A-5

STATE OF NEW JERSEY

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

CSC DKT. NO. 2014-375
OAL DKT. NO. CSR 13474-13

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, removal effective August 8, 2013, 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 removing 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. CSR 13474-13
AGENCY REF. NO. N/A

IN THE MATTER OF LYNDON JOHNSON, CITY OF LONG BRANCH

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

James L. Plosia, Jr., Esq., for respondent, City of Long Branch (Plosia & Cohen, LLC, 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) removed Lieutenant Lyndon Johnson (appellant, Johnson or Lt. Johnson) as a Police Officer employed by the City. Respondent argues that he violated: N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(3) Inability to Perform Duties; 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 and N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause. Specifically, respondent alleges appellant Johnson knowingly and purposefully approved a report in which he and his

son were listed as victims and aware that it contained false information. Appellant contends he acted appropriately and did not violate any regulation, rule, policy or procedure.

PROCEDURAL HISTORY

On December 10, 2012, respondent prepared and served appellant with a Preliminary Notice of Disciplinary Action because of his actions on January 16, 2012, while serving as Watch Commander on the 11:00p.m. – 7:00a.m. shift. A local hearing was not requested by the appellant and a Final Notice of Disciplinary Action was issued on August 8, 2013, sustaining the charges and removing him from service on that date. An appeal was filed timely and the matter was simultaneously filed with the Civil Service Commission and the Office of Administrative Law (OAL) as a contested case on September 13, 2013 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 February 13, 2015, February 24, 2015, March 24, 2015, April 7, 2015, April 13, 2015, May 19, 2015 and August 24, 2015. After post hearing briefs were received, the record closed on December 23, 2015.

On March 31, 2017, the originally assigned Judge (Shuster) retired from the bench. On April 21, 2017, the OAL sent a 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 Assignment Administrative Law Judge Delanoy to discuss how the parties wished to proceed. This matter was re-assigned to the undersigned on May 1, 2017. A telephone conference was held on May 8, 2017, wherein the court requested that the record be re-opened so that the court may acquire all the closing submissions and documents that were missing from the record at OAL. The parties graciously agreed and submitted the requested records. The record closed on July 10, 2017.

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

TESTIMONY

For Respondent

Lieutenant Thomas Shea

Lt. Shea (Shea), was the Internal Affairs Officer that investigated Johnson concerning theft of his son, Lyndon Johnson, Jr.'s (Junior) gun. He testified that the incident occurred on January 16, 2012 (TR22:21) and he became aware of it that morning when he reported to work. (TR24:16). Evidently, the handgun that Junior claimed was stolen from him was located at the Monmouth County Prosecutor's Office as evidence in a homicide case. (TR25:23).

Shea began his investigation by pulling reports, such as the CAD entries (Computer Automated Dispatch). The CAD documents how the call comes in to the department and to whom it is assigned. (TR28:1). On January 16, 2012, a CAD entry for the incident was made at 3:46 a.m. (TR30:13). Shea described that the CAD entry initiated by Dispatcher Hope White (TR31:4) displayed Johnson's address because he was the owner of the car from which the gun was stolen. (TR32:6). The CAD entry indicated that a backpack and a loaded Glock 9 mm was stolen from Johnson's car. (TR34:15).

Lt. Shea then testified about (R-10), which documented a "TRAX" message regarding this incident. (TR35:15). A TRAX message is a report of a serious crime that is broadcast to the surrounding agencies to notify them. (TR35:24). The TRAX message is R-11 (TR38:24) and includes a statement that the Glock was "loaded" when it was stolen from Johnson's car. (TR38-39). Lt. Shea testified that Dispatcher Sergio Chaparro typed the TRAX message. (TR40:19). Lt. Shea explained that, even though the CAD and TRAX message both indicated the gun was loaded, Junior gave a report to Officer Brown that the gun was not loaded. (TR41). Officer Brown's report, also

indicated that the Glock had a trigger lock attached that was locked and a ten-round ammunition magazine in the backpack. The gun was not loaded. (TR43:1).

The vehicle from which the backpack was stolen was owned by Lt. Johnson (TR43:16) and that the weapon was registered through the Long Branch Police Department to Junior. (TR45:8). Lt. Shea testified that: "you're not allowed to carry a loaded handgun unless you're a police officer." (TR48:16). Shea further testified that you are not permitted to carry the weapon on your person unless you have a carry permit, (TR50:20), and Junior did not have one. (TR51:1). Any person who owns a firearm and who does not have a carry permit must transport the firearm in a case in the trunk of the car, unloaded, and the ammunition must be separated from the firearm. (TR51:4). Junior did not indicate that the firearm was located in the trunk when it was stolen. (TR51:10). In fact, he indicated that the weapon in the backseat of his father's car in a backpack, and, although he claimed it was not loaded, there was ammunition in the same backpack. (TR51:12). Any handgun owner who does not properly secure the handgun when transporting it is subject to a third-degree criminal offense for being in possession of a handgun. (TR52). In his report, Officer Brown noted that Junior told him that no ammunition had been taken with the backpack. (TR54:7). Also, Lt. Johnson was present when Officer Brown interviewed Junior (TR55:13) and Junior told Officer Brown that the gun was in the car because he was going to a shooting range the next day. (TR64:24).

Based on the results of his investigation, he contacted the Monmouth County Prosecutor's Office because "this something [he had] to do." (TR71:5). Lt. Shea called Lt. Mayo from the Prosecutor's Office and Mayo told Shea that under these facts it did not appear to justify criminal action against Lt. Johnson, only administrative charges. (TR71:9).

Lt. Shea identified (R-27), a witness statement Junior gave to Detective Verdadeiro and Sgt. Pallone on January 17, 2012. (TR75:10). That statement was the same as had been given to Officer Brown the prior night. (TR75:22). (R-16) is Detective Verdadeiro's report. (TR76).

Lt. Shea explained that there are audio recordings of some of the events that night, including the Watch Commander's telephone conversation and the dispatch calls. (TR78-79). (R-12), was identified as a transcript of Dispatcher White advising a neighboring jurisdiction of the stolen gun. (TR79L:19).

