



STATE OF NEW JERSEY

In the Matter of Enrique Encarnacion	:	
City of Jersey City,	:	<b>FINAL ADMINISTRATIVE ACTION</b>
Department of Public Safety	:	<b>OF THE</b>
	:	<b>CIVIL SERVICE COMMISSION</b>
CSC DKT. NO. 2019-319	:	
OAL DKT. NO. CSV 11880-18	:	
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	:	
	:	

ISSUED: JUNE 3, 2020 BW

The appeal of Enrique Encarnacion, Police Officer, City of Jersey City, Department of Public Safety, 25 working day suspension, on charges, was heard by Administrative Law Judge Kimberly A. Moss, who rendered her initial decision on May 5, 2020. No exceptions were filed.

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 June 3, 2020, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge’s initial decision to modify the 25 working day suspension to a 10 working day suspension.

Since the penalty has been modified, the appellant is entitled to 15 days of back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See *Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, charges were sustained. Thus, the appellant has

not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the 25 working day suspension to a 10 working day suspension. The Commission further orders that appellant be granted 15 days of back pay, benefits, and seniority. The amount of back pay awarded is to be reduced and mitigated as set forth in *N.J.A.C.* 4A:2-2.10. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

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 3<sup>rd</sup> DAY OF JUNE, 2020



Deirdre L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Christopher S. Myers  
Director  
Division of Appeals and Regulatory Affairs  
Civil Service Commission  
P. O. Box 312  
Trenton, New Jersey 08625-0312

Attachment



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. CSV 11880-18

AGENCY DKT NO. 2019-319

**IN THE MATTER OF ENRIQUE L.  
ENCARNACION, CITY OF JERSEY CITY  
DEPARTMENT OF PUBLIC SAFETY.**

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**Leon C. Schiro, Esq.,** for appellant Enrique L. Encarnacion (Mets, Schiro, & McGovern, LLP)

**James B. Johnston, Assistant Corporation Counsel,** for respondent City of Jersey City (Peter Baker, Corporation Counsel, attorney)

Record Closed: May 1, 2020

Decided: May 5, 2020

**BEFORE KIMBERLY A. MOSS, ALJ:**

**STATEMENT OF THE CASE**

Enrique L. Encarnacion (Encarnacion or appellant) appeals the decision of respondent City of Jersey City Department of Public Safety (JCPD) to suspend him for twenty-five working days from the position of police officer for incompetency, inefficiency, or failure to perform duties; neglect of duty; and obedience to laws, regulations, and orders.

## PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) and filed on August 16, 2018. Hearings were held on January 22, 2020 and March 10, 2020. The parties submitted closing briefs on May 1, 2020, on which date the record closed.

## TESTIMONY

### Lorenzo Tosado

Lorenzo Tosado (Tosado) is a lieutenant with the JCPD. On January 25, 2018, he was assigned to the Internal Affairs (IA) division. At that time, he was assigned an investigation of Encarnacion, whose partner was Ali Bravo (Bravo).

The JCPD rule is, when officers take a meal break, they call the dispatcher and the supervisor. This is because an officer can be pulled away from lunch for a call. It was alleged that Encarnacion and his partner were separated for a few hours. On January 25, 2018, Encarnacion took a lunch break without informing the dispatcher. He was at the Ringside Lounge on routes 1 & 9 and Manhattan Avenue in Jersey City. Ringside is in the North District, the area where Encarnacion patrols. While Encarnacion was at Ringside, Bravo was submitting a report regarding an earlier motor vehicle accident to which the two had responded. After Bravo had finished submitting the report, and while the two were still on duty but separated, there was a motor vehicle accident between Bravo's vehicle and another vehicle. Multiple vehicles arrived on the scene of the accident, and someone was injured.

The North District precinct has a front desk manned by the desk lieutenant, who at the time in question was Lieutenant Scalcione. Tosado did not ask Scalcione what time Bravo came in on the date in question. He does not know what other officers came into the District between 7:20 and 8:00 p.m. on the date in question.

