STATE OF NEW JERSEY

In the Matter of Gamaliel Cruz
City of Vineland Police Department

CSC DKT. NO. 2016-1020
OAL DKT. NO. CSR 17703-15
(ON REMAND CSR 8054-11)

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 21, 2018 BW

The appeal of Gamaliel Cruz, Police Officer, City of Vineland Police Department, removal effective May 22, 2012, on charges, was heard by Administrative Law Judge John S. Kennedy, who rendered his initial decision on August 20, 2018. 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 September 20, 2018, 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 Gamaliel Cruz.

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 20th DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré 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

OAL DKT. NO. CSR 17703-15

AGENCY DKT. NO. N/A 2014-1020

IN THE MATTER OF GAMALIEL CRUZ,
CITY OF VINELAND, POLICE DEPARTMENT.

Timothy C. Alexander, Esq., for appellant, Gamaliel Cruz (Jacobs & Barbone, P.A., attorneys)

Michael E. Benson, Esq., for respondent, City of Vineland Police Department (Buonadonna & Benson, P.C., attorneys)

Record Closed: July 6, 2018 Decided: August 20, 2018

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

City of Vineland Police Officer, Gamaliel Cruz, (appellant) appeals the decision of the City of Vineland Police Department (respondent, City) to remove him from employment effective March 14, 2011, in connection with charges that he had given false testimony to a Superior Court Judge on a telephonic application for a search warrant.

PROCEDURAL HISTORY

An Amended Preliminary Notice of Disciplinary Action, (PNDA) dated March 11, 2011, seeks the removal of appellant based on the following charges: N.J.A.C. 4A:2-2.3(a)1— Incompetency, Inefficiency, or Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)6— Conduct Unbecoming a Public Employee; N.J.A.C. 4A:2-2.3(a)3— Inability to Perform Duties; N.J.A.C. 4A:2-2.3(a)11— Other Sufficient Cause; Vineland Police Department (VPD) Rules & Regulations 4:1.4, Abide by all Rules, Regulations and Departmental Procedures; 4:1.7, Officers Will Conduct Themselvese in Accordance with high Ethical Standards; 4:9.2, Performance of Duty; 5:5.6, Truthfulness While Under Oath; 5:5.1, Duty of Employee to Appear and Testify.

After a departmental hearing, charges against appellant were sustained and incorporated into a Final Notice of Disciplinary Action (FNDA) 31-C with a proposed penalty of removal from employment. The appellant appealed his removal to the Civil Service Commission (CSC) and the matter was transmitted to the Office of Administrative Law (OAL), where it was received on June 4, 2012. N.J.S.A. 40A:14-202d. A first hearing was held before the Honorable Bruce M. Gorman, Administrative Law Judge (ALJ) under OAL Docket Number CSR 08054-12 and five hearing days were consumed with testimony. On May 21, 2014, an Amended FNDA was executed by then Vineland City Mayor Ruben Bermudez providing for dismissal of all charges against the appellant. On June 4, 2014, appellant withdrew the appeal and Judge Gorman entered an initial decision permitting the withdrawal pursuant to N.J.A.C. 1:1-19. By Judge Gorman's Order, the file was returned to the CSC. On July 11, 2014, appellant filed a Complaint in Superior Court seeking to enforce the Appointing Authority's dismissal of the charges pursuant to the May 21, 2014, Amended FNDA. On September 30, 2014, Vineland City Council filed a Complaint in Superior Court against Mayor Bermudez and appellant seeking the Court's declaration that the Mayor's dismissal of the charges was ultra vires. On August 28, 2015, the Superior Court entered an Order dismissing both lawsuits without prejudice and retaining jurisdiction to all and permitted the appellant to reopen his de novo appeal before the OAL. The CSC remanded the matter to the OAL where it was filed on November 4, 2015. Transcripts of

the five hearing dates conducted before Judge Gorman were submitted to the undersigned and considered so that the testimony would not have to be reproduced. Due to a defect in the transcript of the previous testimony of the City's witness, Special Agent Ronald Cuff of the Cumberland County Prosecutor's Office, Mr. Cuff's testimony was taken a second time before the undersigned. Additioanl hearings were conducted in this matter on March 5, 2018, March 6, 2018, and April 11, 2018. The parties filed post hearing briefs with the court and the record closed on July 6, 2018.