Shea testified that his investigation on the issue of whether the firearm was loaded or unloaded revealed that Lt. Johnson told Officer Bell that the gun was loaded. (TR85:9). As part of his investigation, Lt. Shea reviewed: (R-19), the statement of Dispatcher Sergio Chaparro, (TR86:19) (R-20) the supplemental statement of Dispatcher Chaparro, (TR87:2), and (R-21) the statement of Dispatcher Hope White. (TR87:6). After these statements had been taken, Lt. Shea had another conversation with Lt. Mayo at the Monmouth County Prosecutor's office, and sent the written statements to Lt. Mayo. Thereafter the case was reviewed by Assistant Prosecutor Schweers. (TR87:12). On January 27, 2012, Schweers sent a letter to the Long Branch Police Director of Public Safety Alphonse Muolo stating that "[t]here is insufficient evidence to support any allegation of criminal wrongdoing against Lyndon B. Johnson pertaining to this matter", and referring this case back to the City for administrative review and action if appropriate. (R-3). (TR87:25).

The witness then identified (R-13), the initial report by Police Officer Brown which was signed by Lt. Johnson. (TR88:6). The report did not specify if the gun was loaded or that there was ammunition in the backpack. (TR88-89). However, Junior told Brown that there was a magazine in the backpack, but that the magazine was not loaded with any ammunition. (R-14). Officer Brown wrote a memo to Lt. Shea dated January 18, 2012, that summarized his involvement in the "Junior" incident. (TR89).

There was a telephone conversation between Officer Bell and Lt. Johnson at 3:43 am where Johnson told Bell that the gun was loaded. (TR98:21). That conversation took place approximately six minutes after the conversation between Junior and his father. (TR98:25). Lt. Shea's investigation did not reveal whether, as of 3:43 a.m., Lt. Johnson had any knowledge of whether the stolen gun was loaded or not. (TR99:16); (TR100:3).

Lt. Shea confirmed that Dispatcher White conveyed to the dispatchers in neighboring towns that a loaded gun had been stolen out of Lt. Johnson's car. (TR101:20). She got the information about the gun being loaded from Lt. Johnson. (TR101:25). Sometime later, Lt. Shea confirmed that Junior told Officer Brown that the weapon was unloaded. (TR102-103). Having this information, Brown noticed the TRAX message and NCIC form both indicated that the gun was loaded, so he spoke to Lt. Johnson about this issue. (TR103). Lt. Shea testified that the discrepancy is critical because "if it's unloaded and loaded, it's the difference between charging him and not charging him, the son. If he's carrying a loaded handgun in the car, you would charge him with the possession of a weapon." (TR104:21). Lt. Shea clarified that a weapon that is locked with a trigger lock cannot be loaded with ammunition (TR107:23) and further explained that if Junior "were stopped by an officer and he had a loaded handgun in the car, he would be charged with a third-degree offense for possession of a firearm, because he doesn't have a permit to carry in the passenger compartment of the car." (TR108:22). If Junior was carrying an unloaded weapon in the car but it was not appropriately stored, that is not a criminal offense, but he could be reported to the State Police for inappropriate carrying with a possibility of revocation of license. (TR109:14).

When asked about what he would do as a Watch Commander if he had been working on February 12, he indicated that while Junior was a victim of burglary, "they would also be charged with carrying that handgun. If they made an admission they had a loaded handgun in their car, they'd be charged with [unlawful] possession of a weapon." (TR116:17). Interestingly, Lt. Shea was asked a hypothetical question that if his son was the person who had made the complaint about the stolen handgun while he was the Watch Commander, Lt. Shea testified that "I would immediately remove myself from the case as the Watch Commander [because] [t]here's a direct conflict. It's my son. I can't perform an official duty where it directly involves me and my family." (TR124:16). Although, Lt. Shea could not point to any policy that stated that principle, he testified that it was just "common sense". (TR125:2). In fact, one of the reasons Lt. Shea filed disciplinary charges against Lt. Johnson is that he continued to be involved in the case after he learned that his son had his weapon stolen. (TR125:17).

Lt. Shea confirmed that he had never heard of a situation where a Dispatcher in Long Branch issued information to other law enforcement agencies (or on an official police document) about whether a weapon was loaded without that information having been conveyed to them by a Watch Commander or police officer. (TR125:25). Lt. Shea also said he never had any issues with the credibility of either Hope White or Sergio Chaparro.

When confronted by Officer Brown about the "loaded vs. unloaded" discrepancy, Lt. Johnson told Brown that "we found out later on it's unloaded, and we'll correct it. We'll update [the TRAX]." (TR134:4). However, nothing was ever updated by Lt. Johnson or anyone else. (TR134:17; 19).

Lt. Shea was asked what if any "equipment" Junior would take to the shooting range besides the weapon and he testified that you take goggles and hearing protection (TR135:13) however, Junior did not claim any of this equipment was stolen from his car that night. (TR138:8).

The witness then identified Exhibit (R-5), which was a Watch Commander's report completed by Lt. Johnson for the shift in question. (TR139). No "matter of record" was noted on the form, although Lt. Shea testified that a claim of the theft of a weapon (loaded or not) from a car owned by the Watch Commander's son would have been important enough to notify the Patrol Commander. Exhibit (R-5). (TR140:6).

Lt. Shea identified (R-12), a transcript of the telephone call that Hope White made to the West Long Branch Police Department and (R-31), a DVD recording of that call from dispatch on that night. (TR6). He confirmed that Lt. Johnson told Hope White the gun was loaded. (TR8-9).

Next was R-30, a DVD of the transcript of Lt. Johnson's Internal Affairs statement. (TR9:16). When asked where he obtained the information that the gun was loaded, Lt. Johnson stated that "I assume it was my son". (TR12:12). Lt. Shea did not

have an explanation where Lt. Johnson could have obtained information other than from Junior. (TR12:20).

Officer Brown learned from Junior that the gun was not loaded before he started typing his report at 4:04 a.m. (TR15:16; 19). Referring to his report (R-17), Lt. Shea confirmed that when Officer Brown arrived at the station to interview Junior, Junior was already present and standing at Lt. Johnson's desk. (TR22:15). Lt. Johnson did not change the TRAX message, NCIC information, or have the Dispatcher call the local Police Departments back to inform them that the gun was unloaded even after learning from Brown that Junior claimed the gun was unloaded. (TR23-24); (TR26:19).

Lt. Shea confirmed that, "[i]f Junior had told his father he was carrying a loaded handgun in the cabin of his car, he can be charged with possession of a weapon under the statute." (TR80:19) because Junior did not have a license to carry a handgun. (TR81:1). Interestingly, Lt. Shea noted that, twenty minutes after Junior told his father that he had had a loaded weapon in his car, he told Officer Brown that the gun was unloaded with a trigger lock on it. (TR81:19). Lt. Shea confirmed that Johnson should not have been involved in any way in the investigation of the theft of his son's weapon, because it was an obvious conflict, in addition to the fact that there were possible criminal charges against his son. TR84-85.