At 7:00 p.m. on January 25, 2018, Bravo went to the North District precinct to complete the report on the motor vehicle accident to which he and Encarnacion had earlier responded. He first dropped Encarnacion off at Ringside. Once Bravo completed the report, he went to the Subroso restaurant, which is two miles from Ringside. It is not appropriate for partners to be two miles apart because they may be called to a case. Tosada did ask Encarnacion if he and Bravo had ever previously split up for the meal break. He did not investigate this.

Bravo had the police car. There was a call of a burglary while they were apart. Encarnacion acknowledged receipt of the burglary call. He did not state that Bravo was not with him. Bravo texted Encarnacion regarding the burglary call, stating that he was on his way to Encarnacion. Dispatch was not informed that they were not together. Bravo had the police car's lights and sirens turned on. He entered an intersection and was involved in a motor vehicle accident. A firefighter, Officer Zepello, was in the other vehicle and sustained injuries. She was pregnant at the time.

Encarnacion filed a report regarding the car accident between Bravo and Zepello. Bravo and Encarnacion had been separated since 7:20 p.m. The call for the burglary came in at 9:20 p.m.

The burglary call came from dispatch, who assigns that call to a patrol car. Response time is important. The address of the burglary was 136 Central Avenue. Sub Rosa, the restaurant that Bravo was in, is on Central Avenue. The supervisors of Bravo and Encarnacion were not aware that they were not together at the time of Bravo's accident. Encarnacion did not inform his superiors that he and Bravo had not been together until he arrived on the scene of Bravo's accident. Encarnacion was driven to the scene of the accident by a civilian. He then walked to the area of the accident. He did not inform dispatch that he was responding to the motor vehicle accident of Bravo.

Sergeant Aquino arrived on the scene of the Bravo accident. She did not know where Encarnacion was when she responded to the scene. Bravo told her that Encarnacion was not there. While she was checking the scene, Encarnacion arrived. Lieutenant Sarno also arrived on the scene and spoke to Encarnacion. He was not previously aware that Bravo and Encarnacion were separated. He did not know that they were on a meal break.

Encarnacion did not properly patrol his post, because he was separated from his partner for two hours. The patrol-post regulation does not state that officers who are partners cannot separate. He was not immediately available, because he was separated from his partner for two hours. He did not call in to let dispatch know that he was taking a meal break. Meal break should be called in prior to taking the break.

Encarnacion's report stated that he was finishing his meal when Bravo responded to the North District precinct to use the restroom. As Bravo was in route to pick Encarnacion up and respond to a call, Bravo was involved in a motor vehicle accident. Tosada asked for a more detailed report from Encarnacion. In a subsequent report Encarnacion stated that he texted Bravo regarding the burglary call.

When an officer completes the academy, he signs for a copy of the rules and regulations. Tosada does not have a signed copy of Encarnacion's receipt of the JCPD rules and regulations.

### Ali Bravo

Bravo has been a police officer for twelve years. He was a patrol officer on January 25, 2018, and his partner was Encarnacion. During their shift that day they had responded to a two-car accident. Bravo dropped Encarnacion at Ringside at approximately 7:00 p.m. and went to the North District precinct to complete the report of the motor vehicle accident. Only one officer must write the report. Bravo told the desk lieutenant that he was there to do a motor vehicle report and went to the computer. Once

he completed the report, at approximately 8:30 p.m., he gave it to Scalcione and told dispatch that the report was complete. After he completed the report, dispatch told him to go on meal break. He didn't tell dispatch that Encarnacion was already on a meal break. No supervisor was aware that Encarnacion had already taken meal break.

He was at the North District precinct for one to one and one-half hours. Ringside is one and one-half to two miles away from the North District precinct. After he was told by dispatch to take a meal break, Bravo went to Subroso. At that time, he and Encarnacion had been separated for one to two hours.

While Bravo was at Subroso he heard the burglary call and heard Encarnacion acknowledging the call. Encarnacion texted him, asking if he got the call. Bravo responded yes, and that he was on the way to get him. As he was going to pick up Encarnacion, Bravo was involved in a motor vehicle accident at 9:27 p.m.

