 193, 217 (1970); see also State v. Butler, 27 N.J. 560, 602 (1958) (citing State v. Mohr, 99 N.J.L. 124, 127 (E. & A. 1923)). The determination as to whether a particular witness is competent is within the discretion of the judge. State v. R.W., 104 N.J. 14, 19 (1986). The issue commonly arises in the instance of children called to testify. The parameters of the judge's discretion are governed by N.J.R.E. 601. Rule 601 provides for the general presumption of competency to testify unless (a) the judge finds that the proposed witness is incapable of expression concerning the matter so as to be understood by the judge and jury either directly or through interpretation; or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth; or (c) except as otherwise provided by these rules or by law. See State v. Scherzer, 301 N.J. Super. 363, 463 (App. Div. 1997).

The New Jersey Supreme Court recently revisited Rule 601, supporting the prior iterations of the appropriate analysis. The Court emphasized that a judge is also free to relax the formal testimonial oath in order to suit the circumstances, putting substance above form, in assuring that the witness understands that she or he is obligated to tell

the truth and the consequences for failing to do so. State v. G.C., 188 N.J. 118, 121 (2006).

Competency, however, is just a threshold issue. That determination does not mandate that I find their testimony to have been more credible or believable than that of other witnesses, or “such as the common experience and observation of mankind can approve as probable in the circumstances.” In re Estate of Perrone, 5 N.J. 514, 522 (1950).

I **FIND** that all of the witnesses were competent.

Credibility determinations

When the testimony of witnesses is in disagreement, the trier of fact must weigh the witnesses' credibility in order to make factual findings. Credibility is the value that the fact finder gives to testimony of a witness and contemplates an overall assessment of the witness's story in light of its rationality, internal consistency, and manner in which it “hangs together” with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Credible testimony must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955); Gilson v. Gilson, 116 N.J. Eq. 556, 560 (E. & A. 1934). A fact finder is expected to base credibility decisions on his or her common sense and life experiences. State v. Daniels, 182 N.J. 80, 99 (2004). Credibility is not dependent on the number of witnesses who appeared, State v. Thompson, 59 N.J. 396, 411 (1971) and the finder of fact is not bound to believe the testimony of any witness. In re Perrone, supra, 5 N.J. at 521-22.

I **FIND** that the facts as stated by Appellant's witnesses were more credible than the facts as stated by Respondent's witnesses.

ANALYSIS AND CONCLUSIONS OF LAW

Applicable Standards

The Civil Service Act and the implementing regulations govern the rights and duties of public employees. N.J.S.A. 11A:1-1 to 12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. An employee who commits a wrongful act related to his or her duties or who gives other just cause may be subject to major discipline. N.J.S.A. 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). In a civil service disciplinary case, the employer bears the burden of sufficient, competent and credible evidence of facts essential to the charge. N.J.S.A. 11A:2-6(a)(2), -21; N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-2.1, "burden of proof"; N.J.A.C. 4A:2-1.4. That burden is to establish 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).

An appointing authority may discipline an employee on various grounds, including conduct unbecoming a public employee, neglect of duty, and other sufficient cause. N.J.A.C. 4A:2-2.3(a). Such action is subject to review by the Civil Service Commission, which after a de novo hearing makes an independent determination as to both guilt and the "propriety of the penalty imposed below." W. New York v. Bock, 38 N.J. 500, 519 (1962). In an administrative proceeding concerning a major disciplinary action, the appointing authority must prove its case by a "fair preponderance of the believable evidence." Polk, supra, 90 N.J. at 560 (citation omitted); N.J.A.C. 4A:2-1.4(a); Atkinson, supra, 37 N.J. at 149.

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). The greater weight of credible evidence in the case—the preponderance—depends not only on the number of witnesses, but "the greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975). Similarly, credible testimony "must not only proceed from the mouth of a credible witness, but it must be credible in itself." In re Estate of Perrone, 5 N.J. 514, 522 (1950).