Lt. Shea testified that he would treat a suspect differently if he had been informed that the suspect was in possession of a stolen weapon which had been loaded, as opposed to the weapon being unloaded. (TR88:16). The witness explained the obvious reason for this difference: "[b]ecause if it's loaded, it can likely kill me if he fires it at me. If it's unloaded, it's not going to kill me – it's a piece of metal". (TR88:18). Lt. Shea's likelihood of using his own weapon in a street confrontation would be different based upon whether the gun was loaded or not. (TR89:1). Lt. Shea explained that, under Long Branch Police Department policy, a police officer "can use deadly force if you have an imminent belief that your life is in danger." (TR91:16).

Lt. Shea confirmed that the fact that a false report was issued at Lt. Johnson's direction is itself misconduct regardless of the potential significance of the false or misleading information. (TR97:15).

Lt. Shea testified concerning the use of Junior's weapon in a subsequent murder. (TR111-112). Lt. Shea explained that the weapon which had been stolen from Junior in Asbury Park was eventually recovered after it had been used in a fatal shooting. The shooter brought it to the Asbury Park Police Department and told them that "[t]his is a Long Branch Officer's gun, I used it to shoot somebody...." (TR120:18).

Anthony O'Blines, was arrested by the Long Branch Police Department and told Officer Yoo that he had information about how the weapon had actually been taken from Junior. (TR5:12). Lt. Shea interviewed O'Blines, but was not allowed to take a formal statement because the Monmouth County Prosecutor's Office did not permit it. (TR5:17). O'Blines told Shea that the gun was taken from Junior in Asbury Park and he was also robbed of money. (TR5:23). A few weeks after the interview, Lt. Shea learned that the weapon was used in a homicide. (TR6:7). This conclusion was subsequently confirmed by gun ownership records. (TR6:23). The original gun owner was Lyndon Johnson, Jr. (TR7:1).

Shea explained Exhibit (R-17), his Internal Affairs Report, and went through the events of the night in chronological order:

1. At 3:37 a.m., Junior calls his dad, and tells him that the gun had been taken from his car. (TR9:11).
2. At 3:43 a.m., Police Officer Bell called into Headquarters and asked if the gun was loaded. Lt. Johnson Senior stated, "yes." (TR9:21).
3. At 3:46 a.m., Dispatcher White, entered the CAD entry that the gun was loaded. (TR9:23; TR10:1).
4. At 3:48 a.m. on a dispatch line Hope White began calling other surrounding towns in the County to notify them that the gun had been stolen and was

loaded. Lt. Johnson was heard in the background yelling someone, asking what was in the backpack. (TR10:3).

5. At 3:50 a.m., White called Ocean Township Police Department, informing them that a gun had been stolen and that it was loaded. (TR10:22).

6. At 3:51 a.m., White called Deal Police Department and Asbury Park Police Department. Johnson is heard in the background yelling at his son. (TR10:24). During one of these phone calls, Johnson is heard yelling: "[h]ow are you going to explain to someone who is going to hire you? How are you going to explain that?" (TR11:3). At that time, Junior was seeking a career in law enforcement, including seeking employment as a Police Officer in the City of Long Branch.

7. At 3:57 a.m., White, again on a taped dispatch line speaking with Monmouth County Dispatch telling them the gun was loaded. TR11:20.

8. At 4:04 a.m., Officer Brown began typing his report concerning the interview with Junior. (TR12:2). Shea later learned that Brown spoke to Lt. Johnson about whether the gun was loaded or not. Brown had heard the information being broadcast that the gun was loaded, but Junior told them the gun was not loaded. (TR12:6). As evidenced by Exhibit (R-14), Brown's conversation with Junior occurred around 3:45 a.m. In response to whether the gun was loaded or not, Lt. Johnson told Brown that TRAX message was wrong and that it was going to be corrected. (TR13:1). Lt. Shea testified, however, that the message was never corrected. (TR13:6). Dispatcher White sends an NCIC report that the firearm was loaded. TR13:9.

9. At 4:19 a.m., White sent the TRAX message that the gun was loaded after the Brown/Johnson conversation Shea had just testified about earlier. (TR13:14).

10. At 4:21 a.m., Brown informed Shamrock that the stolen weapon was unloaded based on Junior's statement. (TR13:22-TR14:6).

Based on this information, some of the Police Officers on patrol thought the weapon was loaded but Shamrock believed it was unloaded. (TR15-16). When asked why this is significant, Lt. Shea testified:

> Because it's a discrepancy of reported facts and also there's a loaded handgun on the street that's tied to a Long Branch

> Police Officer who was a Watch Commander and listed [as] a victim in the report and his son was listed [as] a victim in the report. So, discrepancies could lend one to believe that --that they're not telling the truth. TR17:5.

This was confirmed by Junior after the O'Blines statement, when Junior eventually told Chaparro and Palone the truth about what had happened. (TR17:16).

Shea further testified that it was inappropriate for Lt. Johnson to be involved in his son's case because Lt. Johnson was the owner of the car where the weapon had allegedly been stolen. (TR19). Lt. Shea testified that "[i]t's common sense that you don't get involved in cases that involve your family." (TR19:19). Lt. Shea stated that "I have never seen an officer correct a report in which they themselves are listed as the victim." (TR20:11). It was also inappropriate for Johnson to have approved a report done by Brown which involved Johnson's son and the theft of a gun from Johnson's vehicle. (TR26).

Interestingly, Lt. Shea explained that the vehicle was a crime scene. (TR27:25). As such, the car should have been secured, and the Detective Bureau called out and dusted the vehicle for fingerprints, which the Long Branch Police Department on most car burglaries. (TR28:3). That night however, the crime scene was contaminated because Junior drove the car to Headquarters at his father's direction. (TR29:14; 16; 21). In addition to taking fingerprints, Police Officers could have searched the area and looked for footprints or any other kind of physical evidence. (TR30). However, because the car was driven to Headquarters and because Johnson never called the Detective Bureau out, no such investigation ever took place. (TR31).