### Denise Aquino

Denise Aquino (Aquino) is a sergeant with the JCPD. She was a supervisor in the North District on January 25, 2018. She was Bravo and Encarnacion's supervisor at that time. At 9:18 p.m. Bravo called JCPD to inform them that he was involved in a motor vehicle accident at Sanford Place and Manhattan Avenue. When she arrived on the scene, Aquino saw Bravo in the vehicle but did not see Encarnacion. Bravo told her that Encarnacion was not there.

JCPD has two officer patrol cars on night tour. Aquino should know where officers are when they are on duty.

Prior to the accident, she was not informed that Bravo and Encarnacion had separated. Patrol officers on the night tour should stay together for the whole tour, unless a supervisor decides that they should be separated. Officers cannot unilaterally decide to separate. Although Bravo and Encarnacion separated at 7:04 p.m., Aquino did not

become aware that they were separated until she arrived at the scene of the accident at 9:21 p.m. Prior to Bravo's motor vehicle accident, Aquino was on the way to the burglary call. When Encarnacion acknowledged the burglary call, Aquino believed that Bravo and Encarnacion were together, heading to the burglary.

Meal breaks are thirty minutes. The officers must give their location to the dispatcher when they call in for a meal break. When Bravo was released for meal break by the dispatcher, the meal break would be for the unit, Bravo and Encarnacion. Bravo and Encarnacion did not have to be together for the meal break but should be in close proximity to each other. Ringside and Subroso are in the same district, but they are one mile apart. This is not acceptable.

Encarnacion and Bravo being separated for two hours was unacceptable. Lieutenant Sarno also was on the scene of Bravo's accident. Aquino and Sarno asked Encarnacion where he was at the time of the accident. He stated that he was in a restaurant.

The meal-break regulation states that permission to dine must be requested through CCB (dispatch). Units will give their meal-period location and advise CCB when they resume patrol. Dispatch will tell the officer to go on meal break and advise, meaning tell dispatch where the officer is going. Bravo and Encarnacion were a unit.

Aquino received a one-day discipline for failure to supervise because she was not aware that Bravo and Encarnacion had separated.

Aquino was on patrol when Bravo came to the North District to write the earlier motor vehicle accident report. Lieutenant Scalcione was the desk lieutenant at the time Bravo came in to write the report. When an officer comes into the district to write a report, he must check in with the desk lieutenant. One officer works on a report.



Joseph Sarno

Sarno is a lieutenant with the JCPD. On January 28, 2018, he was the patrol lieutenant. He was assigned to the South District. At 9:20 p.m. he became aware of a motor vehicle accident involving Bravo. He arrived on the scene, saw Bravo and asked him where Encarnacion was. Bravo replied that Encarnacion was in the area. Sarno saw Encarnacion walking and appearing to be in distress.

Partners are expected to stay together. Sarno became aware that Encarnacion was at the Ringside Lounge when he responded to the burglary call. On a meal break, partners should not be more than one fourth of a mile apart. Sarno did not receive any information that Encarnacion was taking a meal break.

Sarno was disciplined because Encarnacion and Bravo had separated. He received a one-day suspension for failure to supervise. Prior to Bravo's motor vehicle accident Sarno trusted Bravo and Encarnacion. He trusts them less now.

Sarno was unaware of the prior motor vehicle accident that Bravo and Encarnacion responded to. One officer writes the report. Officers can separate, within reason, when one is writing a report. When one officer is writing a report, his partner should tell the desk lieutenant where he is going. When one partner is writing a report at the district, the other partner should either be in the district building or within a block of the district building. If they separate, they should not be more than one or two blocks apart. Partners should not be separated for more than fifteen minutes. Thirty minutes is stretching it. Partners separated for two and one-half hours is unacceptable. The unit would not be available for that time.

There is an order that states that officers must tell dispatch where they are going for meal break, but it is not enforced.

