A-3

STATE OF NEW JERSEY

In the Matter of Lyndon Johnson
City of Long Branch,
Department of Public Safety

CSC DKT. NO. 2012-3624
OAL DKT. NO. CSV 09884-12

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 19, 2017 BW

The appeal of Lyndon Johnson, Police Lieutenant, City of Long Branch, Department of Public Safety, 120 working day suspension, on charges, was heard by Administrative Law Judge Dean J. Buono, who rendered his initial decision on August 23, 2017. 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, at its meeting on October 18, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

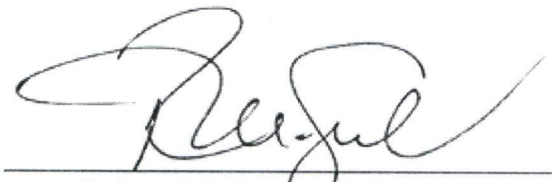
ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Lyndon Johnson.

Re: Lyndon Johnson

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
OCTOBER 18, 2017



Robert M. Czech, Chairperson
Civil Service Commission

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and
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 09884-12
AGENCY REF. NO. 2012-3624

IN THE MATTER OF LYNDON JOHNSON,
CITY OF LONG BRANCH DEPARTMENT
OF PUBLIC SAFETY.

Stuart J. Alterman, Esq., for appellant, Lyndon Johnson (Alterman and Associates, LLC, attorneys)

James L. Plosia, Jr., Esq., for respondent City of Long Branch Department of Public Safety (Plosia and Cohen Law Firm, attorneys)

Record Closed: July 10, 2017 Decided: August 23, 2017

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

The City of Long Branch (respondent) suspended Lieutenant Lyndon Johnson (appellant or Johnson) for 120 days. The discipline stemmed from an alleged violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee. Specifically, respondent alleges that, "On two separate occasions, Johnson threatened and made inappropriate comments to Long Branch police dispatchers under his direct command and supervision." Appellant denies the charge.

PROCEDURAL HISTORY

On May 31, 2012, respondent prepared and served appellant with a Preliminary Notice of Disciplinary Action charging appellant with a violation of N.J.A.C. 4A:2-2.5(a)(1) and including the specification set forth above. A departmental hearing was waived and, thus, a Final Notice of Disciplinary Action was issued on July 6, 2012, sustaining the charge and a 120-day suspension. An appeal was filed timely and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case on July 23, 2012, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Hearings were held on April 13, 2015, and May 19, 2015, and were conducted by the Honorable John Schuster, ALJ[1]. On the first day of hearing, it was acknowledged that the Notices of Disciplinary Action identified N.J.A.C. 4A:2-2.5(a)(1) as the charge against appellant. Since that regulation concerns disciplinary procedures and not causes for discipline, an oral application was granted to amend the Notices to set forth N.J.A.C. 4A:2-2.3(a)(6) as the charged offense. After the hearing, the parties requested an opportunity to submit closing summations and, upon the last received, the record closed on February 12, 2016.

On March 31, 2017, Judge Schuster retired before writing the decision. On April 21, 2017, the OAL sent correspondence to all parties notifying them of the retirement and requesting a telephone conference. A telephone conference was held on April 25, 2017, with the parties and the OAL assignment judge to discuss how the parties wished to proceed. This matter was reassigned to the undersigned on May 1, 2017. A telephone conference was held on May 8, 2017, wherein I requested that the record be reopened for submission of documents that were missing from the OAL file. The parties graciously agreed and submitted the requested documents. The record closed on July 10, 2017.

[1] Respondent brought four separate disciplinary actions against appellant. This was the first case to be heard.

FACTUAL DISCUSSION

Dispatcher Sergio Chaparro

Sergio Chaparro (Chaparro) is currently employed with the Long Branch Police Department as a police officer. He became a police officer in January 2015, but prior to that time he worked as a dispatcher for the Long Branch Police Department. April 13, 2015 ("Tr.1",10.) Chaparro explained that he knew Johnson before he began working for Long Branch because Johnson "knows my family." (Tr.1, 14:12.) Chaparro also went to high school with Lyndon Johnson, Jr. (Tr.1, 14:15.)

Chaparro testified that he spoke to his father and brother, one retired and one a current Long Branch police officer, about statements that Johnson made to him. (Tr.1, 45:19–21.) On January 19, 2012, and January 20, 2012, Chaparro gave statements to the Long Branch Internal Affairs Division regarding the contact he had with Lyndon Johnson, Jr., and a matter concerning a stolen handgun. (Tr.1, 46:12–15.) Chaparro also testified that Johnson had not spoken to him about his son's stolen gun incident until April 5, 2012. (Tr.1, 46:16–19.)