FACTUAL DISCUSSION

Appellant was employed as a Police Officer for approximately sixteen years. As of August 3, 2010, appellant was assigned to the Detective Division of the Vineland Police Department (VPD). He had previously worked on numerous drug related investigations utilizing information provided by a particular confidential informant named "Ryan Howard", a pseudonym ordered by the court for confidential reference in this case. Mr. Howard had communicated frequently with appellant by cell phone as well as in-person meetings, as needed. A "confidential informant" is aspecific classification of informant in a range that basically includes entirely anonymous "tipsters" who are, in fact, unknown, in any respect, to law enforcement; "tipsters" who identify themselves but otherwise have no relationship to law enforcement; and confidential informants who have a formal relationship with law enforcement by way of established use and experience, and may, as in the case of Ryan Howard, have been formally registered with an agency, such as the VPD. Mr. Howard was also a confidential informant for the U.S. Division of Alcohol, Tobacco, and Firearms (ATF). On August 3, 2010, appellant engaged in numerous phone contacts with Ryan Howard. Appellant denies knowing to whom he was speaking during any of those contacts.

As of August 3, 2010, Mr. Howard had been working with appellant as a confidential informant for the preceding six years and had almost daily phone contact with him. Howard, as of that date, had been using a cell phone, registered in the name of his mother, to communicate with appellant. That cell phone's number was (856) 776-XXXX. Appellant used a VPD issued cell, with phone number (856) 297-XXXX. On

August 3, 2010, Howard called appellant on three occasions in the afternoon. The first two calls were listed on the call detail for the CI's mother's phone (R-21 for 08/03/10), at 1:22 and 2:48 PM for one minute each. The third was at 3:27 PM for three minutes. That night at 8:54 PM, Ryan Howard called appellant's cell phone, and the call was listed as a two minute call. It was followed by a return call , listed as "Incoming Call, from appellant's phone at 8:57 PM for one minute and at 9:01 PM listed as a two minute call. At 9:10 PM, appellant called Howard, the call was listed as a two minute call and at 10:08 PM, appellant called Howard, and call was listed as a two minute call. At 10:17 PM Howard called appellant for four minutes and then for the last time on August 3, at 10:38 PM for three minutes. There were ten calls all together; six from Howard to appellant and four from appellant to Howard. Appellant, nevertheless, maintains that he did not know to whom he was speaking. In addition to being a long time confidential informant for appellant, he describes Howard as being a "testifying informant", and that he is someone who has been especially useful to him and law enforcement.

During the evening of August 3, 2010, at approximately 9:00 PM, Ryan Howard was visited at his home by three men in a Cadillac with Pennsylvania tags whom he understood to be members of a criminal gang. He observed that they were armed, in possession of drugs and planning a home invasion of a Vineland resident named H.L. Howard, using his mother's cell phone, called appellant on his department issued cell phone.

Ryan Howard was interviewed, under oath, by the Cumberland County Prosecutor's Agent Ron Cuff, on November 1, 2010, in connection with a criminal investigation into false swearing charges against appellant. He stated to Agent Cuff that the gang members called him on his cell phone to say that they were in Vineland to "... run in H.L.'s house" (Transcript of Hearing on February 18, 2014; 29/14-24.); i.e. to do a home invasion. They wanted Ryan Howard "to drive them out there." (Transcript of February 18, 2014; 30/14-24.) When asked by Agent Cuff what he told appellant on that date, Howard related that when the three gang members left his house"...I called Gami and I said... 'Yo, these guys from Philly they're down here to turn over H.L.'s