In the instant case, the allegations hinge on whether Appellant was authorized by her superior officer to take three days off during Super Storm Sandy, Monday, Tuesday and/or Wednesday, October 29, 30, and 31, 2012, respectively. The relevant facts elicited reveal that questions remain as to whether Appellant requested and received permission to take days off from Deputy Chief Paz during the telephone conversation on Sunday evening, October 28, 2012. Appellant testified that Deputy Chief Paz gave her permission to take time off, and the record indicates he and Chief Diaz were both also absent on Monday, October 29, 2012. It was not until Wednesday, October 31, 2012, that Deputy Chief Paz called Appellant to inquire about her absence and ordered her to report to work. This telephone call occurred, coincidentally, after Chief Diaz confronted Deputy Chief Paz and became angry upon learning of Appellant's absence. Respondent's contention that Deputy Chief Paz did not give Appellant permission to take the day off, but rather instructed Appellant to report to work on Monday, October 29, 2012, yet admitted to taking the day off himself, is unpersuasive. Accordingly Respondent has failed to present evidence sufficient to lead a reasonably cautious minded person to the conclusion that Appellant was absent for three days without permission. The schools were closed on the days in question and Appellant's young daughters were home while her husband, himself a police officer, worked. It is more likely that Appellant requested permission to be home than not.

Respondent's other charges are derivative of this dispositive allegation, and I **CONCLUDE** that Respondent has failed to present evidence sufficient to lead a reasonably cautious minded person to the conclusion that Appellant has violated N.J.S.A. 40A:14-147, any of the enumerated sections of N.J.A.C. 4A:2-2.3(a), the Rules and Regulations of the City of Passaic Police Department or the Disciplinary Code.

Regarding the charge of absent for three days without leave, I **CONCLUDE** that Respondent has failed to prove, by a preponderance of the competent, credible evidence, that Appellant was absent without leave on Monday, Tuesday, and/or Wednesday, October 29, 30 and 31, 2012.

Regarding the charge of violating N.J.S.A. 40A:14-147, each of the enumerated sections of N.J.A.C. 4A:2-2.3(a), the Rules and Regulations of the City of Passaic

Police Department or the Disciplinary Code, I **CONCLUDE** that Respondent has failed to prove, by a preponderance of the competent, credible evidence, that Appellant has engaged in conduct violative of the subject statutes, regulations and code.

Appellant alleged Respondent failed to conduct a statutorily required hearing pursuant to N.J.A.C. 4A:2-2.4(a), prior to her termination. Appellant requested a hearing, and although several hearings were scheduled and she appeared, no actual hearings were ever held. Appellant argues denial of her statutory right to a hearing prior to termination prevented her from presenting evidence, and violates her due process rights. Respondent admits attempts to schedule hearings during the sixteen months of suspension, but there is no evidence that any hearings were actually held. No due process claim was filed in this matter and the undersigned will not address this assertion.

Appropriateness of Penalty

It is well established that the employee's past record and any mitigating circumstances may be reviewed in assessing a penalty. See Bock, supra, 38 N.J. 500. The severity of the infractions must also be balanced against "whether removal or something less is appropriate under the circumstances." In re Figueroa, CSV 3819-01, Initial Decision (October 10, 2003), remanded, Merit Sys. Bd. (December 3, 2003), <<http://njlaw.rutgers.edu/collections/oal/>>; see Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980). Progressive discipline may be "bypassed when an employee engages in severe misconduct," especially where the offense involves "public safety" and risks "harm to persons or property." In re Herrmann, 192 N.J. 19, 33-34 (2007). In assessing penalties, "[t]he overriding concern" is the "public good." George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463, 465.

"[W]here the underlying conduct is of an egregious nature," an individual may be removed regardless of disciplinary history. In re Glenn, CSV 5051-03, Initial Decision (February 25, 2005), adopted as modified, Merit Sys. Bd. (May 23, 2005), <<http://njlaw.rutgers.edu/collections/oal/>>; see Henry, supra, 81 N.J. 571. Counseling,

warnings, meetings, etc., do not constitute discipline under Civil Service rules. See N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-3.1.

Respondent asserts that Appellant's prior disciplinary actions support the suspension and termination. In 1997 Appellant was indicted for official misconduct regarding work for the Passaic Board of Education while on City time as a police officer and receiving pay from both entities for working on the same date. The charges involved two conflicting hours, and were eventually dismissed. Appellant had been suspended without pay for ten months, but that suspension was reduced to ten days and she received all of her back pay. In 2007 Appellant was charged with multiple violations of the Police Department Rules and Regulations arising out of her failure to report a shooting incident, and neglect of her supervisory and other duties. Appellant received a Letter of Reprimand. In 2012 Appellant was charged with chronic absenteeism and other violations for abuse of time/attendance during the prior year, wherein she took off 42.5 sick days and exhibited a pattern of using sick time and time coming to extend her days off, holidays and vacations. She was also charged with scheduling her sick and "time coming/time off" to coincide with her husband's time off. For these offenses Appellant received counseling from Deputy Chief Paz and a letter of reprimand.

