



STATE OF NEW JERSEY

In the Matter of Benjamin Ruiz
City of Perth Amboy, Department of
Public Safety

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NOS. 2016-4436 & 2019-
673

OAL DKT. NOS. CSR 09471-16 &
14253-18

(Consolidated)

ISSUED: JUNE 26, 2019 BW

The appeals of Benjamin Ruiz, Police Chief, City of Perth Amboy, Department of Public Safety, two removals effective June 7, 2016, on charges, were heard by Administrative Law Judge Joann LaSala Candido, who rendered her initial decision on May 22, 2019. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of June 26, 2019, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeals of Benjamin Ruiz.

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 26TH DAY OF JUNE, 2019



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

(CONSOLIDATED)

OAL DKT. NO. CSR 09471-16

AND

OAL DKT. NO. CSR 14253-18

**IN THE MATTER OF BENJAMIN RUIZ,
CITY OF PERTH AMBOY.**

Nick Milewski, Esq. on behalf of appellant (Mets Schiro McGovern, attorneys)

Peter J. King, Esq., on behalf of the City of Perth Amboy (King and Petracca, attorneys)

Record Closed: April 22, 2019

Decided: May 22, 2019

BEFORE JOANN LASALA CANDIDO, ALAJ:

STATEMENT OF THE CASE

Appellant, Benjamin Ruiz, appeals his indefinite suspension and subsequent removal as Chief of Police by respondent, City of Perth Amboy (City or respondent), on charges of N.J.A.C. 4A:2-2.3(a)(2) insubordination; N.J.A.C. 4A:2-2.3(a)(6) conduct unbecoming; N.J.A.C. 4A:2-2.3(a)(7) neglect of duty; misuse of public property, including motor vehicles; and N.J.A.C. 4A:2-2.3(a)(12) other sufficient cause; as well as a violation of department rules and regulations of the Perth Amboy Police Department

(Department). Appellant disputed all claims and sought reinstatement as Chief of Police with the Department.

PROCEDURAL HISTORY

On December 15, 2014, the City issued a Preliminary Notice of Disciplinary Action suspending appellant indefinitely from his position as Chief of Police after receiving notification from the Middlesex County Prosecutor's Office that day that there were pending charges against appellant of theft in the third degree. On June 2, 2016, the respondent issued a Final Notice of Disciplinary Action (FNDA) sustaining the charges and indefinitely suspending the appellant. Appellant filed a timely notice of appeal and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case where it was filed on June 23, 2016, under docket number CSV 09471-16. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On August 29, 2018, the respondent issued a Final Notice of Disciplinary Action (FNDA) sustaining the charges other than the conviction of a crime, and added that on May 31, 2016, while serving an indefinite suspension, appellant was taken into custody for Stalking, in violation of N.J.S.A. 2C:12-10; Impersonating a Police Officer, in violation of N.J.S.A. 2C:29-1; and Defiant Trespass, in violation of N.J.S.A. 2C:18-3. Thereafter, the respondent removed the appellant. Appellant appealed on June 23, 2016, and September 7, 2018.

The 2016 matter was assigned to ALJ Richard McGill and the 2018 matter was assigned to ALJ Patricia Caliguire. The two matters were consolidated for hearing by the undersigned, which was held on January 25, 2019, and February 13, 2019. The record remained open at the request of the parties for the receipt of briefs and closed on April 22, 2019.

TESTIMONY¹

1. Charges related to the Mustang and motorcycle repairs:

Jill A. Goldy

Jill Goldy, Chief Financial Officer for the City of Perth Amboy, testified on behalf of the City. Her duties include approving purchase orders after receiving a purchase requisition form from a department within the Perth Amboy governing body with a purchase voucher from the vendor. She received a purchase order voucher from the Department dated March 13, 2014, for items to be ordered from Harley Davidson of Long Branch for motorcycle parts including: a four-bank charger, a twelve-and-one-half-foot charging extension, and six Jim's Force Fans Black for a total of \$2,423.50. R-1. Goldy received another purchase order signed by appellant dated March 13, 2014, for seven mufflers and seven muffler tips for Department motorcycles. R-2. The police department owns six motorcycles. Appellant issued his own check to the City in the amount of \$768 dated July 8, 2014, as reimbursement for muffler parts he ordered through the City for his personal motorcycle. The check was taken by the Middlesex County Prosecutor's Office and never returned to the City. Goldy testified that employees are trained that public funds are never to be used for personal items. Taxpayer money should only be spent for business purposes. Also, employees are not allowed to store personal vehicles on public property as appellant had done with his personal motorcycle.

Gregory C. Fehrenbach

Gregory Fehrenbach is employed by Government Management Advisors since 2004. He testified on behalf of the City. The Advisors provide services for municipalities including administrators. Fehrenbach held the position of Interim Business Administrator for six-and-one-half months from July 1, 2008, to early January

¹ The following represents a summary of those who testified at the hearing and not intended to be verbatim.