Sergent Jeffrey Palone

Palone testified that he has been employed by the Long Branch Police Department for twenty years. (TR8:19). He had previously worked as a corrections officer in the Monmouth County Sheriff's Department. (TR9:9). Palone was promoted to Sergeant in 2005 and since 2010, he has been head of the Detective Bureau. (TR10:6).

He testified that even though the Detective Bureau was not called the night of this incident (TR14:14), Junior provided information that his gun had been stolen from his father's car. (TR15:13). During the January 17th interview, Junior did not state that any of the equipment a person would be expected to possess and bring to a shooting range was reported to be in the car or stolen. (TR17). Palone thought that this was "very strange." (TR17:25).

Junior told the Detectives the magazine stolen from his car was empty. (TR21:13). Palone reiterated that if you are going to leave a weapon in a car it should be in the trunk simply because it is more secure and "least accessible". (TR22:13). "For an incident like this", the Detective bureau would have responded to a call involving a theft of a weapon from "one of our guys... or their son's". (TR26:5). "There is no normal theft of a gun." (TR26:15). "I think at that moment, anytime a gun is stolen out of a house or a vehicle, detectives should be called, forensics should be set up, at least give it a try. . .". (TR27:11). As a Supervisor "I would want to send somebody out". (TR27:18). The theft of Junior's gun should have been handled by a Detective. (TR28:19). Palone testified that Lt. Johnson "should have removed himself from that. .

.". (TR30:17). Palone stated that it would be "wrong for me to be involved" in a case in which his child was making a complaint of having had a weapon stolen. (TR35:2).

Junior's "veracity" was in question after he told the Detectives his story. (TR 38:21). In fact, "at one point, I had a hard time believing his story." (TR 39:9). "Taking the gun in the middle of the night out of his house, a secure area, and putting it--wrapping it in a towel or--or an article of clothing and putting it in the backseat of a car didn't make any sense to me." (TR39:22). Also, the absence of any equipment – headphones, magazines, ammunition, cleaning kit – did not make any sense. (TR40:3). "I don't know what he takes to the gun range." (TR40:5). Junior's story "just didn't sound right". (TR40:8). Also, he gleaned from Junior's body language during the interview, that "I didn't believe he was being honest with me." (TR40:25).

Sgt. Palone eventually learned that Junior's story was not true when Anthony O'Blonze was arrested. (TR41:7). O'Blonze was a "frequent flier" and told Lt. Ray Chaparro "a different version of things that happened" than Junior told the Long Branch Police Department. (TR42:9). O'Blines had a personal relationship with Lt. Johnson's ex-wife (Junior's mother), and knew Junior as well. (TR44). O'Blines told Chaparro that, in fact, Junior had the handgun stolen from him in Asbury Park that night. (TR46).

As a result, on July 27, 2012, Junior was re-interviewed and a videotape of that recording was introduced into evidence in Exhibit (R-52:7). Present during the interview was Junior's attorney. (TR58-59). Sgt. Palone explained that the stolen weapon had eventually turned up, when a person walked into the Freehold Police Department and handed over a gun saying "I just used this gun to kill someone". (TR60:17). That was the same gun stolen from Junior.

On cross-examination, Palone acknowledged that even though there are no rules and regulations in the Long Branch Police Department prohibiting police officers from being involved in investigating their own family members, it is simply a matter of "common sense". You should not be involved in a criminal investigation involving your family. (TR62:3).

Officer Marshall Brown

Brown has been employed by the Long Branch Police Department for thirteen years and is currently serving as a Detective. (TR64:13). In January of 2012, Brown was a Patrol Officer working the overnight shift, 11:00 p.m. to 7:00 a.m. (TR66:4).

He was working patrol and driving his patrol car when he received a call at 3:46 a.m. from Lt. Johnson requesting him to come to Headquarters to investigate a burglary and theft relating to a motor vehicle. (TR68:17).

When he got to the Police Department, he met with Junior and took a report from him regarding the stolen gun. (TR69:2). Before taking the statement, Lt. Johnson advised him that a vehicle had been broken into and items had been stolen. (TR69:24). Brown testified, that the vehicle from which the theft had occurred was registered to Lt. Lyndon Johnson and the report was ultimately approved in writing by Lt. Johnson. (TR71:7).

Officer Brown's report is (R-14). (TR72:17). Junior told him that the weapon was not loaded with a trigger lock (TR74:1) and that there was also one ten round magazine in the backpack but the magazine had no ammunition. (TR74:6). Junior told Brown that the handgun and magazine were in his car in preparation to go to the shooting range the next day. (TR78).

Officer Brown testified that, when transporting a weapon, a gun owner is required to do it in a safe manner – "either in a lockbox or in the trunk of his vehicle." (TR79:11).

Junior had not done so in this case. (TR79:15). When asked, who would have decided whether to charge Junior criminally for his failure to properly secure the weapon, Brown stated that it would have been either a Sergeant or Lt. Johnson who was working that night. (TR80:13). Also, if a criminal complaint was issued it would have been approved by the Watch Commander, who was again Lt. Johnson. (TR80:17).

After taking the statement and going back on the road that night, Brown looked at the TRAX message, which indicated that the weapon was loaded. (TR83-84). Brown then "asked Lt. Johnson whether the gun was in fact loaded, because the information I had received from Lyndon Jr. was that the gun was not loaded." (TR84:14). Officer Brown testified that Johnson replied that "the gun was not loaded and that the TRAX message that was put out was done so in error, and that it was going to be later changed." (TR84:19). However, the TRAX message was never changed. (TR84:23).

Officer Brown testified that he was not aware of any Police Department Rules and Regulations which would prohibit police officers from being involved in a criminal matter involving a family member. (TR87:4). He has had a handful of situations in which a relative was involved, and he would have someone else take the report so that he would not be involved. (TR87:12). Johnson did not include any other Supervisor in the case nor did he call the Detective Bureau and eventually approved Brown's report. (TR88:14-21).

Officer Sergio Chaparro

Chaparro is employed as a Police Officer for the City of Long Branch. At the time of the deposition he had been an officer for four months. (TR10:25). At the time of this incident, he worked as a Dispatcher for the Long Branch Police Department for three or four years. (TR11:11). Chaparro worked the midnight shift, and his Watch Commander was Lt. Johnson. (TR12:1).

