STATE OF NEW JERSEY

In the Matter of Benito Gonzalez
Camden County, Police Department

CSC DKT. NO. 2015-2849
OAL DKT. NO. CSR 06048-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 1, 2020 BW

The appeal of Benito Gonzalez, Police Officer, Camden County, Police Department, removal effective April 15, 2015, on charges, was heard by Administrative Law Judge Elia A. Pelios, who rendered his initial decision on May 29, 2020. 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 July 1, 2020, 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 Benito Gonzalez.

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 1st DAY OF JULY, 2020

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
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 06048-15
AGENCY DKT. NO. N/A

IN THE MATTER OF BENITO GONZALEZ,
CAMDEN COUNTY (POLICE DEPARTMENT).

Arthur J. Murray, Esq., for appellant (Alterman and Associates, LLC, attorneys)

Antonietta P. Rinaldi, Assistant County Counsel, for respondent (Christopher A. Orlando, County Counsel, attorneys)

Record Closed: October 24, 2019 Decided: May 29, 2020

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

Benito Gonzalez ("Gonzalez" or "appellant") a Lieutenant with the Camden County Police Department ("respondent," "CCPD" or "Department") appeals the Department's decision to remove him from employment for violating N.J.A.C. 4A:2-2.3(a): (6) Conduct unbecoming a public employee; and (3), inability to perform duties, and other sufficient cause.

PROCEDURAL HISTORY

Respondent issued a Final Notice of Disciplinary Action (FNDA) dated April 15, 2015, removing him from employment based upon those charges on that same date. Appellant appealed the FNDA to the Office of Administrative Law (OAL) on April 29, 2015. The matter was heard on June 12, and 26, 2019. The record was held open for the simultaneous filing of closing briefs and was closed on October 24, 2019. By way of letter dated August 5, 2015, appellant waived the 180-day rule. Appellant's appeal of the denial of his application for disability retirement benefits was also transmitted to the OAL in a separate matter (OAL Dkt. No. TYP 05608-16) that was being case-managed in concert with the present matter, but on August 20, 2019, the transmitting agency requested that the file be returned. On September 28, 2019 it was, and that matter closed.

FACTUAL DISCUSSION

On April 15, 2015, Camden Police Lieutenant Benito Gonzalez (appellant) was served with a Final Notice of Disciplinary Action (FNDA) terminating him on the same date on charges of conduct unbecoming, inability to perform duties, and other sufficient cause. More specifically, the County alleges that on May 7, 2014, Gonzalez exposed himself and masturbated in view of a young female patron in a Starbucks in Cherry Hill, and that he plead guilty to lewdness in municipal court. It also contends that through a disability pension filing, he had admitted that he is disabled as a result of post-traumatic stress disorder (PTSD) and therefore, is no longer fit for duty. Gonzalez contends that he entered a conditional dismissal program and that the mere presence of a disability retirement application is not proof that he is unfit for duty.

The first witness to testify was Joseph Wysocki, Assistant Chief of the CCPD. Wysocki is in his twenty-ninth year as an officer. He's the second in command and has been in that role since 2017. He came up through the ranks and worked in internal affairs

from 2009 through 2013. In May 2014 he was in the role of deputy chief. He oversaw the internal affairs and investigative divisions. He reported directly to the chief.

He reviewed a reproduction of a Facebook post (R-1) from the Cherry Hill Police Department's page describing the event at issue in these proceedings and which show a security camera picture of an individual strongly resembling appellant. Detective Hoffman initially showed him the post. Wysocki went to the chief with the post that he had seen and requested an investigation.

To his knowledge the appellant never came to work intoxicated and never acted strange in his presence. They worked together for approximately five years, give or take. On the day of the incident the captain told Wysocki that the appellant was at a training seminar. He came to learn that the appellant went into a Starbucks on that date and while seated at a table was staring at an eighteen-year-old female patron in the establishment. He took down his shorts and began to masturbate while looking at her. The woman went to a Starbucks employee and asked the employee to retrieve her stuff because she was upset and did not want to go back to her table. The employee, a twenty-year-old female, also observed the appellant masturbating. His understanding was consistent with a Police Report of the incident created by the Cherry Hill Police Department (R-2).