2009; again, from September 16, 2010 through June 30, 2014, and from June 25, 2018, through January 22, 2019.

Fehrenbach testified as to the Personnel Policy Manual of the Department, effective April 2012. R-4. Referring to the conflict of interest section of the policy, he stated that employees are not permitted to use public funds for purchase, nor is an employee permitted to use a public purchase order for ordering personal items.

Fehrenbach stated that pursuant to the Rules and Regulations of the City the Department, Section 95-5 (R-5), an officer may be removed for incapacity, misconduct, performance of an act or omission, or disobedience of the rules and regulations.

Fehrenbach stated that if a personal vehicle is to be used for business purposes, the employee must submit a request to the City Administrator and the City insurance carrier, for liability purposes, to use the vehicle.

Fehrenbach said that he signed the PNDA of August 29, 2018. J-3. The PNDA of December 15, 2014, read under Incident(s): "On Monday, December 15, 2014 the City was notified by the Middlesex County Prosecutor's Office that there are pending charges against you of Theft in the Third Degree." J-1. The reason the FNDA was issued in August 2018 was because action had to be taken to address the prior termination that was pending before the Civil Service Commission after appellant was found not guilty in the criminal matter.² The administrative action needed to proceed. He said that the FNDA was not always the same as written in the PNDA. In this matter, the two were different because the criminal court made a finding of not guilty on both indictments and a decision had to be made to proceed with the administrative matter. The FNDA did not specify the reasons for the disciplinary action. As a rule, the municipality will with disciplinary measures if a related criminal matter is pending. Disciplinary charges were brought against appellant within forty-five days of the notice of dismissal of the charges. J-3.

² Appellant had been charged with theft, stalking, impersonating an officer, and defiant trespass—all of which were dismissed.

Lawrence Cattano

Lawrence Cattano, Perth Amboy Deputy Chief of Police, testified on behalf of the City. Cattano stated that he saw a red Mustang owned by appellant in the police maintenance garage on a lift. R-6. He observed workers doing work in the garage, but not specifically on appellant's Mustang. He did not recall if he saw appellant in the garage while the Mustang was on the lift but did recall speaking to appellant at some point about the Mustang but did not recall exactly when. The police department does not permit personal vehicles to be in the maintenance garage. Cattano observed a video that depicts a vehicle outside the door of the garage with people around the vehicle, but he did not recognize anyone other than a captain in the police force and appellant. He had no knowledge who the owner of the vehicle was or if work had been done to the vehicle. He only recognized Mechanic Velez using a flashlight in the front of the motor.

Roman McKeon

Roman McKeon, Perth Amboy Acting Chief of Police, testified on behalf of the City. He is responsible for forwarding infractions brought to his attention to the office of professional standards unless they are criminal in nature. If so, then the infractions are referred to the Prosecutor's Office. McKeon relies upon the Perth Amboy Police Internal Affairs Policy and Procedures dated March 6, 2008, and July 23, 2015, to address discipline issues. R-9 and R-11. He also relies upon the compilation of the Perth Amboy Police Department Rules and Regulations dated July 9, 2015. R-10. He additionally relies upon the Police Department's Code of Ethics, outlined in R-12.

McKeon testified that the charges sustained on August 29, 2018, were based upon appellant's actions in violation of the provisions listed. Part of McKeon's duties is to issue police badges. Police officers are required to return all police badges when suspended or terminated. The officer must sign a badge request to obtain an additional badge, and this request must then be approved by the Chief of Police. Officers will surrender the additional badges to Internal Affairs if they resigned, are terminated, or suspended. R-14 and 15.

Lt. Anthony Montalvo

Lieutenant Anthony Montalvo, a then-sergeant with the Perth Amboy Police Department, testified on behalf of the City. In 2013, Montalvo was assigned to the traffic bureau overseeing the unit as well as the motorcycle unit. At the time, the City owned six motorcycles. Appellant's motorcycle was kept in the police mechanic garage. His motorcycle had a different seat that contained a passenger seat, different floorboards, and other cosmetic differences from police motorcycles.

Montalvo was assigned to lead the City Christmas Parade in December 2013 on a motorcycle through the streets of the City to end at City Hall. There were members of a classic car club that drove in the parade, one member being the appellant. Appellant owned a Mustang that he drove in the parade. Appellant's Mustang broke down and Montalvo contacted Bobby O'Buck, at the request of the appellant, to have the vehicle towed into the police garage. Montalvo stated that a privately owned vehicle was not permitted inside the police garage but could be parked in the lot outside. He did not observe work being done to the Mustang.

Montalvo was also instructed by appellant to look for fans, pipes, and tips for the City motorcycles. He was aware that appellant bought a police motorcycle from the City that had "Police" written on it but had his own license plate. Appellant would use the motorcycle for funeral escorts and a police unity tour that raises awareness for officers that have died. Montalvo signed the purchase order for six fans, seven pipes and tips. He picked the parts up at a dealer and the mechanics installed the muffler pipes, tips, and fans on the police motorcycles as well as on the appellant's motorcycle. The pipes were changed for safety reasons since they were louder than ordinary pipes.