house,' and he said ' Where are they at?' And I gave him the description of the car." Cruz responded "All right. I'm going to go out now and see if I can find the car." Cruz later "... ended up finding the car... and ... wanted a little more than I was telling him." At that point, Howard gave more details concerning their descriptions, that the "fat guy" has a gun, where the gun was in the car, who was driving, who was in the back, who was the passenger, that one of them rolled a joint or a "dutch", that they were "very particular" about going over to H.L.'s house, and that one of them, named "Dink", was a high ranking member in the Crips gang. At that point Howard stated to Cuff, in reference to what Howard had been telling appellant: "I told him [Cruz] about that dude Dink is supposed to be a high ranking man in the Crips and I said whatever he [Cruz] does don't blow my cover and he said 'No, no, no, I ain't going to blow your cover.' Howard further stated that "I talk to him [Cruz] like every day...whenever he's working" and acknowledged being a confidential source for Cruz for three years. (Transcript of Hearing on February 18, 2014; 39, 40/1-25) According to affidavits given by both appellant's supervisor, Sergeant Paul Shadinger (Sgt. Shadinger) (R-33) and one of his co-officers, Gary Mollik (R-34), appellant reported to them, after taking the call, the nature of the call and specifically identified Ryan Howard as the caller and source of the information.

Upon informing Sgt. Shadinger of the call from Mr. Howard, appellant was advised by Sgt. Shadinger to issue a BOLO (Be on the look-out). Shortly afterwards, Officer Wallace reported seeing the subject Cadillac on Park Avenue and intercepted it at the driveway of XXX West Park Avenue. At that time, appellant pulled into the driveway of the adjacent property and made observations. Marijuana and handcuffs were found in the possession of two of the subjects, marijuana and latex gloves were observed in plain view, and the subjects were arrested, handcuffed and transported to VPD headquarters. Their vehicle was towed to headquarters where appellant made arrangements to make a telephonic search warrant application.

Appellant first contacted the on-call Assistant Prosecutor (AP), John Jesperson, for permission to make an application to a judge. He did not advise AP Jesperson that he knew his informant or request any advice concerning the nature of his earlier contact

with the informant. Upon making phone contact with Superior Court Judge Walter Marshall, and being placed under oath, appellant, in commencing his recitation of probable cause, stated "...I got a phone call from an anonymous subject...". Judge Marshall shortly after, during appellant's account, asked specifically "Alright uhh, the subject you said was anonymous, you did not know this person?" Appellant responded "Correct. Correct." (R-6.)

Appellant denies he definitively knew during any of the multiple calls of August 3, 2010, that he was speaking to Ryan Howard. He states he only thought it was Howard. It was not until the next day, August 4, 2010, in a follow-up call from Howard, that he claims he realized definitively it was Howard. Appellant executed a confirmatory affidavit (R-27e) for review and approval by the warrant judge and AP Jesperson after he made this realization. That affidavit referenced to appellant's source as "a subject who wished to remain anonymous." He also executed a Search Warrant Approval Form (R-16), with box number twelve (12) marked "NO" to the question whether the investigation involved a confidential informant or source. He also prepared a police report (R-27c) stating that his source was a "subject who wished to remain anonymous." Upon realizing that the caller was Ryan Howard, appellant did not correct the record or prepare a supplemental police report to reflect that his source was a known confidential informant.

AP David Branco, prepared an Inter-Office Correspondence of October 18, 2010, to Cumberland County Prosecutor, Jennifer Webb McRae (R-13) while in the midst of preparing a Pre-Indictment Referral Report Form (PIRRF) in connection with the charges against the suspects arrested on August 3, 2010. AP Branco had read a memorandum, dated August 24, 2010, (R- 29) prepared by AP Katie Wilson. It stated at the outset "This is a brand new case. Vineland Police (Gami Cruz) received info from an individual who wished to remain anonymous (possibly someone who knows Gami?)..." Ms. Wilson concluded her memo, noting "Also, we need to find out...whether caller is truly anonymous or known to Detective Cruz." In his interview with Special Agent Cuff, AP Branco explained the significance of the phrase "subject who wishes to remain anonymous" to someone in law enforcement:

> "When [Cruz] stated in his police report that he received a tip from a caller who wished to remain anonymous, that choice of words to me means something very different than I got an anonymous tip. (J-1 and P-5, p.8.)

Before completing his PIRFF, AP Branco spoke to appellant while he happened to be in the Prosecutor's Office. At the outset of that conversation, Branco asked appellant if he had known the "tipster" and he admitted that he knew the tipster and admitted that he had intentionally "... worded his affidavit as described herein to protect the identity of the caller."(R-13 p.2) Thus, Branco's assessment of the phrase "a person who wished to remain anonymous" was what appellant had used it to shield the identity of and protect his confidential informant.