An audio statement of A.N. (R-3), the woman appellant was staring at, was played. She stated that his laptop was facing everyone in the store. She had no doubt that appellant was looking at her. When appellant noticed that the employee retrieved A.N.'s belongings and brought them to her, he got up and left. Appellant arrived after A.N. had already been there. He sat with a woman that he apparently knew. They were talking about summer plans. They stopped talking and he was working on the laptop when the woman left. A.N. noticed that his pants were pulled down and he was fully exposed.

Wysocki then played an audio statement by P.A., an employee of Starbucks (R-4). She stated that A.N. approached her and told her what was going on. She looked over at appellant and she could see "things down there." She went to her manager who was

on the phone at that time. P.A. went to the table and retrieved A.N.'s belongings. She noted that when appellant saw her gathering the items he hastily gathered his own belongings and left, so quickly that he left his drink behind. P.A. provided a description of appellant in her statement.

A security video of the incident was then reviewed. (R-5.) On May 7, 2014, at approximately 3:48 p.m. Wysocki noted that the appellant can be seen entering the store. He observed nothing unusual about appellant's appearance either when he entered or when he appeared at the counter at about 3:52 p.m. Nothing appeared awry to Wysocki. A.N. is seen on the camera at about 5:12 p.m., and at 5:15 p.m. appellant is seen exiting the store. Wysocki explained that in his experience it is unusual for witnesses to not mention that a person appeared to be drunk if they did so appear, and further noted that neither statement mentioned that appellant appeared to be drunk.

Wysocki reviewed a summons (R-6) that charged appellant with lewdness. Disciplinary charges were proffered and Wysocki reviewed the Preliminary Notice of Disciplinary A-action and the Final Notice of Disciplinary Action which called for removal. (R-8.) He states that the chief made the decision to terminate appellant. He also reviewed the rules of conduct (R-9) noted that on page 11, item number 1.5 of the Code of Ethics notes that conduct occurring while off duty applies as well.

He reviewed regulations which imposed a standard of conduct (R-9, at 19); which required obedience to laws and regulations (p. 20); and which required that off-duty incidents, including those which involve contacts with law enforcement, must be reported to the department.

Wysocki then reviewed the appellant's civil service job description for the position of Lieutenant. (R-10.) He notes that there was no discipline history, but that appellant's conduct was so egregious that no penalty was discussed short of termination. He believes this is a betrayal of the police department and states that there is no way that a police officer who has engaged in such conduct can work with any female victims nor

would he have the respect of other officers, both of which are necessary to perform the job. Appellant was terminated after his departmental hearing. A review of the auto-match system showed the appellant's charge and guilty plea. (R-7.)

On cross-examination Wysocki acknowledged that prior to 2013 appellant was employed with Camden City not Camden County, and explained that officers of Camden City were offered the opportunity to apply to move to Camden County but had to undergo a new psychiatric evaluation. He observed that there were no medical records in appellant's IA file.

Dr. Gary Glass, a physician and a psychiatrist who specializes in forensic psychiatry, testified on behalf of appellant. He is licensed in the State of New Jersey since 1976 and is board-certified by the American Board of Psychiatry and Neurology since 1981. He has been an examiner for board certifications, a role which he has been very honored to perform. He has evaluated 13,000 to14,000 officers in his career and has performed evaluations for both employers and employees. He was offered as an expert in forensic psychiatry. No objection was lodged, and he was qualified as offered.

Dr. Glass reviewed the report he authored in this matter (P-2) dated October 22, 2017. He performed an evaluation of the appellant. He interviewed the appellant on June 22, 2017. Dr. Glass noted that there was an initial event in 2011. He reviewed records after the interview, as is his normal procedure, because he does not want to be misled by someone else's opinion. He first makes his assessment based on his impressions and then reviews records to corroborate or challenge his impression.

Dr. Glass noted that a critical incident occurred in June of 2011. Appellant was performing surveillance of a drug dealer. He saw the deal go down and they moved to apprehend a suspect. A chase ensued first by car then on foot. While running the appellant fell having tripped over a curb. He lost his weapon and was shot at by the suspect. The shot missed him, but the suspect attempted to shoot again. The suspect's gun jammed, and the suspect was apprehended. Appellant was taken to the hospital.