Martin Perez

Martin Perez (Perez) is a sergeant in the JCPD. He is a supervisor of training. He does academy training. Encarnacion was in the academy prior to December 18, 2006. The training at the police academy in the class Encarnacion was in included multiple topics, one of which was rules and regulations governing patrol. Encarnacion attended a two-hour academy class on June 26, 2006, where rules and regulations were one of four topics covered. Perez was in that class also.

The rules and regulations of the JCPD are online and at each command. Officers are responsible to maintain knowledge of the rules and regulations. Rule 3:122 states that officers must acquire and maintain a working knowledge of all laws and ordinances and all orders and policies of the department.

**FACTUAL DISCUSSION**

After hearing the testimony and reviewing the evidence, I **FIND** the following **FACTS**:

Encarnacion is a member of the JCPD. On January 25, 2018, he and his partner, Bravo, were on night tour. The night tour has two officers in one patrol car. Their supervisor was Aquino. On the day of the incident at approximately 7:00 p.m. they completed a motor vehicle investigation. At 7:04 p.m. Bravo dropped Encarnacion off at the Ringside Lounge. Encarnacion was taking a meal break. He did not inform dispatch that he was taking a meal break. Encarnacion did not inform the desk lieutenant at the North District where he would be. Bravo responded to the North District precinct shortly thereafter. Bravo went to the precinct to complete the report for the motor vehicle investigation. One officer writes the report. The other officer should be at the precinct or in the vicinity of the precinct. Bravo completed the report at 8:29 p.m. At that time, Bravo was released for a meal break by dispatch, and he went to Subroso, which is one mile away from Ringside.

When an officer wants to take a meal break, he calls dispatch with the request. The meal break is thirty minutes. Partners taking a meal break should be together, or at least not separated by more than one-quarter of a mile.

At approximately 9:00 p.m. there was a call from dispatch regarding a burglary. Encarnacion acknowledged the call, while still at Ringside separated from Bravo. He texted Bravo to make sure Bravo received the call. Bravo stated that he would pick Encarnacion up. At 9:21 p.m. Bravo was involved in a motor vehicle accident. He had not picked up Encarnacion at that time.

Aquino came to the scene of Bravo's motor vehicle accident. She asked Bravo where Encarnacion was, and he said Encarnacion was not there. Sarno also arrived on the scene, as did Encarnacion. Encarnacion was questioned by Sarno and Aquino. Prior to speaking to Encarnacion, Aquino and Sarno did not know that Encarnacion and Bravo had been separated for more than two hours.

The JCPD meal-break regulation states that permission to dine must be requested through CCB (dispatch). Units will give their meal-period location and advise CCB when they resume patrol. Dispatch will tell the officer to go on meal break and advise, meaning tell dispatch where the officer is going. Bravo and Encarnacion were a unit.

Encarnacion was in the police academy in class on June 26, 2006, when there was instruction regarding the JCPD rules and regulations. The rules and regulations of JCPD are online and at each command. Officers are responsible to maintain knowledge of the rules and regulations. Rule 3:122 states that officers must acquire and maintain a working knowledge of all laws and ordinances and all orders and policies of the department.

## LEGAL ANALYSIS AND CONCLUSION

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the charges of incompetency, inefficiency or failure to perform duties; neglect of duty; and obedience to laws, regulations, and orders must be **SUSTAINED**.

The purpose of the Civil Service Act is to remove public employment from political control, partisanship, and personal favoritism, as well as to maintain stability and continuity. Connors v. Bayonne, 36 N.J. Super. 390 (App. Div.), certif. denied, 19 N.J. 362 (1955). The appointing authority has the burden of proof in major disciplinary actions. N.J.A.C. 4A:2-1.4. The standard is by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). Major discipline includes removal or fine or suspension for more than five working days. N.J.A.C. 4A:2-2.2. Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee, and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. An employee may be removed for egregious conduct without regard to progressive discipline. In re Carter, 191 N.J. 474 (2007). Otherwise, progressive discipline would apply. W. New York v. Bock, 38 N.J. 500 (1962).