Consideration of past disciplinary history is discretionary, and only recent history should be considered. I **CONCLUDE** that Appellant's prior discipline is distinguishable, and insignificant because Respondent promoted her to Sergeant and then to Lieutenant despite the prior discipline.

Appellant began working as a police officer for the CPPD in 1992 at the age of 21. She worked on foot patrol in the housing projects for three years, and then was transferred to vehicle patrol for one year, until she was promoted to detective. Appellant was the first female detective in the history of the CPPD. As a detective, Appellant engaged in undercover work, which included work with the narcotics division, assistance to the FBI, and investigation of major crimes. In 2002, Appellant was the first female officer in the CPPD promoted to the rank of Sergeant. Four years later, Appellant was promoted to Lieutenant. Appellant has a twenty-three-year career in law

enforcement, with promotions to Sergeant and Lieutenant, numerous service commendations and citations. These mitigate against such excessive and disproportionate discipline. If the charges had been sustained, I **CONCLUDE** that the lengthy suspension and eventual termination would have been excessive and disproportionate considering the circumstances of this case.

Appellant alleged Respondent failed to conduct a statutorily required hearing pursuant to N.J.A.C. 4A:2-2.4(a), prior to her termination. Respondent admits that there were attempts to schedule hearings during the sixteen months of suspension, however there is no evidence that any hearings were actually held. No due process claim was filed in this matter and the undersigned will not address this assertion.

Appellant claimed that her 17-month suspension violates New Jersey law, because the applicable statute, N.J.A.C. 4A:2-2.4(a), limits suspension for non-criminal complaints or indictments to six months. I **CONCLUDE** that Appellant is not charged with a criminal complaint or indictment, and her suspension lasted sixteen and a half months from December 7, 2012, until her termination on April 21, 2014. I further **CONCLUDE** that the initial suspension exceeded the time allowed by law.

ORDER

Accordingly, I **ORDER** that the action of the Respondent, City of Passaic Police Department, of removing the Appellant, Odalys Rastatter, as a Police Officer is **REVERSED**, and that this appeal is **DISMISSED**.

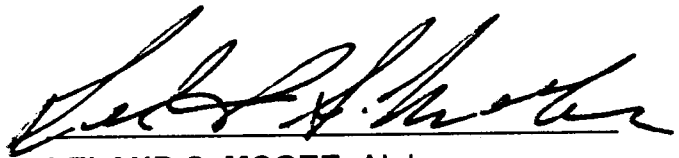
I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

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. 40A:14-204.

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

1/11/16
DATE


LELAND S. MCGEE, ALJ

Date Received at Agency:

1/11/16

Date Mailed to Parties:

1/11/16

dr

WITNESSES AND DOCUMENTS IN EVIDENCE

Witnesses

For Appellant:

Odalys Rastatter,
Passaic Police Captain Louis Gentile,
Passaic Police Officer Daniel Sienkiewicz,
Civilian employee Soveida Cespedes,
Civilian employee Roberta Herbert, and
Civilian employee Veronica Ramirez-Chance

For Respondent:

Passaic Police Officer Ruben Pagan
Passaic Deputy Police Chief (retired) Matthew Paz,
Internal Affairs Police Detective Milton Figueroa, and
Deputy Police Chief and Officer-in-Charge Rosario Capuana

Exhibits

For Appellant:

A-1 Attendance Record
A-2 FNDA Document

For Respondent:

R-1A Text messages Rastatter/Pagan
R-1B Pagan phone records
R-1C Pagan Report
R-2A Memo Vaz
R-2B Phone Records Vaz
R-2C Computerized Attendance Record