Miguel Garcia

Miguel Garcia, a Perth Amboy police vehicle mechanic, testified on behalf of the City. He has been employed with the police department for twelve years, with a daily shift of 8:00 a.m. to 4:00 p.m. When he arrived at work on a Monday morning in December 2013, he observed appellant's red Mustang in the third bay of the police

garage. He saw Mechanic Angel Velez put appellant's Mustang on a lift. Velez then entered the office where Garcia was and told Garcia that the car needed a new clutch. He overheard the conversation between appellant and Velez on what part the car needed for the repair since he was in the office. He then saw the appellant place a box containing the part on a desk in an office.

Garcia videotaped Velez working on appellant's vehicle so that he would not be blamed for working on a car during working hours that was not owned by the City. R-16. He stated that it took about two hours to diagnose the problem and then a few hours to repair it.

Garcia also repaired and maintained the motorcycles belonging to the department. Montalvo gave him pipes, tips, and fans to install on the City motorcycles as well as appellant's motorcycle. Appellant's motorcycle had a different style seat and a low-profile box for the compartment in the back, and different foot pads. He installed emergency strobe lights on appellant's motorcycle at the request of Police Officer Lisa Stray, who is his supervisor, despite his objection to working on a personal vehicle during work hours. He also did two oil changes on the motorcycle prior to 2012. He did not discuss the motorcycle pipes with appellant until after he finished his work on the City-owned motorcycles.

Garcia stated that he also heard appellant ask Velez, while in the office, to check on a car that was coming into the police lot that was having air conditioning issues. Garcia stated that he then observed a brownish-gold color vehicle during a morning in July outside the garage bay. Shortly thereafter, Velez asked Garcia for the air conditioner testing machine that Garcia had been using so that he could check this vehicle. Garcia then saw Velez pump antifreeze into a jug, which he then poured into the vehicle.

Angel Velez

Angel Velez, also a mechanic with the Perth Amboy Police Department, testified on behalf of the City. He stated that during a Christmas parade on a Saturday in December 2013, he drove a 1950 Chevy Coupe owned by appellant in the parade. He had picked up the vehicle from appellant's home that was about six houses away from his own home. Appellant drove his Ford Mustang in the parade, which broke down during the parade. Velez continued on and the vehicle he was driving also broke down at the end of the parade. He told appellant that the Chevy broke down.

Velez went to work on the Monday morning and saw appellant's Mustang in the police garage. Appellant told Velez that the vehicle needed repairs. Velez inspected the vehicle and determined that the clutch, as appellant had suspected, needed repair. A few days later, appellant delivered the parts to Velez and instructed him to install them. The work took about an hour and one-half. Appellant was not present during its repair. After completion Velez drove the vehicle to appellant's home, which he recalled as a Thursday afternoon, and walked back to the police garage.

Velez also stated that during the summer of 2014 appellant told him that a car was coming into the police yard that had been overheating and for him to check it. This vehicle was owned by a relative of appellant's secretary, Lourdes Ruiz, who is also happened to be Velez's daughter's godmother. Velez inspected the air conditioning system and observed that the condenser was saturated with oil at the bottom. He put needed antifreeze in the radiator but did not have sufficient Freon to fix the air conditioning system. This job took less than a half-hour.

Robert O'Buck

Robert O'Buck testified on behalf of appellant. O'Buck is an auxiliary captain with the Perth Amboy Police Department where he has volunteered for approximately twenty-three years. He participated in the 2013 Christmas parade as a member of the Raritan Bay Cruisers car club to which he and appellant belonged. O'Buck was driving directly behind the appellant when appellant's Mustang broke down. He then helped

push the vehicle to the side of the road. He determined that the clutch was inoperable. O'Buck told appellant he would take care of the car and for appellant to continue to the end of the parade. O'Buck's vehicle also broke down not far from the Mustang. He had access to a tow truck and owned his own vehicle repair shop but decided to tow the Mustang to the police department garage because it would have been difficult to tow it to appellant's mother's home where the vehicle was normally stored, because of the difficult driveway there. He also chose not to tow it to his garage, but rather to the police garage. O'Buck did not notify appellant before towing his vehicle to the police garage; also no one authorized him to leave the vehicle there. He said that appellant never instructed him to remove the vehicle from the police garage once he learned where it was nor did the appellant ever contact him to repair the vehicle.

O'Buck testified that he had repaired appellant's vehicles prior to December 2013 and that he assumed that he would be repairing the Mustang as well. He said that although he had intended to remove the vehicle from the police garage, he had not heard from appellant.