Hearings at the OAL are de novo. Ensslin v. Twp. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994), certif. denied, 142 N.J. 446 (1995).

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) (citation omitted). 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 an act as required by his

or her job title or was negligent in its discharge. Avanti v. Dep't of Military & Veterans Affairs, 97 N.J.A.R.2d (CSV) 564; Ruggiero v. Jackson Twp. Dep't of Law & Pub. Safety, 92 N.J.A.R.2d (CSV) 214.

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 Cty., 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 this matter, the charges of incompetency, inefficiency, or failure to perform duties; neglect of duty; and obedience to laws, regulations, and orders are merged. Encarnacion and all JCPD officers are required to maintain knowledge of the JCPD orders and policies. The meal-break policy is that the officers have thirty minutes for meal break and must request a meal break from dispatch. Encarnacion was on a meal break for more than two hours. He acknowledged a call for a burglary when he knew that he was separated from his partner. He did not call dispatch to request a meal break. He began his meal break more than eighty minutes before Bravo was told to take a meal break.

JCDP Rule 3:122 states that officers must acquire and maintain a working knowledge of all laws and ordinances and all orders and policies of the department. Encarnacion was required to know the JCPD general order regarding meal breaks.

When determining the appropriate penalty to be imposed, the appointing authority must consider an employee's past record, including reasonably recent commendations and prior disciplinary actions. Bock, 38 N.J. at 523. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522–24. Major discipline may include removal, disciplinary demotion, suspension, or fine no greater than six months. N.J.S.A. 11A:2-6(a); N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.4. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number, and proximity of prior disciplinary infractions evaluated by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

In this matter, Encarnacion does not have any prior discipline. He has been an officer for more than ten years. Although he and Bravo were separated for more than two hours, approximately ninety minutes of that time Bravo was writing the motor vehicle report and they would not have been out on patrol. Accordingly, a suspension of ten days would be an appropriate discipline in this matter.

### ORDER

Based on the foregoing findings of fact and applicable law, it is hereby **ORDERED** that the determination of the Jersey City Police Department that Enrique Encarnacion's conduct constituted incompetency, inefficiency, or failure to perform duties; neglect of duty; and obedience to laws, regulations, and orders be **AFFIRMED**.

It is further **ORDERED** that the discipline of a twenty-five-day suspension be and is hereby **MODIFIED** to a ten-day suspension.

It is further **ORDERED** that respondent reimburse appellant with any applicable back pay.

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

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

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

May 5, 2020



\_\_\_\_\_  
DATE

\_\_\_\_\_  
KIMBERLY A. MOSS, ALJ

Date Received at Agency:

May 5, 2020

Date Mailed to Parties:

May 5, 2020

ljb



**WITNESSES**

**For Appellant**

None

**For Respondent:**

Lorenzo Tosado

Ali Bravo

Denise Aquino

Joseph Sarno

Martin Perez

**EXHIBITS**

**For Appellant**

None

**For Respondent**

- R-1 Final Notice of Disciplinary Action
- R-2 Internal Affairs Report of Lt. Lorenzo Tosado dated February 27, 2018
- R-3 Motor Vehicle Accident Report where Bravo was injured dated January 25, 2018
- R-4 Jersey City Police Manual
- R-5 Jersey City Police General Order 5-18 regarding Police Radio Practices and Procedures
- R-6 Report of Encarnacion dated January 25, 2018
- R-7 Report of Encarnacion dated January 30, 2018
- R-8 Report of Bravo dated January 30, 2018
- R-9 Report of Aquino dated February 1, 2018

- R-10 Report of Sarno dated February 1, 2018
  - R-11 Service Record of Encarnacion
  - R-12 Police Academy Training Schedule for Class 70 from June 26, 2006, to  
June 28, 2006
  - R-13 Not in Evidence
  - R-14 Not in Evidence
  - R-15 Aquino's Supervisor Activity Sheet dated January 25, 2018
  - R-16 Same as R-9
  - R-17 Timeline
-