On January 16, 2012, he recalled that, Junior called the dispatch line and asked to speak with his father. (TR15:13). Junior sounded a little "panicked" in his

conversation, so Chaparro asked him if anything was the matter. Junior replied that someone had broken into his car. (TR16:4). Chaparro started to generate a CAD. (TR16:15) then transferred the call to Lt. Johnson. Shortly thereafter, Junior came to Headquarters. (TR17:8). Chaparro was able to overhear some of the conversation that Junior had with his father, and recalled that his father was "very, very angry and just was scolding his son". (TR18:16). "How could you be so stupid you left the gun in the car? What were you doing with the gun?" (TR19:12). Chaparro recalled Lt. Johnson asking his son if the gun was loaded but did not recall hearing Junior's answer. (TR19-20).

In the Internal Affairs statement (R-19), he recalled Lt. Johnson "venting and pacing" in the dispatch area, stating in a loud voice: "How could you be so stupid, why would you have a loaded gun in your car?" (TR21-22). Based upon this statement, Chaparro concluded that the stolen gun had been loaded with ammunition. (TR22:13). Chaparro recalls that Lt. Johnson told the Dispatchers "[h]ave everybody on the road call Headquarters or a 10-2." (TR23:6). A "call in for a 10-2" is ordered by the Watch Commander if there is something "sensitive you don't want to put out over the radio for anybody to have scanners." (TR24:10).

The TRAX message (R-10 and R-11) that was issued at Lt. Johnson's direction contained a picture of the Glock that had been stolen but the picture was taken off the internet. (TR28). Pursuant to departmental procedure, Chaparro gave Lt. Johnson the TRAX message for review and Johnson told him to include a better picture of the Glock. Then Chaparro asked Johnson if he wanted anything changed and Lt. Johnson replied: "No, it's okay, it's good." (TR30:21).

As Chaparro was creating the TRAX message, Officer Brown came in the station typed his report on the burglary of the vehicle. (TR31:24). Chaparro believes that he sent the TRAX message before Brown finished typing his report. (TR32:23). At no point after Chaparro sent out the TRAX (R-11) was he asked to amend it. (TR33:16). Chaparro recalls some conversation that night about whether the stolen gun had in fact been loaded or unloaded. (TR34:4). Chaparro recalls that he and Dispatcher White

both asked Lt. Johnson whether the gun was loaded or unloaded. (TR34:10). Junior was standing in the area when this question was asked. Upon hearing the question, Lt. Johnson turned to Junior and asked if the gun was loaded; Junior didn't really answer, and Johnson reiterated the question: "Was the fucking gun loaded?" (TR34:20). Chaparro looked over at Junior, who picked up his head and responded yes to the question. (TR34:25).

On cross-examination, Chaparro reiterated that he heard "with his own ears" Junior say to Lt. Johnson that the gun was loaded. (TR36:19).

Dispatcher Hope White

White has been a Dispatcher with the Long Branch Police Department since November 1, 1999. (TR106). She has known Lt. Johnson before that date, when she was an EMT. She worked on the midnight shift, with Lt. Johnson as her Watch Commander, for more than four years. (TR107).

When asked about the events of January 16, 2012 she explained that the original call from Junior came into dispatch and Chaparro took the call. (TR111:11_. She sat six or eight feet from Chaparro so she could hear Chaparro's side of the conversation, but not the party on the other end. (TR11:20). Her first involvement came when Lt. Johnson told her and Chaparro to call other local law enforcement agencies to inform them that his son's vehicle was broken into and that "a gym bag was stolen with a loaded gun." (TR112:14). As White began to call various departments, she was asked by other dispatchers if the gun was loaded; so, she asked Lt. Johnson if the gun was loaded, and he replied, "yes". (TR114:1).

Lt. Johnson was standing behind her when she made these calls (TR114:8) before Junior ever got to headquarters. (TR114:14). White continued conveying that the gun was loaded (TR114) and began preparing the NCIC entry and TRAX message. (TR114:11). White testified that she was the one who created the NCIC message. (TR115:2).

White recalled that Officer Brown said to Johnson that his son claimed the gun was unloaded. (TR123). Once the information about the gun being loaded was changed the entries and TRAX message should have been modified "if that was the truth". (TR128:15). If the statement about the gun being loaded was not the truth, then the entry should have stayed the same. (TR129:1). She explained that there is a great deal of difference between issuing various messages about a stolen gun having been loaded as compared to unloaded. (TR129-130). White specifically testified that "We don't enter every gun that is loaded. . .[e]very gun is not entered as a loaded gun." (TR130:12-15). At no time was she ever directed by Lt. Johnson to change the information. (TR135:6).

For Appellant

Lieutenant Lyndon Johnson

Lt. Johnson testified that, on January 16, 2012, Dispatcher Chaparro transferred a call from his son and he could tell something was wrong by the tone of his son's voice. (TR5). According to Lt. Johnson, Junior told him that he "fucked up" and that his gun was stolen out of his car. (TR6:1). Lt. Johnson testified that he got "very limited basic information surrounding the events" and told him to get to the station immediately. (TR6:10). Thereafter, Lt. Johnson had the Dispatchers call "all surrounding towns" to convey the information. (TR6:23).

Lt. Johnson had Officer Brown come to Headquarters to interview Junior, and "I turn my son over to him. . .". (TR7:4). Lt. Johnson said that he told Chaparro to start a TRAX message and to get it out to all the other towns as to what had occurred. (TR7:8).

He recalled going "going back and forth" with the Dispatchers about the details of the case (TR7:12) and he was not "concerned" "whether the gun was loaded, unloaded, trigger locked, un-trigger locked". "I was concerned that there was a loaded possible gun out in the street and that someone could be the victim of a shooting." (TR7:17).

At some point, Officer Brown came to him with his report, and Lt. Johnson approved it, sending it along to the Detective Bureau. (TR8:1). "[A]t that point, I didn't care. I was just concerned with trying to locate this gun." (TR8:6). His first concern was the gun, and that, as a Long Branch Police Department Watch Commander, "[m]y second responsibility was to my son. I thought about his career, his future career. I thought about how this could possibly, you know, be devastating to his career." TR13:10.

Lt. Johnson testified that, as far as he was concerned, ". . . a handgun. . . is always considered loaded." (TR14:19). "I would treat a stolen gun if I was making a report or any officer, I would like to believe that he would think to treat the gun as if it were loaded, because I wasn't there when it was taken, so I don't know its condition. For the safety of the public and all parties involved, you treat it as loaded." (TR16:1). Lt. Johnson then testified that he had "no idea" if the gun was loaded or unloaded (TR17:8) despite speaking to his son. But they did discuss whether or not the trigger lock was on it. (TR19-20).