Branco explained his concerns with the statement made by the appellant:

> "I also explained to him that this would have to be brought to the attention of the court as well as in the discoverable material to the defense attorney, should the case move forward. He understood the gravity of my concerns with the procedures that he had utilized. He also asked what else he could have done to protect the identity of the informant so as not to have fatal consequences visited upon him and still maintain the integrity of the case. Without getting into the specifics with him, I told him that there was a legal process that we may have been able to use. However, that option may now be closed to us because Sr. Trial Attorney John Jesperson, who had received the advice call on this search warrant, was unaware of the informant category. As such, he could not explore other options with the detective. I was very open to Det. Cruz and told him he was going to have to take his lumps on this when it came to court." (R-13, p.2.)

The County opened a criminal investigation on October 26, 2010. Special Agent Cuff interviewed AP David Branco on October 27, 2010. On Novemebr 1, 2010, Agent Cuff also interviewed appellant's confidential informant, Ryan Howard, who acknowledged his long history with appellant and the information he had given to him. Among other things, he stated that he told appellant "Don't blow my cover." He did not

interview appellant since his investigation was criminal in nature and not a disciplinary proceeding.

The County Prosecutor, on November 8, sent a letter to VPD Chief Codispoti (R-23) advising that the Prosecutor was declining prosecution of appellant for false swearing and any related charges arising out of the events of August 3, 2010. The letter specifically noted there was ". . . more than sufficient evidence to support criminal charges" but noted ". . . obtaining a conviction at trial could have catastrophic effect on the safety of other persons." The letter further stated "... this Office shall be required from this date forward to disclose Detective Cruz's integrity issue to the defense in all future criminal prosecutions. So please consider this when taking administrative action." (R-23, p.1.)

Upon receipt of the Prosecutor's declination letter, the City of Vineland Internall Affairs (IA) unit, headed by Leutenant Lene Bowers (Lt. Bowers) and Sergeant Andrew Catti (Sgt. Catti), re-opened its investigation of appellant's conduct. The City conducted an interview of appellant on November 12, 2010. During the interview, (see Interview Transcript as recorded during testimony of Sgt. Catti, Transcript of Hearing on April 23, 2014; 109-123) appellant acknowledges that he knew the caller was Ryan Howard when he took the call, even though Mr. Howard did not state his name:

> "DETECTIVE CRUZ: I got a call stating that there were three subjects in a red car with Pennsylvania tags... We towed the car back to the station and I just called in for a telephonic wanant based on that.
>
> SERGEANT CATTI: You did.
>
> DETECTNE CRUZ: I did. I did it myself, correct.
>
> SERGEANT CATTI: Okay. The information you received concerning this it was a confidential informant.
>
> DETECTNE CRUZ: Yes.
>
> SERGEANT CATTI: That you have dealt with in the past.
>
> DETECTIVE CRUZ: Yes.

SERGEANT CATTI: Okay. And you know his name, correct.

DETECTIVE CRUZ: Well, I know his name, correct.

SERGEANT CATTI: Okay. And then you went for the telephonic search warrant?

DETECTIVE CRUZ: Yes

(Transcript of Hearing on April 23, 2014; 112-13.)

Appellant then explains his reasons for stating the nature of his caller to the judge: "I went for the search warrant and my big-my big thing was when I was talking to the Judge even prior to even calling him up and so forth was protecting this informant, that was my main concern was protecting the informant." (Transcript of Hearing on April 23, 2014; 113/13-18) Appellant recalled the judge stated " 'You do not know who the subject was' or something like that and I said "Correct, correct,' and I went along with that." (Transcript of Hearing on April 23, 2014; 115/1-5) Appellant went on to note that although "obviously the guy never gave me his name but, you know, I had-you know, I dealt with him and I'm-... you know, familiar.." (Transcript of Hearing on April 23, 2014; 115/1-13) appellant stated in his IA interview that he had never been asked by a Superior Court Judge for a confidential informant's name, so it " ... caught me off guard."