2. Charges related to an incident occurring at a 7-11 Store:

Phil Terranova

Phil Terranova, a retired Captain of the Perth Amboy Police Department since 2016, testified on behalf of the City. Terranova went to a 7-11 Store with a detective on the police force to investigate a reported incident. At that time, appellant was suspended from an unrelated incident. Terranova observed a fence that runs behind the 7-11 Store that had two holes in it, which would enable someone to see the street behind the store. The store employee informed him that a member of the police department went behind the store to look through the fence. The employee provided Terranova with a description of the police officer and he concluded that the description fit appellant. He assigned two of his narcotic investigators to conduct a surveillance of the area. The surveillance video showed the appellant walking behind the 7-11 Store and peering over the fence. R-18. Terranova was aware that the street behind the

store was where the house owned by appellant's secretary was and could be viewed over the fence or through the holes in the fence. Appellant was charged with stalking.

The store manager stated that appellant identified himself as a police officer. Based upon appellant identifying himself as a police officer while suspended and his trespassing behind the 7-11 Store, Terranova made the decision to obtain an arrest warrant for appellant and participated in his arrest along with three other officers. Appellant was stopped while driving his vehicle and placed in custody. The arrest was videotaped. During the search of appellant, Terranova found a Perth Amboy Chief's police badge in his back pocket. R-20. At the time appellant was suspended, he was required to hand in his handgun, all police identification and badges. All these items had to be returned to the police department since he was no longer considered a police officer while suspended.

Carl Dwight Graham, Jr.

Retired Perth Amboy Police Lieutenant Carl Graham, Jr. testified on behalf of the City. Graham investigated the incident occurring at the 7-11 Store in town in 2016 where it was alleged that appellant was peeking over a fence in the back of the 7-11 at someone's home. Graham interviewed a 7-11 employee named J.W. who told him that when she confronted appellant he stated he was a police detective and showed his badge. This was confirmed on the 7-11 Store video and J.W. identified appellant as the one who said he was a detective. The employees were not able to place appellant behind 7-11. A surveillance was then conducted behind the 7-11 Store by the police. When he reviewed the surveillance tape, Graham identified appellant as the subject who was behind the 7-11 Store. Surveillance was then set up at appellant's home and once he left his home, he was stopped and placed under arrest. Appellant had a Chief's badge in his possession.

Lourdes Ruiz

Lourdes Ruiz testified on behalf of appellant. She is not related to appellant. Ruiz was employed with the Perth Amboy Police Department as the appellant's

secretary assistant. Ruiz stated that she was on her way to the store to buy diapers when she received a telephone call from her son that a police officer was at her home and wanted to speak to her about her safety.

Ruiz claimed that she had never been in fear of appellant. She even allowed him to pick up her son after school and drop him off near, but not at, her home because her husband did not like appellant.

Miguel Pellot

Perth Amboy Police Captain Miguel Pellot testified on behalf of appellant. He was assigned to the Office of Professional Standards (Internal Affairs) from January 2010 to January 2015. Pellot, as part of his duties collected suspended officers' weapons, ammunition, department-issued ID cards, access cards to buildings, and police breast badges. He stated that there was no limit as to how many badges an officer could have, but his duty required him to only collect the badge the officer wore on his uniform every day.

When appellant was suspended, Pellot went to his home to collect his ammunition. He did not request his badge because someone from the City had collected it prior to his going there. The reason the badge and ammunition were collected was the City did not want an officer who had been suspended out with a firearm or have them identify themselves as a police officer using a badge. Pellot stated that there was nothing in writing that required the collection of all of a suspended officer's badges. Pellot read section 3:9.15 of governing the policy and procedure for the surrender of police property when suspended, which read in part that officers are to turn in all such property. Suspended officers shall immediately surrender all of their police identification, if applicable, and any other Department property entrusted to them. R-15. Although all badges should be taken, Pellot stated that it was not the practice of the police department to take any additional badges that had been purchased.

Benjamin Ruiz

Ruiz testified on his own behalf. He was hired by the City in May 1988 as a patrol officer. In the Spring of 1989, Ruiz was promoted to the narcotics unit and then moved to juvenile unit. He then moved to the traffic unit for several years, which included the motorcycle unit. Ruiz was then assigned to the crime prevention bureau for approximately ten years where he rose to the rank of sergeant and then lieutenant while in that bureau. At the end of ten years, Ruiz was promoted to captain and assigned to patrol and administration. In December 2010 he was assigned acting chief until his promotion to chief in 2012.

As Chief, Ruiz purchased the motorcycles for the police department from Edison Harley Davidson until they went out of business, and subsequently contracted with Mike's Harley Davidson in Delaware. He purchased a motorcycle from Mike's Harley Davidson in 2003 that was used for funerals, escorts, and special events. Not for personal use. He personally insured the motorcycle. It was stored in the police garage and a key was left with the motorcycle. The City became involved in the Unity Tour after September 11, 2001, and his motorcycle was used in that tour. After the Unity Tour, he determined that additional lighting was needed for the motorcycles and strobe lights were purchased for the six motorcycles. When Ruiz became chief, he was able to increase the motorcycle unit from two police motorcycles to six.