In Chaparro's statement at the Monmouth County Prosecutor's Office, he said that on April 5, 2012, Johnson came into the dispatch area where Chaparro was working. At approximately 3:00 a.m., Chaparro and Johnson were alone in the dispatch area. Appellant opened the conversation by saying, "let me ask you a question, bro, is this the part where you act all buddy, buddy with me and joke around to my face and as soon as I turn my back you try to fuck me?" He continued, "I'm under the impression that the second I ask you to do something you run to the 'back' . . . and tell them what I ask you to do, and you can ask your dad[2] . . . that's not the way we run things around here. The way I run things is I am man-to-man, where if I have a problem I'll address you directly." The conversation continued for the next ten to fifteen minutes, but it was not disclosed what was discussed in that period. Then appellant said, "If I have to I will secure the TV . . . as well as the internet and cell phones. Is that what you want me to

[2] Dispatcher Chaparro's father had recently retired as a Long Branch police officer.

do?" (R-8.) Chaparro understood that Johnson was alleging that Chaparro had stabbed him in the back by giving the Internal Affairs statement. (Tr.1, 58:11–16.) The witness testified that he "didn't know how . . . to take" Johnson's statements. (Tr.1, 59:13.) Chaparro also testified that having the TV on or using cell phones during work can be a distraction, and there are times when shift commanders direct that they be turned off.

Chaparro further testified that he understood Johnson's comments to be threatening and to be intended to make the dispatchers' environment "a little bit of a[n] uncomfortable environment where we have to just pretty much sit there in silence, no TV and no cell phone." (Tr.1, 63:12–14.) The judge asked why somebody would do that, and the witness replied, "Retaliation." (Tr.1, 63:17.) Chaparro commented that the only reason for any retaliation was his statement in the "Junior" Internal Affairs investigation. (Tr.1, 63:20–25.)

Dispatcher Hope White

Hope White (White) has been employed as a dispatcher in Long Branch since 1999. (Tr.1, 106:17.) She has known Johnson since before she began working for Long Branch, and he has been her watch commander for several years. (Tr.1, 107.)

Sometime after 3:00 a.m. on March 8, 2012, Johnson came into the dispatch area where dispatchers White and Chaparro were working and said, "I know you were all called in the back." (Tr., May 19, 2015 ("Tr.2"), 32:5–7, 39:22–23.) White explained that, "when you are called in the back and you give a statement you are not supposed to talk about it. There is like a gag order." (Tr.2, 32:7–10.) White explained that Johnson did not say "you are not supposed to talk about it"; other officers told her that after she was questioned. (Tr.2, 32:11–19.) After Johnson said to White and Chaparro, "I know you were called in the back," he told White, "they are going after my kid." (Tr.2, 32:20–24.)

White testified that Johnson then said, "well things are going to get bad around here," and "we are not going to have TV, you are not going to be allowed to be on the internet, you are not going to be allowed to be on your cell phone." (Tr.2, 33:3–7.) Neither White nor Chaparro responded to Johnson's statement. White went home and wrote down the incident in her journal. She said, "I was really upset that he came in and did that." (Tr.2, 33:18–23.)

White identified Exhibit (R-11), which was a copy of her journal. (Tr.2, 34:3.) She noted Johnson's comments in her journal because, "I was just like furious, you know I was like livid." (Tr.2, 34:7–8.) The March 8, 2012, entry in her journal reads:

> Came into dispatch, when everyone was gone but me and Sergio. They are trying to go after my kid. He asked if we were pulled, called in the back. We both looked down and said yep. I said what I remembered. He said I know there is a gag order but things are going to get bad around here. He has to know every little thing we do, every little thing and that he, wait, every little thing . . . [t]hat we do. He threatened to keep the TV off and no internet and that things were going to get bad around here and [he] was probably being watched and taped. I told Sergio the next day that I couldn't sleep. We needed to speak to Shea. He said, "let's see what happens," and I said, "okay." I told Susan [one of White's senior partners] I think we were threatened but I am not sure.
>
> [Tr.2, 40:4–19.]

White explained that she felt that Johnson's comments were unjustified or offensive, because she does her job. I **FIND** that Dispatcher White was taken aback or alarmed by appellant's comments, but not threatened.

White testified that the dispatchers have no right or entitlement to watch TV, use the internet for private purposes, or use cell phones while on duty. However, the practice has been that the dispatchers use them when they are not busy with police business. Johnson never told her she could not watch TV or use the internet or her cell

phone. Also, he never asked her about anything concerning the interviews she gave to Internal Affairs, nor did he ever specifically threaten her well-being.

Dispatcher Chaparro was not called to testify about appellant's remarks of March 8, 2012.

FINDINGS OF FACT

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he int erest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province 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.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

The testimony of respondent's witnesses was especially credible and persuasive. Their testimony was clear and concise. It was obvious that they had concerns regarding their contact with Johnson and had no axe to grind. In fact, it was apparent from the testimony that they simply wanted to do their jobs.

Conversely, Johnson did not testify. I cannot and will not make an adverse inference based upon that choice. However, I find the testimony from White and

Chaparro about Johnson's comments to be clear.