Upon conclusion of the interview of appellant on November 12, 2010, a PNDA, dated November 12, 2010, and executed by Chief Tim Codispoti, was served on appellant, charging, among other things, violations of truthfulness standards and conduct unbecoming a public employee, and seeking a ninety-day suspension. While a hearing on the November 12, 2010, charges was pending, by letter, dated March 11, 2011, the Cumberland County Prosecutor's Office, through First AP, Harold Shapiro (see R-27i) advised Chief Codispoti that appellant's false testimony had led the Prosecutor's Office, as of March 8, 2011, to dismiss with prejudice eleven cases, involving twenty defendants. In thirteen instances, first or second degree charges had been dismissed, mostly involving appellant as the affiant on the respective search warrant applications. Following receipt of the March 11, 2011, letter from the

Prosecutor, the City prepared a new PNDA (R-27j), dated March 11, 2011, and served it on appellant on March 14, 2011. It stated additional charges related to the impact of the Prosecutor's decision to not proffer future testimony of appellant and sought removal of appellant.

During his testimony before this tribunal, appellant explained that on August 3, 2010, he was a Dectective of Narcotics with VPD. Ryan Howard had been a Confidential Informant with whom he had worked with for six years prior and spoke to him approximately three or four times each week. Ryan Howard called appellant on his VPD issued cell phone from a number he did not recognize. Appellant spoke to him three times on August 3, 2010, but asserts that he did not recognize his voice. Ryan Howard asked him not to "blow his cover" and appellant knew that Ryan Howard was one of just a few informants that would give him this type of information. Appellant ran the situation by one of his supervisors, Sgt. Shadinger and appellant told him he thought it might be Ryan Howard. Sgt. Shadinger stated he was informed by appellant that he had received a call, the evening of August 3, 2010, from his confidential informant, "Ryan Howard." He recalled that appellant "... specifically identified "Mr. Howard" by name. Ryan Howard had never wished to remain anonymous in any of appellant's prior dealings with him. Appellant could not tell Judge Marshall that he had a hunch about the identity of the caller but did not discuss his "hunch" with AP Jesperson when discussing the possibility of calling for a telephonic search warrant.

At the time he spoke to Judge Marshall, appellant's main concern was protecting the identity of his informant. He had no ill intent. Judge Marshall caught him off guard when he asked him if he knew the identity of the caller so he went along with the Judge and followed his questions. On cross-examination, Cruz stated that he felt he had a duty to the identity of Ryan Howard and that was his intent when he spoke to Judge Marshall on August 3, 2010.

In view of the contradictory testimony and evidence presented by appellant and the respondent witnesses, the resolution of the charges against appellant requires that I make a credibility determination with regard to the critical facts. The choice of

accepting or rejecting the witnesses' testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, 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 experiences 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 witnesses' 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 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, 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 Perrone, 5 N.J. 514. 521-22 (1950). See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses and compairing the transcripts of the testimony of all of the witnesses in this proceeding, I deem appellant's testimony, that he did not know the identity Ryan Howard when he called Judge Marshall for the telephonic search warrant, is not credible. Appellant testified that he had spoken to Ryan Howard approximately three to four times each week for the previous six years. He also testified that his main concern was to protect the identity of his informant. This contradicted his testimony that he did not know the identity of the individual that gave the tip. During his IA interview appellant stated that he had never been asked by a Superior Court Judge for a confidential informant's name in any other telephonic search warrant applications, so it " ... caught me off guard." If appellant did not know the identity of the caller, he would not have been caught off guard. Accordingly, I **FIND** as **FACT** that appellant knew that the individidual with whom he was speaking, on August 3, 2010, was his confidential informant, Ryan Howard. I also **FIND** as **FACT** that he knew Ryan Howard's identity prior to speaking to Judge Marshall during his application for a telephonic search warrant.