Montalvo brought to his attention that the motorcycles needed pipes, tips, and fans for their exhaust systems to make the motorcycles louder for safety purposes. Ruiz was unaware that these parts were also placed on his motorcycle since he had recently changed the parts, at his own expense, to customize his motorcycle. Ruiz wrote a check on July 8 to the City to cover the parts installed in May to his motorcycle in the amount of \$768.

Ruiz went to the Christmas parade in 2013 driving his Mustang convertible. He stated that it started to snow during the parade and his car made a loud "pop" sound. He was able to pull the car over to the side about four or five feet from the curb. O'Buck was driving behind him and pulled over to help Ruiz. Ruiz gave the keys to O'Buck and

jumped on a float that was going by since O'Buck knew the cause of the "pop." Ruiz testified that it was not his intention to have the Mustang towed to the police garage, since O'Buck had been working on his vehicles for years and had access to the keys and the garage at his mother's house where the vehicle was normally parked. Ruiz saw that the Mustang was in the police garage on the Tuesday after the parade and asked the police mechanic, Angel Velez, why the Mustang was at the garage. He stated that he did not ask Angel to repair the vehicle. He stated he asked O'Buck on a Tuesday to pick up the car and had advised the mechanics that he bought the part and put it in the car so that O'Buck could pick up the vehicle and repair it. Ruiz spoke to O'Buck again two times on Wednesday and asked him to pick up the vehicle. He testified that he was unaware that Angel repaired the vehicle using the part he dropped off. He asked Angel if the work had been done during working hours and was assured that it had not.

Ruiz further claimed that on a Tuesday in the summer of 2014, he was contacted by a young fellow he knew who said he was having problems with his car's air conditioner. The lad came to the police garage and Angel Velez checked the vehicle to see if it needed Freon. Angel put water in the radiator despite appellant's instruction to just look at the car since appellant only wanted to know what was wrong with the vehicle.

In 2016, Ruiz was helping a friend by picking her son up after school and bringing him home. He was not able to drop the boy off at the house because the father of the boy did not like Ruiz due to a prior domestic violence matter. Ruiz would wait at the 7-11 Store to make sure the boy entered his home. This would occur a few times a week. He acknowledged that he had been approached by an employee of the 7-11 Store on two separate occasions asking what he was doing behind the store.

Ruiz stated that he had all his police items ready for pickup after he was arrested, claiming that he surrendered all items that were requested. He asserted that he had his badges ready for pickup, but no one ever came by for them.

The determination of a matter such as the instant case often turns on credibility of the witnesses. A fact finder "is free to weigh the evidence and to reject the testimony

of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Estate of Perrone, 5 N.J. 514, 521-22 (1950); see also D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). In other words, a trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). In this case, any determination of whether or not appellant engaged in the alleged misconduct is based in large part on the testimony of the witnesses. One factor to consider in determining which party's version of an incident has the "reasonable probability of truth" is that the "interest, motive, biases or prejudice of a witness may affect his credibility and justify [the trier of fact], whose providence it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952). More importantly, in so far as this matter is concerned, "[a] trier of fact may reject testimony because it is inherently incredible, or because it is overborne by other testimony." Congleton, 53 N.J. Super. at 287.

In the instant case, I have considered the strength of the consistent testimony, the demeanor, as well as the possible conflicting position(s) of witnesses, prior to finalizing this initial decision. The testimony of the City's witnesses was credible and compelling. Each was straightforward, believable, and consistent. Even O'Buck, appellant's own witness, contradicted appellant's testimony when stating he did not hear from appellant after the Mustang was towed to the police garage. Appellant's testimony, however, was deemed lacking in credibility and was not straightforward or believable.

FINDINGS OF FACT

Nine witnesses testified in this matter. Ruiz testified on his own behalf and called as a witness Lourdes Ruiz and Robert O'Buck. The record includes documentary evidence and the testimony of the individuals who witnessed or had knowledge of the incidents they described. Based upon a review of the totality of the pertinent evidence,

and having had the opportunity to assess the demeanor and credibility of the witnesses and review the documents admitted into evidence, I **FIND** the following pertinent **FACTS**:

1. Appellant had been employed by the Perth Amboy City Police Department since May 1988. He was assigned to various departments within in the police force until becoming its Chief in 2012.
2. Ruiz, as Chief, purchased police motorcycles for the department. He purchased a motorcycle for himself in 2003 that was used by the department, mostly Ruiz, for funerals, escorts, and special events as well as in the Unity Tour. The motorcycle was insured under his name and was kept in the police garage.
3. The City owned six police motorcycles during appellant's tenure as Chief.
4. A purchase order dated March 13, 2014, and signed by appellant was for seven mufflers and seven muffler tips for the police department motorcycles.
5. Pipes and tips were installed on appellant's personal motorcycle and paid by the City.
6. Ruiz reimbursed the City to cover the parts in the amount of \$768 by check dated July 8, 2014. The Prosecutor's Office did not return the check to the City.
7. Employees were not permitted to use public funds for purchase of personal items nor permitted to use a public purchase order for ordering personal items.
8. There was no request submitted by Ruiz to the City Administrator and the City insurance carrier for use of his personal motorcycle during business hours for liability purposes.
9. Ruiz drove his personal Mustang convertible in a Christmas parade in 2013 on a Saturday in December.
10. During the parade Ruiz's Mustang broke down and stopped about four feet from the curb. Robert O'Buck, an auxiliary officer, was driving behind Ruiz. He was Ruiz's mechanic.
11. O'Buck's wife owns a towing service that is used by the police department.
12. O'Buck towed the Mustang to the police garage after the parade on the weekend and placed it inside in the bay area without consulting with Ruiz.
13. Ruiz purchased the part for the Mustang and asked Angel Velez to repair the vehicle.

14. Ruiz had no further contact with O'Buck while the Mustang was in the police garage for the five days.
15. Angel Velez repaired the vehicle and drove it to Ruiz's mother's home on the Thursday five days after the parade. It was normally stored at that location.
16. Privately owned vehicles were not permitted in the police garage.
17. Police officers were required to hand in all identification, handgun, ammunition, and all badges in their possession when suspended or terminated.
18. Ruiz failed to surrender his personal badge that had the designation of Chief of Perth Amboy Police, even though not being requested to do so.
19. Ruiz showed an employee of a 7-11 Store his police badge, holding himself out as a detective working on a case. When arrested, Ruiz had the police badge in his pocket.

LEGAL DISCUSSION AND CONCLUSION

An appeal to the Civil Service Commission requires the Office of Administrative Law to conduct a de novo hearing and to determine appellant's guilt or innocence as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). The burden of persuasion is on the agency in enforcement proceedings to prove violations of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The agency must prove its case by a preponderance of the credible evidence, which is the standard in proceedings before an administrative agency. Atkinson v. Parsekian, 37 N.J. 143 (1962). The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958).

There is no constitutional or statutory right to a government job. State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his duties, or gives other just cause, may be subject to major discipline. N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The burden of persuasion is on the agency in enforcement proceedings to prove violation(s) of administrative regulations. Cumberland Farms, 218 N.J. Super. at 341. The appointing agency must prove its case by the preponderance of the credible evidence.

Atkinson, 37 N.J. 143. Preponderance may be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses. Lewis, 67 N.J. 47. The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein, 26 N.J. 263. The Civil Service Commission has held that a police officer is held to a higher standard of duty than that of other public employees. In re Kines, 2013 N.J. CSC LEXIS 507 (July 31, 2013). A police officer is a special kind of public employee whose primary duty is to enforce and uphold the law. Ibid. A police 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. Ibid.

The Merit System Board and its predecessor and now successor, the Civil Service Commission (CSC), and the courts have generally held that law enforcement officers are held to a higher standard than other public employees. Police officers are law enforcement officers to which this higher standard applies. "It must be recognized that a police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. . . . He 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. . . ." Moorestown Twp. v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965).

Further, that the criminal charges against the appellant were ultimately dismissed does not operate to preclude the appointing authority from seeking to remove him on disciplinary charges (e.g., conduct unbecoming a public employee) premised upon the conduct underlying the offenses. Sabia v. City of Elizabeth, 132 N.J. Super. 6, 12 (App. Div. 1975). Rather, the quantum of proof required to sustain a disciplinary infraction is markedly different than that necessary for a criminal conviction. In re Phillips, 117 N.J. 567, 574-75 (1990). In a disciplinary action "it is necessary to establish the truth of the charges only by a preponderance of the evidence . . . while in a quasi-criminal or criminal proceeding, the proofs must establish guilt beyond a reasonable doubt." Id. at 575; see In re Darcy, 114 N.J. Super. 454, 458-59 (App. Div. 1971). Thus, while "a final judgment of conviction is essential to a finding of guilt based on a departmental disciplinary charge of having violated the criminal law" the converse of that principle does not apply. Phillips, 117 N.J. at 575.

As the Appellate Division stated in Sabia:

Where the conduct of a public employee which forms the basis of disciplinary proceedings may also constitute a violation of the criminal law, . . . the absence of a conviction, whether by reason of non-prosecution or even acquittal, bars neither prosecution nor finding of guilt for misconduct in office in the disciplinary proceedings.

[Sabia, 132 N.J. Super. at 12.]

The City's charges against the appellant were based upon the conduct of the appellant's underlying criminal charges. The Middlesex County Prosecutor's Office charged appellant with theft in the third degree, which resulted in the disciplinary action on December 15, 2014. Appellant was subsequently found not guilty of this charge. Additional criminal charges were filed against appellant of Stalking, in violation of N.J.S.A. 2C:12-10; Impersonating a Police Officer, in violation of N.J.S.A. 2C:29-1; and Defiant Trespass, in violation of N.J.S.A. 2C:18-3. These charges were also dismissed when appellant was found not guilty in August 2018.