R-2D	Original Color Coded Computerized Attendance Record
R-3	Not in evidence
R-4	PNDA
R-5	FNDA
R-6A	Master attendance record
R-6B	Rastatter Handwritten Daily Attendance Report
R-6C	Original attendance record
R-7	Not in evidence
R-8A	I.A. attendance record
R-8B	Part of Figueroa's report
R-8C	Internal Affairs complaint notice
R-8D	Administrative Investigation
R-9	Not in evidence
R-10A	Preliminary Notice - 10/29/97
R-10B	Final Notice – 12/19/97
R-10C	Specification Sheet
R-10D	Incident
R-11A	Preliminary Notice – 6/12/98
R-11B	Final Notice – 7/7/98
R-12A	Preliminary Notice – 9/26/07
R-12B	Final Notice – 11/1/07
R-12C	Letter of Reprimand
R-13A	Preliminary Notice – 1/17/12
R-13B	Final Notice – 1/25/12
R-13C	Figueroa IA Report – 12/28/11, Misuse of Sick Time Investigation
R-14	Figueroa IA Report – 12/23/12, Workplace Harassment Investigation
R-15A	Passaic Police Department Rules and Regulations
R-16	2/24/03 Council Resolution
R-17	Not in evidence
R-18	Not in evidence
R-19	Not in evidence
R-20A	Vilardi's report
R-21	Not in evidence

R-22A	10/31/12 Time off request form
R-22B	10/30/12 Time off request form
R-22C	10-31-12 Rastatter's operations report
R-23	Collective Bargaining Agreement PBA Local 14
R-24	Rastatter Superior Court Complaint
R-25	11/20/12 DVD of interview of Rastatter
R-25B	Transcript of DVD of Internal Affairs' Interview

ORDER ON EMERGENT MOTION

Odalys Rastatter,
Plaintiff-Appellant,

v.

Richard Diaz, individually, and
in his official capacity as
Chief of the City of Passaic
Police Department; The City of
Passaic Police Department; The
City of Passaic; Matthew Paz,
individually, and in his
official capacity as Deputy
Chief of The City of Passaic
Police Department,
Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-
MOTION NO. M-
BEFORE PART: E
JUDGE(S): MARIE P. SIMONELLI
HARRY G. CARROLL

EMERGENT MOTION

FILED: June 2, 2016

BY: plaintiff-appellant

ANSWER(S)

FILED: June 6, 2016

BY: defendants-respondents

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON
THIS 8TH DAY OF June, 2016, HEREBY ORDERED AS FOLLOWS:

EMERGENT MOTION
FOR

LEAVE TO APPEAL

GRANTED DENIED OTHER
() () ()

REINSTATE PLAINTIFF TO HER
POSITION AS LIEUTENANT WITH
PASSAIC POLICE DEPARTMENT

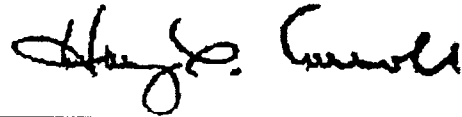
GRANTED DENIED OTHER
() () ()

STAY ALL PROMOTIONS TO
POSITION OF LIEUTENANT IN
THE CITY OF PASSAIC POLICE
DEPARTMENT

GRANTED DENIED OTHER
() () ()

SUPPLEMENTAL: The matter is summarily remanded to the Civil Service Commission. The Civil Service Commission is directed to decide the pending motion for reconsideration within thirty days. The City of Passaic and the Passaic Police Department are enjoined from filling plaintiff's position pending the Civil Service Commission's decision on the motion for reconsideration. Jurisdiction is not retained.

FOR THE COURT:



HARRY G. CARROLL, J.A.D.

ORDER ON MOTION

Odalya Rastatter,
Plaintiff-Appellant,

v.

Richard Diaz, individually, and
in his official capacity as
Chief of the City of Passaic
Police Department; The City of
Passaic Police Department; The
City of Passaic; Matthew Paz,
individually, and in his
official capacity as Deputy
Chief of The City of Passaic
Police Department,

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-
MOTION NO. M-
BEFORE PART: E
JUDGE(S): MARIE P. SIMONELLI
HARRY G. CARROLL

MOTION

FILED:

July 5, 2016

BY: defendants-respondents

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON
THIS 8TH DAY OF July, 2016, HEREBY ORDERED AS FOLLOWS:

MOTION TO

VACATE JUNE 8, 2016 ORDER

GRANTED

DENIED

OTHER

MODIFY JUNE 8, 2016 ORDER

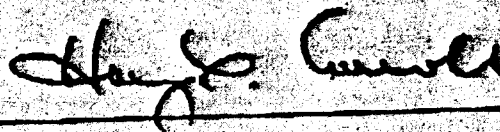
GRANTED

DENIED

OTHER

SUPPLEMENTAL: The period within which the Civil Service Commission is directed to decide the pending motion for reconsideration is extended for ninety days. All other provisions of the June 8, 2016 order remain in effect.

FOR THE COURT:



HARRY G. CARROLL, J.A.D.