FINDINGS OF FACT

After carefully reviewing the exhibits and documentary evidence presented and after having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to be the additional relevant and credible **FACTS** in this matter: As of August 3, 2010, appellant had been employed by VPD for approximately sixteen years. On August 3, 2010, appellant received a call from his confidential informant advising that he had been visited at his home by three men in a Cadillac with Pennsylvania tags whom he understood to be members of a criminal gang. He observed that they were armed, in possession of drugs and planning a home invasion of a Vineland resident named H.L. As a result of this information, three individuals fitting the description given where arrested. Appellant contacted Superior Court Judge Marshall to obtain a telephonic search warrant of the Cadillac. Appellant did not inform Judge Marshall that he knew the identity of the informant. By letter, dated March 11, 2011, the Cumberland County Prosecutor's Office advised Chief Codispoti that appellants's false testimony had led the Prosecutor's Office, as of March 8, 2011, to dismiss with prejudice eleven cases, involving twenty defendants. In thirteen instances, first or second degree charges had been dismissed, mostly involving appellant as the affiant on the respective search warrant applications. Following the receipt of the March 11, 2011, letter from the Prosecutor, the City prepared an amended PNDA dated March 11, 2011, and served it on appellant on March 14, 2011. It stated additional charges related to the impact of the Prosecutor's decision to not proffer future testimony of appellant and sought removal of appellant.

LEGAL ANALYSIS AND CONCLUSION

Under the Civil Service Act, a public employee may be subject to major discipline for various employment-related offenses, N.J.S.A. 11A:2-6. In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:-2.21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent,

relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

Respondent has sustained charges of violations of N.J.A.C. 4A:2-2.3(a)1— Incompetency, Inefficiency, or Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)6— Conduct Unbecoming a Public Employee; N.J.A.C. 4A:2-2.3(a)3— Inability to Perform Duties; N.J.A.C. 4A:2-2.3(a)11— Other Sufficient Cause; VPD Rules & Regulations 4:1.4, Abide by all Rules, Regulations and Departmental Procedures; 4:1.7, Officers Will Conduct Themselves in Accordance with high Ethical Standards; 4:9.2, Performance of Duty; 5:5.6, Truthfulness While Under Oath; 5:5.1, Duty of Employee to Appear and Testify.

Appellant argues that the charges against him should be dismissed because he did not know the identity of the caller and therefore was not untruthfull.

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." 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 could not 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 at 35-36.]

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.

In the present matter, the record reflects that appellant failed to perform several of his duties specifically involving how to respond to questions of a Superior Court Judge during a telephonic search warrant and by not disclosing his "hunch" as to the identity of the anonymous called to AP Jasperson. He clearly demonstrated an absence of judgment in a sensitive position requiring public trust in the agency's judgment. Accordingly, I **CONCLUDE** that the charges of a violation of N.J.A.C. 4A:2-2.3(a)(1) (incompetence, inefficiency, failure to perform duties) must be and is hereby **SUSTAINED**.

Respondent also sustained charges against appellant for conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6). To the extent that appellant is charged with violation of VPD Rules and Regulations 4:1.7, which addresse an Officers Conduct, consideration of such violation will be addressed in concert with the current analysis.

"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 v. City of Atlantic City, 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. In re Emmons, 63 N.J. Super. 136 at 140.

In the present matter, the record reflects that appellant failed to perform duties required of him in his handling of the call to Judge Marshall for a telephonic search warrant. Appellant knew the identity of the caller and failed to advise the Judge of this fact when asked. Even though appellant's intent was to protect the identity of his informant and was not done with ill intent, his untruthfulness creates issues whereby he cannot testify in any criminal court without a prosecutorial disclosure of his "Brady Issue," thereby, reducing his ability to serve as a police officer. This clearly constitutes behavior which could not only adversely affect the morale of the facility and undermine public respect in the services provided. The refusal of the Cumberland County Prosecutor's Office to call appellant as a witness in any criminal trial serves to eleiminate appellant's ability to perform central functions of his job; namely making arrests and testifying in court. Accordingly, I **CONCLUDE** that the appointing authority has proven, by a preponderance of credible evidence, that the charges of N.J.A.C. 4A:2-2.3(a)6 (conduct unbecoming a public employee), and VPD Rules and Regulations 4:1.7, as well as Inability to Perform Duties, N.J.A.C. 4A:2-2.3(a)3, and VPD Rules and Regulations 5:5.1 should be and are hereby **SUSTAINED**.

Appellant has also been charged with a violation of N.J.A.C. 4A:2-2.3(a)(12) (other sufficient cause). Specifically, appellant is charged with violations of VPD Rules & Regulations 4:1.4, Abide by all Rules, Regulations and Departmental Procedures; 4:1.7, Officers Will Conduct Themselvese in Accordance with high Ethical Standards; 4:9.2, Performance of Duty; 5:5.6, Truthfulness While Under Oath; 5:5.1, Duty of Employee to Appear and Testify. I **CONCLUDE** that the consideration of the charges constituting a violation of N.J.A.C. 4A:2-2.3(a)(11) (other sufficient cause) have been addressed and **SUSTAINED** within the discussion of violations of N.J.A.C. 4A:2-2.3(a)(1),(3) and (6).