Based upon the documents in evidence and the credible testimony, I **FIND** that on two separate occasions Johnson made comments to Long Branch police dispatchers under his direct command and supervision about an incident involving his son and a stolen gun. I **FURTHER FIND** that those same comments were made to dispatchers after Johnson had been under investigation by the Long Branch Police Department Internal Affairs Division. I **FURTHER FIND** that Johnson knew that dispatchers White and Chaparro were witnesses to the Internal Affairs investigation and gave statements to authorities.

CONCLUSIONS OF LAW

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil-service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 11A:1-2(a). A civil-service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline, including removal. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a).

This matter involves a major disciplinary action brought by the respondent appointing authority against the appellant. An appeal to the Civil Service Commission requires the OAL to conduct a hearing de novo to determine the appellant's guilt or innocence, as well as the appropriate penalty if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). Respondent has the burden of proof and must establish by a fair preponderance of the credible evidence that appellant was

guilty of the charges. Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is found to preponderate if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962). Evidence is also said to preponderate "if it establishes 'the reasonable probability of fact.'" Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). 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).

Here, respondent charges appellant with conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Suspension or removal may be justified where the misconduct occurred while the employee was off duty. Emmons, supra, 63 N.J. Super. at 140.

It is difficult to imagine a more basic example of conduct that could adversely affect the morale or efficiency of a governmental unit or destroy public respect in the delivery of governmental services than the image of a public employee exercising his

authority to intimidate and control subordinate employees for possible personal gain. To allow or ignore this behavior cloaked in the façade of a watch commander having authority to shut off the TV and restrict personal internet and cell-phone usage would be to ignore common sense and the provision of a safe work environment for the dispatchers.

Johnson claims that since Chaparro was unsure if he was threatened, it is conclusory that the charge should not be sustained. However, the fact that Chaparro was unsure if he was threatened is not conclusory to the outcome. Also, Johnson claims that White was unsure of being threatened and simply had an emotional reaction to his comments. A review of her remarks in live testimony and those given in a statement at the Monmouth County Prosecutor's Office reveals that she was clearly offended by his remarks. She believed she was a good employee and did her job faithfully. She was offended by the possibility of losing their common practice of TV, phone, and internet usage on their down time, through no fault of her own. Johnson's comment that he was going to make things "bad around here" was clearly made in an attempt to threaten and affect the behavior of the dispatchers.

Johnson makes the following arguments in support of his position that no threat was made. A watch commander has the authority to shut off the TV and restrict personal internet and cell-phone use at any time. Therefore, saying he would do it cannot be a threat. Also, he claims that a threat requires an intent to inflict harm or loss on another or another's property. I find those arguments to be unpersuasive, conclusory, and, as stated, absent common sense. Again, his comments can only be perceived as attempting to affect the behavior of the dispatchers.

Respondent's theory that appellant's comments were an attempt to scare the dispatchers from cooperating with an Internal Affairs investigation is logically supported by the credible evidence.

CONCLUSION

I **CONCLUDE** that respondent has met its burden of proof by demonstrating that appellant's actions were objectively threatening. I further **CONCLUDE** that for the reasons set forth herein, respondent has proven by a preponderance of the evidence that appellant acted in a manner that constituted unbecoming conduct by a public employee.

PENALTY

Where appropriate, concepts of progressive discipline involving penalties of increasing severity are used in imposing a penalty and in determining the reasonableness of a penalty. West New York v. Bock, 38 N.J. 500, 523–24. Factors determining the degree of discipline include the employee's prior disciplinary record and the gravity of the instant misconduct.

However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate regardless of an individual's disciplinary history. See Henry v. Rahway State Prison, 81 N.J. 571 (1980). It is settled that the theory 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).

Here, appellant has no prior disciplinary history. However, considering the nature of appellant's job duties, and the nature of his conduct in attempting to intimidate dispatchers under his command based on their cooperation with an Internal Affairs investigation, I **CONCLUDE** that the respondent's action suspending appellant for 120 days without pay was justified.

ORDER

I **ORDER** that appellant's appeal is **DENIED** and that the charges against Johnson are **SUSTAINED**. I **FURTHER ORDER** that respondent's imposition of a 120-day suspension without pay is **AFFIRMED**.

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

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

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

August 23, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 8/23/17

Date Mailed to Parties: 8.23.17

/vj

APPENDIX

WITNESSES

For appellant:

None

For respondent:

Sergio Chaparro

Hope White

EXHIBITS

For appellant:

None

For respondent:

R-1 Not admitted

R-2 Not admitted

R-3 Not admitted

R-4 Long Branch Police Department work schedule, January 16, 2012

R-5 CAD entries, January 16, 2012

R-6 Transcript of telephone conversation of Hope White, January 16, 2012

R-7 Not admitted

R-8 Statement of Sergio Chaparro, dated April 12, 2012

R-9 Statement of Hope White, dated April 4, 2012

R-10 Not admitted

R-11 Handwritten journal of Hope White