Lt. Johnson admitted that there was discussion between he, Brown and Chaparro whether the gun was loaded. (TR21:17). Lt. Johnson testified that, because his son told him the car had been unlocked, there was no evidentiary value to checking for fingerprints on the car, because there was no forced entry. (TR24:1). But, if a police officer working that night suggested they dust the car, Lt. Johnson would not have stopped them. (TR24:16).

Brown's report was factually accurate (TR29:25) and he conceded that he was the victim of a theft, because he owned the car. (TR31:23).

On cross-examination, Lt. Johnson did not recall if his son told him the gun was loaded. (TR55:8). When confronted with the fact that the dispatchers heard the conversation, Johnson replied: "[i]t could have been true." (TR55:16). He had no facts to indicate that the conversation had not taken place (TR55:24) and agreed that the only way he would have known if it was loaded was if his son had told him. (TR57:23).

When asked why he conveyed to White and Chaparro that the gun was loaded he testified "[b]ecause it was a stolen gun." (TR64:3).

Johnson agreed that if his son had told him that the gun was loaded he should have been charged criminally (TR64:10) for an improperly stored gun in a car, even if the gun was unloaded. (TR72:2 4). He stated that the ammo and the gun would have to be properly stored together (TR72:12) and insisted that his son storing an unloaded weapon in a backpack could meet the requirement of the statute, which states "securely tied package". (TR75-76).

Lt. Johnson acknowledged that if his son had told him the gun was loaded and he later approved a report that said the gun was unloaded, he would have been approving a false report. (TR110:19). Lt. Johnson acknowledged that he did not fix the TRAX message, and felt no need. (TR113:7-11). There was no need because he could not rely on what Brown had told him. (TR113-115).

Lt. Johnson was confronted with the fact that his son said that he had stored his firearm and equipment for the shooting range in his car, (TR133:25), yet the equipment was not reported in his backpack in the car. (TR134:8); 11. Lt. Johnson said that his son had his own ear and eye protection for shooting his weapon. (TR138:16).

When shown (R-5), in which he reported as Watch Commander that there were no major incidents on his shift, (TR140:21), he did not consider the theft of a handgun to be a "major incident". (TR140:25). He also agreed that it was a mistake to approve Brown's report. (TR141:25). Johnson agreed that the teletype message he authorized went out at 4:19 a.m., which was forty-two minutes after the first call from his son. (TR143). The time was later corrected to 4:09 a.m., meaning there was a thirty-one-minute difference. (TR145-146). The TRAX message was sent out at 4:19 a.m., which is forty-two minutes after the initial call from Junior to his father. (TR148:22). Lt. Johnson agreed that Officer Brown spoke to him after he saw the TRAX message. (TR149:1) but did not speak to Brown about what Junior had told Brown. Certainly, not before he conveyed information to the Dispatchers about the contents of the telex

message. (TR149:22). Lt. Johnson also agreed that he never told Chaparro or White to change the information in the telex message or the TRAX message. (TR150:12). Johnson agreed that Brown's report was completed at 4:09 a.m. (TR152:11). In his opinion, it did not make any difference in terms of what his son said about the gun being unloaded (TR154:12) and believed his son's story. (TR157:10). The weapon was later used as a weapon in a murder. (TR158:8).

Lt. Johnson agreed that the Detective Bureau are experts in dusting for fingerprints (TR170:9) and did not call the Detective Bureau because "I felt that there was no evidential value to be retrieved." (TR171:17). Lt. Johnson immediately removed any conflict of interest when he "pushed enter on the computer." (TR171:25).

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 interest, 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: Lieutenant Thomas Shea, Sergeant Jeffery Palone, Officer Marshall Brown, Officer Sergio Chaparro and Dispatcher Hope White were especially credible and persuasive. Even from simply reading the transcripts, their testimony was clear and concise. It was obvious that they had concerns regarding their interaction with Lt. Johnson and his actions respecting his son. It was also clear from reading the testimony they had no axe to grind. In fact, it was apparent from the testimony that they simply wanted to do their jobs.

Conversely, Johnson's testimony was not credible. His own testimony appeared to support the respondent's arguments and assisted them in proving the facts of the case by a preponderance of the evidence. He admitted to being involved in the incident with his son and discussing the matter with him despite Junior possibly being subject to criminal prosecution.

Lt. Johnson approved the TRAX message that the gun was loaded and said, at that time, "I was concerned that there was a loaded possible gun out in the street and that someone could be the victim of a shooting." (TR7:17). Despite him failing to recall that while in the station, he asked Junior if the gun was loaded; Junior didn't really answer, and Johnson reiterated asking: "Was the fucking gun loaded?" (TR34:20). Chaparro testified that he looked at Junior, who picked up his head and responded, "yes" to the question. (TR34:25). This interaction was all witnessed by Chaparro. Clearly, Lt. Johnson knew early-on that the gun was loaded. Admittedly, "[m]y second responsibility was to my son. I thought about his career, his future career. I thought about how this could possibly, you know, be devastating to his career." (TR13:10). Then, Junior told Brown that the weapon was in a backpack in the backseat of his father's car and it was not loaded but there was ammunition in the same backpack. (TR51:12). Knowing this, the chronology of events surrounding this case provide clarity as to what Lt. Johnson knew or should have known.

- At 3:37 a.m., Junior called Lt. Johnson, and told him that his gun had been stolen. (TR9:11).

- At 3:43 a.m., Lt. Johnson told Bell the gun was loaded. (TR9:20).
- At 3:46 a.m., Dispatcher White, acting under the direction of Lt. Johnson, entered the CAD entry that the gun was loaded. (TR9:23; TR10:1).
- At 3:48 a.m., Hope White called surrounding towns notifying the gun was stolen and loaded. (TR10:3).
- At 3:50 a.m., White called Ocean Township Police Department, informing them that a gun had been stolen and it was loaded. (TR10:22).
- At 3:51 a.m., White called Deal Asbury Park Police informing them that a gun had been stolen and it was loaded. Johnson is heard in the background yelling at his son. (TR10:24). Johnson is heard yelling at his son: "[h]ow are you going to explain to someone who is going to hire you? How are you going to explain that?" (TR11:3).
- At 3:45 a.m., Brown interviews Junior who says the gun is not loaded.
- At 3:57 a.m., White, told Monmouth County that the gun was loaded. (TR11:20).
- At 4:04 a.m., Brown spoke to Lt. Johnson about whether the gun was loaded and heard information being broadcast that the gun was loaded. (TR12:6). As evidenced by Exhibit (R-14), Lt. Johnson told Brown that TRAX message was wrong and that it was going to be corrected. (TR13:1). Also, Dispatcher White sent an NCIC report that the firearm was loaded. (TR13:9).
- At 4:19 a.m., White sent out a TRAX message stating that the gun was loaded. (TR13:14).
- At 4:21 a.m., Brown informed Shamrock that Junior told him the weapon was unloaded. (TR13:22).