Accordingly, I further **CONCLUDE** that the charge of a violation of N.J.A.C. 4A:2-2.3(a)(12) (other sufficient cause) must be and is hereby **SUSTAINED**.

PENALTY

In West New York v. Bock, 38 N.J. 500, 522 (1962), which was decided more than fifty years ago, our Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Herrmann, 192 N.J. 19, 29 (2007) (citing West New York v. Bock, 38 N.J. at 522). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." West New York v. Bock, 38 N.J. at 523-24.

As the Supreme Court explained in In re Herrmann, 192 N.J. at 30, "[s]ince Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct." According to the Court:

> . . . First, principles of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct . . .
>
> The second use to which the principle of progressive discipline has been put is to mitigate the penalty for a current offense . . . for an employee who has a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions . . .
>
> . . . [T]hat is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that 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.

[In re Herrmann, 192 N.J. at 30-33.]

In the case of In re Carter, 191 N.J. 474 (2007), the Court decided that the principle of progressive discipline did not apply to the sanction of a police officer for sleeping on duty and, notwithstanding his unblemished record, it reversed the lower court and reinstated a removal imposed by the Board. The Court noted the factor of public-safety concerns in matters involving the discipline of correction officers and police officers, who must uphold the law and "present an image of personal integrity and dependability in order to have the respect of the public." In re Carter, 191 N.J. at 486.

In the matter of In re Stallworth, 208 N.J. 182 (2011), a Camden County pump-station operator was charged with falsifying records and abusing work hours, and the ALJ imposed removal. The CSC modified the penalty to a four-month suspension and the appellate court reversed. The Court re-examined the principle of progressive discipline. Acknowledging that progressive discipline has been bypassed where the conduct is sufficiently egregious, the Court noted that "there must be fairness and generally proportionate discipline imposed for similar offenses." In re Stallworth, 208 N.J. 182, at 193. Finding that the totality of an employee's work history, with emphasis on the "reasonably recent past," should be considered to assure proper progressive discipline, the Court modified and affirmed (as modified) the lower court and remanded the matter to the CSC for reconsideration.

To determine whether a lesser penalty than the respondent's termination of appellant is appropriate, the concept of progressive discipline is generally examined. Our courts uniformly have upheld the concept in a long line of cases, beginning with West New York v. Bock, 38 N.J. 500, 523 (1962): (an employee's past record of both discipline and commendations can be considered). See also In re Hermann, 192 N.J. 19, 21 (2007). However, the judiciary also agrees that progressive punishment can be waived when the offense involved is sufficiently egregious. In re Stallworth, 208 N.J. 182, 196-197 (2011). However, the Court in Hermann also declared that progressive discipline can be used to mitigate the penalty where there is a substantial record of

employment that is largely or totally unblemished by significant disciplinary infractions. In re Hermann, 192 N.J. at 32-33.

I am satisfied that appellant's conduct in this case was egregious such that progressive discipline need not be considered. The public who is served, and other employees, deserve to be able to expect that police officers are able to make arrests that will lead to convictions of those deserving such punishment. Appellant's inability to testify in a criminal court proceeding within Cumberland County eliminates his efectivness to serve the public as a Police Officer within the respondent. Accordingly, I **CONCLUDE** that the respondent's action in removing the appellant from his position was justified.

DECISION AND ORDER

The appointing authority has proven by a preponderance of credible evidence the charges against appellant with 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)(3) Inability to Perform Duties; and N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause, and I **ORDER** that these charges be and are hereby **SUSTAINED**. Furthermore, I **ORDER** that the penalty of removal is hereby **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.

I

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.

8/20/18
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: August 20, 2018

Date Mailed to Parties: August 20, 2018.