I **CONCLUDE** that though the criminal charges did not result in a conviction or a forfeiture of his employment, that did not exclude the City from pursuing disciplinary action against him premised upon his underlying conduct in the criminal charges.

The evidence presented concerning appellant's misappropriation of municipal resources for his personal use and benefit, specifically using taxpayer money to order parts for his personal motorcycle and the use of municipal facilities and personnel to repair and store his personal vehicles, were sufficient to establish that appellant misused public property and materials. Montalvo credibly testified that appellant directed him to have his personal vehicle towed to, and left in, the municipal police garage. Video footage taken by Mechanic Velez displayed appellant's Mustang on a lift being worked on by Garcia. Although appellant stated that he never asked for the work to be done on his vehicles (Mustang and motorcycle) at any time, nevertheless, he never instructed the mechanics not to work on his vehicles. The Mustang remained in

the police garage for five days before being removed. In his failure to do so, he received the benefits of their labor.

Moreover, based upon the credible testimony of Montalvo and Garcia appellant ordered parts for his motorcycle at the City's expense, and not until months later attempted to reimburse the City in the amount of \$768.

Therefore, based upon the credible testimony of the City's witnesses and the evidence presented, I **CONCLUDE** that the charge of misuse of public property has been sustained.

The facts adduced, and the evidence presented concerning appellant's behavior regarding the 7-11 incidents was sufficient to establish the charges of insubordination, conduct unbecoming of an employee, and other sufficient cause.

Unbecoming conduct is broadly defined as any conduct that adversely affects the morale or efficiency of the governmental unit or that has a tendency to destroy public respect and confidence in the delivery of governmental services. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). Conduct unbecoming need not be predicated on violations of the employer's rules or policies but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Karins v. City of Atlantic City, 152 N.J. 532, 555 (1998). Appellant's unauthorized use of personnel and police property at the expense of taxpayers as well as holding himself out as a police officer while suspended and without authority to have a chief of police badge in his possession, deviates from the "implicit standard of good behavior" expected from a public employee.

Insubordination is defined as intentional disobedience or refusal to accept a reasonable order, assaulting or resisting authority; and disrespect or use of insulting or abusive language to supervisor. Black's Law Dictionary 870 (9th ed. 2009) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines

insubordination as “not submissive to authority; disobedient.” Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation. Similarly, case law generally interprets the term to mean the refusal to obey an order of a supervisor. See e.g. Belleville v. Coppla, 187 N.J. Super. 147 (App. Div. 1982); Millan v. Morris View, 177 N.J. Super. 620 (App. Div. 1981); Rivell v. Civil Service Comm’n, 115 N.J. Super. 64 (App. Div. 1971), certif. denied, 59 N.J. 269 (1971). According to Webster’s II New College Dictionary (1995) “insubordination” refers to acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Stanziale v. County of Monmouth Bd. of Health and Merit Sys. Bd., 350 N.J. Super. 414 (App. Div. 2002), certif. denied, 174 N.J. 361 (2002).

I **CONCLUDE** respondent has demonstrated by the preponderance of the legally competent, credible evidence that appellant committed acts of insubordination and conduct unbecoming a public employee for the reasons set forth above.

Appellant was also charged with neglect of duty, violating N.J.A.C. 4A:2-2.3(a)(7). Neglect of duty can arise from an omission to perform a duty or failure to perform or discharge a duty and includes official misconduct or misdoing, as well as negligence. Steinel v. City of Jersey City, 7 N.J.A.R. 91, 95, modified on other grounds, 7 N.J.A.R. 100, modified on other grounds, 193 N.J. Super. 629 (App. Div. 1984), aff’d, 99 N.J. 1 (1985). Generally, the term neglect connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977).

I **CONCLUDE** that respondent has not met its burden of proving, by a preponderance of the credible evidence, the charge of neglect of duty. There is no evidence presented that proves appellant failed to perform his job duties.

Appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause. Other sufficient cause is generally defined in the charges against appellant as all other offenses caused and derived because of all other charges against him. Other sufficient cause is an offense for conduct that violates the implicit standards of good behavior which devolve upon one who stands in the public eye as an upholder

of that which is morally and legally correct. Therefore, I also **CONCLUDE** that the respondent has met its burden of proof on this charge.

Therefore, based on the testimony of the City's witnesses, as well as credible evidence and applicable law, I **CONCLUDE** that the charges of conduct unbecoming of an employee, insubordination and other sufficient cause, and the charges pertaining to violations of the Department's policies have been sustained.