The appellant argues that he was not aware of any conflicting information while issuing the TRAX report. However, that is not the case. In fact, as of 4:04 a.m., Lt. Johnson had information that the gun was unloaded from his own son and he did nothing to correct the TRAX information. Uncontested is the fact that the person with the best knowledge of whether the gun was loaded or not was Junior and he told Brown the gun was not loaded at 4:04 a.m. The fact that some officers thought the gun was loaded and some thought that it was unloaded is extremely troublesome. Lt. Johnson's

failure to act or permit an investigation by the detectives allowed incorrect information to be entered in TRAX thereby endangering the lives of countless officers and civilians. The fact that he "felt that there was no evidential value to be retrieved" (TR171:17) by notifying the detective bureau is extremely suspect and impeded an appropriate third party investigation on whether the gun was loaded.

Lt. Johnson believes that he used good judgment and did nothing wrong despite never correcting the TRAX message and not calling the detective bureau to properly investigate. (TR13:6). In fact, Lt. Johnson stated that he removed the conflict when he "pushed enter on the computer", this refers to approving Officer Brown's report. However, that is not supported by any fact in the record. I found those actions, at the time, to be a self-serving.

It was obvious that Johnson attempted to "sell" his version of the facts to the trier of fact. Particularly, his recitation and demonstration of the contact with the officers and his son was not credible. It was not realistic to believe a competent police officer would ignore the conflict in the case and remain involved in a case where he and his son were the victims of a crime, relay incorrect information to neighboring agencies about a stolen loaded firearm and not call the detective bureau to investigate. Again, the only explanation was self-preservation.

Based upon the documents in evidence and testimony I **FIND,** by a preponderance of credible evidence, that on January 16, 2012, Lt. Johnson and his son were the victims of a crime. I **FURTHER FIND,** on the same date, Lt. Johnson remained involved in the investigation, failed to contact the Detective Bureau and approved the report officer Brown took from Junior. I **FURTHER FIND,** Lt. Johnson knowingly and purposefully approved a report in which he and his son were listed as victims and knew that it contained false information.

LEGAL ANALYSIS AND 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. 1 1A: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. 1 1A: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 Merit System Board 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).

The respondent sustained charges of violations of N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(3) Inability to Perform Duties; 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 and N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause.

Initially, Lt. Johnson has been charged with a violation of N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties. Under N.J.A.C. 4A:2-2.3(a)(1), an employee may be subjected to major discipline for "incompetency, inefficiency, or failure to perform duties." Although progressive discipline is the general rule, sheer incompetency can be the grounds for firing without progressive discipline.

Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See, In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline).

"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). (Note: Gaines had a substantial prior disciplinary history, but the case is frequently quoted as a threshold statement of civil service law.)

"In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper remedy for a county treasurer who couldn't balance the books, after the auditors tried three times to show him how).

> In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that '[t]he [MSB's] application of progressive discipline in this context is misplaced and contrary to the public interest.' The court determined that Klusaritz's prior record is 'of no moment' because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the County.
>
> [In re Herrmann, 192 N.J. 19, 35-36 (2007) (citations omitted).]

There is no definition in the administrative code of the term "inefficiency," and therefore, it has been left to interpretation.

In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980).

The fundamental concept that one should be able to perform the duties of the position is stated in Briggs v. Department of Civil Service, 64 N.J. Super. 351, 356 (App. Div. 1960), which happens to be a probationary period case involving a nurse:

> Manifestly, the purpose of the probationary period is to further test a probationer's qualifications. Neither the Legislature nor the Commission has given the courts any guidance in determining the extent of assistance or orientation which a probationer must receive. Undoubtedly her duties must be explained to her and she must be given reasonable opportunity to perform the duties expected of her. But this does not mean she is entitled to on-the-job training in the manner of performing her duties. This is what she must be qualified for—the proper performance of her duties as outlined by the appointing authority.

Lt. Johnson and his son were the victims of a crime and yet he remained involved in the investigation by directing the taking of statements and not calling the Detective Bureau. He knowingly and purposefully approved a report in which he and his son were listed as victims and aware that it contained false information. Lt. Johnson allowed incorrect information to be disseminated to the surrounding departments that could have endangered the lives of officers and civilians. Accordingly, I **CONCLUDE** that the respondent has met its burden in demonstrating support to sustain a charge of Incompetency, Inefficiency, Failure to Perform Duties. Charges of violation of N.J.A.C. 4A:2-2.3(a)(1) are hereby **SUSTAINED**.

Respondent sustained charges of N.J.A.C. 4A:2-2.3(a)(3) Inability to Perform Duties. An employee must be able to physically, intellectually, and psychologically perform his or her duties. Where an employer brings a charge under N.J.A.C. 4A:2-

2.3(a)(3) it is challenging the employee's ability to perform the duties associated with the position, and is seeking to remove the employee or demote him or her to a different position, but is bringing a charge that is not, strictly speaking, disciplinary in nature. However, from the employee's point of view, the outcome may be just as severe as if it were a disciplinary charge. Obviously, the outcome of this type of charge will turn on medical or performance based evidence. None of that was presented here. I **CONCLUDE** that the respondent has not met its burden in demonstrating support to sustain a charge of N.J.A.C. 4A:2-2.3(a)(3) Inability to Perform Duties. The charge of violating of N.J.A.C. 4A:2-2.3(a)(3) is hereby **DISMISSED**.

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

It is difficult to contemplate a more basic example of conduct which could destroy public respect in the delivery of governmental services than the image of a police Lieutenant disseminating incorrect information about a stolen firearm. Also, knowingly and purposefully approving a report in which he and his son were listed as victims while being aware that it contained false information. I **CONCLUDE** that appellant's actions

constitute Unbecoming Conduct, and the charge of N.J.A.C. 4A:2-2.3(a)(6) is hereby **SUSTAINED**.