JSK/dm

APPENDIX

WITNESSES

For appellant:

Appellant
Charles Capelli
Joseph Valentine

For respondent:

Ernest Ronald Cuff, Jr.
Timothy Cadispoti

EXHIBITS

Transcripts from testimony taken before Judge Gorman considered by this tribunal

Hearing, date September 12, 2012

No witnesses

Hearing, date February 14, 2014

Ronald Cuff

Hearing, date February 18, 2014

Ronald Cuff

Hearing, date April 23, 2014

Ronald Cuff
Andrew Catti

Hearing, date April 24, 2014

David Branco
Andrew Catti
Ryan Howard

Joint Exhibits

J-1 CD of Branco interview, dated October 27, 2010
J-2 Hand Written statement of Confidential Informant, dated January 25, 2012
J-3 Transcript of Cruz Deposition, dated February 11, 2014

For appellant:

P-1 Not Moved
P-2 AP Wilson's IOC (Also marked as R-29)
P-3 Statement of Ryan Howard, dated January 25, 2012 (Also marked as J-2)
P-4 Civil Service Job Description
P-5 AP Branco Interview Transcript
P-6 CD and transcript of telephone conversation between Cruz and Shadinger on May 27, 2014
P-7 Map of area surrounding Vineland Police Department
P-7a Officer Rodriquez discipline action, dated July 1, 2008
P-7b Officer Rodriquez discipline action, dated August 16, 1994
P-7c Officer Rodriquez discipline action, dated March 29, 2007

For respondent:

R-1 Redacted CCPO Investigation
R-2 Property Inventory
R-3 Witness Acknowledgment (Branco)
R-4 Search Warrant – Redacted
R-5 Search Warrant Affidavit – Redacted
R-6 Transcript (Judge Marshall and Cruz, dated August 3, 2010)
R-7 Search Warrant Approval Form
R-8 Search Warrant Return – Redacted
R-9 Evidence Log – Redacted
R-10 Witness Protection Declination (Redacted)
R-11 Witness Protection Declination for C.I.'s Mother
R-12 Original Redacted Branco IOC to Webb-McRae, dated October 18, 2010
R-13 Unredacted Branco IOC
R-14 Email Transmittal of IOC to Benson, dated February 10, 2014
R-15 Second Version of Redacted Branco IOC
R-16 Signed Search Warrant Approval Form
R-17 CD Recording of Cruz and Judge Marshall
R-18 Signed Search Warrant
R-19 Cruz Report, dated August 3, 2010
R-20 Confidential Informant's telephone records
R-21 Phone Records from August 2, 2010 through August 10, 2010
R-22 CD of Cuff interview of CI on November 1, 2010
R-23 Prosecutor Declination Letter to Codispoti not to prosecute, dated November 8, 2010
R-24 Cuff Report – Unredacted, dated November 17, 2010
R-25 Shapiro letter to Cadispoti, dated March 11, 2011
R-26 Shapiro letter to Codispoti, dated April 26, 2011
R-27a Critical Incident Sheet, dated October 27, 2010
R-27b Webb-McRae letter to Codispoti, dated October 27, 2010
R-27c Vineland Police Department Case Report

R-27d Telephonic Search Warrant Application Transcript, dated August 3, 2010

R-27e Search Warrant Affidavit

R-27f Webb-McRae letter to Codispoti, dated November 8, 2010

R-27g Critical Incident Sheet, dated November 12, 2010

R-27h PNDA, dated November 12, 2010

R-27i Shapiro letter to Codispoti regarding dismissed cases, dated March 11, 2011

R-27j PNDA, dated March 11, 2011

R-27k Shapiro letter to Codispoti regarding dismissed cases, dated April 26, 2011

R-27l Critical Incident Sheet, dated March 15, 2011

R-27m Critical Incident Sheet, dated May 25, 2012

R-28 CD of Vineland Internal Affairs interview of Cruz, dated November 12, 2010

R-29 AP Wilson's IOC

R-30 Audio Recording of Cuff interview of AP Branco, dated October 27, 2010

R-31 Transcript of telephone call between Cruz and Shadinger, dated February 12, 2018

R-32 Deposition transcript of Cruz, dated February 4, 2014

R-33 Affidavit of Sgt. Shadinger, dated March 20, 2014

R-34 Affidavit of Officer Mollik, dated March 14, 2014

R-35 Email from Cruz to Robert MaGee, dated August 5, 2010