DISCIPLINARY ACTION

The only remaining issue concerns the penalty that should be imposed. The seriousness of appellant's infractions must be balanced in the equation of whether removal or something less is appropriate under the circumstances. Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980). The New Jersey Supreme Court has recognized that the principle of progressive or incremental discipline is not a "fixed and immutable rule" that must be applied in every disciplinary setting. In re Herrmann, 192 N.J. 19, 33 (2007); In re Carter, 191 N.J. 474, 484 (2007). Rather, "some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." Carter, 191 N.J. at 484. Progressive discipline is not a necessary consideration "when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest." Herrmann, 192 N.J. at 33. In matters involving police officers, the courts have found the penalty of dismissal appropriate for "infractions that went to the heart of the officer's ability to be trusted to function appropriately in his position." Id. at 36; see Cosme v. E. Newark Twp. Comm., 304 N.J. Super. 191, 206 (App. Div. 1997), cert. denied, 156 N.J. 381 (1998). In addition, "[a]cts that subvert good order and discipline in the police department" have been deemed to constitute conduct so unbecoming a police officer as to warrant dismissal. Herrmann, 192 N.J. at 35.

Against this backdrop, the seriousness of appellant's actions warrant removal. Further, there is no question that an administrative action for removal of a civil service employee from his position is independent of any criminal prosecution that may be

based upon the same facts, acts, or commissions. Sabia v. City of Elizabeth, 132 N.J. Super. 6, 12 (App. Div. 1974); Darcy, 114 N.J. Super. 454; In re Pennica, 36 N.J. 401 (1962); City of Asbury Park v. Dep't of Civil Ser., 17 N.J. 419, 429 (1955). Even the appellant's acquittal in a criminal case does not prevent disciplinary charges from being leveled and prosecuted against him for the same conduct. Fletcher v. Newark, 143 N.J. Super. 210, 218 (Law Div. 1976); Borough of Park Ridge v. Salimone, 36 N.J. Super. 485 (App. Div. 1955); Darcy, 114 N.J. Super. 454; Twp. of E. Hanover v. Cuva, 156 N.J. Super. 159 (1978). The type and scope of infractions is a critical consideration in this case. Appellant argues that termination is a "draconian" penalty considering his "unblemished" disciplinary record during his thirty years of service. However, appellant's disposition to be misleading is detrimental to the mission and function of the Department. The effective, efficient, and safe operation of a police force requires the mutual trust, confidence, and support between its officers and the community. Once an officer's credibility is compromised, any police actions taken by him are subject to question.

I therefore, **CONCLUDE** that the serious nature of appellant's infractions warrants his removal. I further **CONCLUDE** that removal is plainly the appropriate discipline when his infractions are considered against the high standard to which police officers are held.

ORDER

Based upon the foregoing, it is **ORDERED** that the appeal filed by appellant be and is hereby **DISMISSED WITH PREJUDICE**.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, 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.

May 22, 2019
DATE

Joann Lasala Candido
JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

May 22, 2019

Date Mailed to Parties:

May 22, 2019

APPENDIX

WITNESSES

For Appellant:

Robert O'Buck
Miguel Pellot
Lourdes Ruiz
Benjamin Ruiz

For Respondent:

Jill Goldy
Gregory Fehrenbach
Lawrence Cattano
Roman McKeon
Anthony Montalvo
Miguel Garcia
Angel Velez
Phil Terranova
Carl Graham, Jr.

EXHIBITS

Joint:

- J-1 Preliminary Notice of Disciplinary Action dated December 15, 2014
- J-2 Final Notice of Disciplinary Action dated June 2, 2016
- J-3 Final Notice of Disciplinary Action dated August 29, 2018
- J-4 Preliminary Notice of Disciplinary Action dated December 23, 2014

For Appellant:

- P-1 Chief Cattano statement dated December 3, 2014
- P-2 Trial transcript dated August 31, 2016

For Respondent:

- R-1 City of Perth Amboy Purchase Order dated March 13, 2014
- R-2 City of Perth Amboy Purchase Order dated March 13, 2014
- R-3 Appellant check to City in the amount of \$768
- R-4 City of Perth Amboy Personnel Policy Manual
- R-5 Establishment of Police Department
- R-6 Photo of Mustang on lift in police garage
- R-7 Snapshot of video frame of vehicle
- R-8 Video of vehicle in police garage (missing)
- R-9 Perth Amboy Police Department Policy and Procedures
- R-10 Perth Amboy Police Department Rules and Regulations
- R-11 Perth Amboy Police Department Policy and Procedures Internal Affairs
- R-12 Law Enforcement Code of Ethics
- R-13 Acknowledgment of receipt of Police Manual by appellant
- R-14 Additional Badge Request
- R-15 Badge Order Form
- R-16 Video of 7-11 surveillance
- R-17 Statement of Angel Velez dated October 15, 2014
- R-18 snapshots of video of 7-11
- R-19 Statement of Benjamin Ruiz dated August 4, 2014
- R-20 Photo of Chief of Police badge