The respondent also sustained charges for a violation of N.J.A.C. 4A:2-2.3(a)(7) (Neglect of Duty). Neglect of Duty can arise from an omission or failure to perform a duty as well as negligence. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div 1977). "Duty" signifies conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957). Neglect of duty can arise from omission to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Although the term "neglect of duty" is not defined in the New Jersey Administrative Code, the charge has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title or was negligent in its discharge. Avanti v. Dep't of Military and Veterans Affairs, 97 N.J.A.R.2d (CSV) 564; Ruggiero v. Jackson Twp. Dep't of Law and Safety, 92 N.J.A.R.2d (CSV) 214.

Again, it is difficult to contemplate a more basic example of Neglect of Duty than the image of a police lieutenant, as articulated above. I **CONCLUDE** that appellant's actions constitute Neglect of Duty, and the charge of N.J.A.C. 4A:2-2.3(a)(7) is hereby **SUSTAINED**.

Finally, the charge of N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause was sustained against Lt. Johnson. The definition of which is amorphous terminology taken literally constitutes insufficient notice to appellant of the charge faced and is impossible to prepare to defend. As such, standing alone without any other specifically lesser included offenses, I **CONCLUDE** that the respondent has not met its burden in demonstrating support to sustain a charge of N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause. The charge of violating of N.J.A.C. 4A:2-2.3(a)(12) is hereby **DISMISSED**.

CONCLUSION

I **CONCLUDE** respondent has met its burden of proof by demonstrating that on January 16, 2012, Lt. Johnson and his son were the victims of a crime, while Lt. Johnson remained involved in the investigation he failed to contact the Detective Bureau and allowed false information to be disseminated to surrounding police departments regarding the gun being loaded. Lt. Johnson knowingly and purposefully approved a report in which he and his son were listed as victims knowing that it contained false information

I **FURTHER CONCLUDE** for the reasons set forth herein respondent has proven by a preponderance of the evidence that petitioner acted in a manner that constituted violations of N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties; 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 and those charges are **SUSTAINED**. Likewise, I **CONCLUDE** for the reasons set forth herein respondent has not proven by a preponderance of the evidence that petitioner acted in a manner that constituted violations of N.J.A.C. 4A:2-2.3(a)(3) Inability to Perform Duties and N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause and those charges are **DISMISSED**.

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, supra, 38 N.J. 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).

The record reflects that appellant has a prior disciplinary history. It is noted that a single charge of Incompetency, Inefficiency or Failure to Perform Duties by itself, can be sufficient grounds for termination in the absence of any other disciplinary history. Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline).

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>
> [In re Herrmann, 192 N.J. 19, 35-36 (2007) (citations omitted).]

Furthermore, police officers are held to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576–77 (1990). Both police officers and correction officers represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Here, the general principles of progressive disciplinary standards make clear that removal can be imposed. Given the high standard of conduct required, I **CONCLUDE** that the respondent has demonstrated that the removal is warranted.

The record in the above case coupled with commonsense reflects inexcusable Incompetency, Inefficiency, Failure to Perform Duties, Conduct Unbecoming and Neglect of Duty. Considering the record in the present matter including the appellant's disciplinary record, the nature of the job duties and the nature of the charges, I **CONCLUDE** that the respondent's action Terminating and Removing appellant was justified.

DECISION AND ORDER

I **ORDER** petitioner's appeal be **DENIED** and the charges levied against Lt. Johnson including Incompetency, Inefficiency, Failure to Perform Duties, Conduct Unbecoming and Neglect of Duty be **SUSTAINED**. I **FURTHER ORDER** respondent's imposition of removal is **AFFIRMED**.

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

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

recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

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

Lieutenant Lyndon Johnson

For Respondent:

Lieutenant Thomas Shea

Sergeant Jeffery Palone

Officer Marshall Brown

Officer Sergio Chaparro

Hope White

EXHIBITS

For Appellant:

None

For Respondent:

R-1	December 10, 2012, Preliminary Notice of Disciplinary Action
R-2	August 8, 2013, Final Notice of Disciplinary Action
R-3	January 27, 2012, letter from Assistant Prosecutor Gregory Schweers to Director Alphonse Muolo
R-4	February 22, 2012, letter from First Assistant Prosecutor Richard Incremona to Director Alphonse Muolo
R-5	January 16, 2012, memo from Lt. Johnson to Captain Peter Antonucci
R-6	January 16, 2012, CAD entry
R-7	January 16, 2012, NCIC Entry Form
R-8	January 16, 2012, message regarding stolen gun
R-9	Printout of "New Bulletin" summary
R-10	January 16, 2012, "TRAX" message

R-11	January 16, 2012, "stolen handgun" alert
R-12	January 16, 2012, transcription tape recording of conversation in Police Headquarters
R-13	January 16, 2012, "stolen gun" Incident Report
R-14	January 16, 2012, narrative of Patrol Marshall E. Brown
R-15	January 18, 2012, memo from Police Officer Brown to Lt. Shea
R-16	January 24, 2012, Narrative of Detective Michael Verdadeiro
R-17	August 29, 2012, Lt. Shea Investigative Report document regarding stolen gun
R-18	"Stolen Gun" documents
R-19	January 19, 2012, Statement of Sergio Chaparro
R-20	January 20, 2012, Supplemental Statement of Sergio Chaparro
R-21	January 20, 2012, Statement of Hope White
R-22	January 20, 2012, Statement of Marshall Brown
R-23	April 4, 2012, Statement of Richard O'Brien
R-24	February 26, 2012, memo from Lt. Shea to Lt. Johnson
R-25	March 7, 2012, letter from Stuart Alterman, Esq. to Lt. Shea
R-26	March 8, 2012, memo from Lt. Johnson to Lt. Shea
R-27	January 17, 2012, Statement of Lyndon Johnson Jr.
R-28	June 25, 2012, Arrest Report for Anthony O'Blines
R-29	August 2, 2012, letter from Gregory Schweers to Lt. Shea
R-30	August 30, 2012, videotaped statement of Lt. Lyndon Johnson
R-31	DVD recording of telephone conversations from January 16, 2012
R-32	November 26, 2013, Civil Service Commission Denial of Request for Interim Relief (seeking restraint of Johnson's suspension without pay)
R-33	"Trigger lock" pictures

R-34 "Cable lock" pictures

R-35 July 27, 2012, videotape recording of interview of Lyndon Johnson, Jr.