His bruises were treated, and he was cleaned up and he was released. He was later diagnosed with PTSD by Dr. Ackerman pursuant to the incident. Dr, Glass states that PTSD is often misused within the profession but believes it's an appropriate finding that the June 2011 incident could lead to a direct causation of PTSD

Dr. Glass noted that the appellant had multiple diagnoses of PTSD and had spent ten days in a facility diagnosed with PTSD. PTSD was indicated on his pension documents. Appellant was also diagnosed with alcoholism. He's seen seven or eight doctors between June 2011 and May 2014, and all have diagnosed him with PTSD. Some doctors indicated they were not sure that the appellant could return to work. Dr. Tiedemann administered a fitness for duty evaluation and determined that the appellant was not fit to return to duty; however, appellant's workers' compensation doctor pushed for a return. He was allowed to return but to light duty and returned eventually to full duty as a police officer which Dr. Glass notes is uncommon for people with PTSD.

Dr. Glass offered his diagnosis of appellant as suffering from post-traumatic stress disorder, alcohol abuse disorder, and major depressive disorder. He believes the PTSD is a result of June 2011 incident and that the alcohol abuse as a result of the PTSD. The major depressive disorder stands on the other two. He believes that appellant never should have returned to full duty but notes again that it was pushed for by the workers' compensation doctor.

Other incidents occurred which could have exacerbated the conditions. In January 2014 there is an event involving guns and physical battle. In March 2014 there was a "shots fired" incident. Dr. Glass believes the appellant was highly intoxicated when the event that triggered the disciplinary action occurred and that appellant does not remember it. Many individuals act out due to the frustration they experienced being paralyzed at other events. People sometimes can no longer act, and they feel humiliated and embarrassed—emotionally impotent. He distinguishes this acting out from fetishistic behavior as people with fetishes tend to not operate out in the open. With PTSD the acts

are more likely to be in the open which can be an indication that appellant's behavior was not fetishism but rather a result of the PTSD.

Dr. Glass notes that there is a three-year gap between the initial critical event and the lewd act but also notes that there were only two months between shooting incidents and another two between the second shooting incident and the lewd act. The previous examining doctors used very sophisticated tests and there is no indication at all of any sort of sexual disorder. Glass therefore believes that appellant had not felt impotent until January to March 2014. There have been no repeats of the behavior because appellant has stopped drinking. He believes that the issues should have been flagged in a psychiatric evaluation before joining the Camden County Police Department. Glass would not return the appellant to active duty because he cannot do the job and believes he would never be able to return to active duty because there's too much at stake. He believes appellant has been treated successfully for alcohol abuse but believes that he is totally and permanently disabled from the performance of his job duties.

He notes on cross-examination that the appellant attended AA meetings after he left the Transitions Program. There was no initial awareness of the alcohol issue and no hint of it until after the May 2014 event. Dr, Glass never saw the video of the incident and was never before given the police report. When confronted with Dr. LoPredo's evaluation, which indicated that the May 2014 incident was not caused by PTSD but rather by exhibitionist disorder, Dr. Glass expressed his disagreement. He notes that exhibitionism is a fetish under the DSM. People can have more than one disorder and he acknowledges as possible that the appellant has both PTSD and exhibition disorder but notes that he did not exhibit the pathology of exhibitionism. Appellant committed an act of lewdness. Exhibitionism is usually not a one-off, but Glass acknowledges that it's unknown whether this is the only incident. He reviewed the video for the hearing and notes that the appellant did not appear drunk on the video, but he states that often people who drink are able to hide it. He had no corroboration of the facts beyond the appellant's statements to him. With regard to impotency Glass talked about pattern versus non-pattern behaviors. He

believes the lewd act is not a symptom of the PTSD but rather an outgrowth of the disabling episode coupled with alcohol abuse.

The appellant testified on his own behalf. He lives in Deptford, N.J. and has been married since 1996. He has three children, ages twelve, nineteen and twenty-one. His date of birth is April 18, 1968, and he is fifty-one years old. He graduated high school from Camden Catholic in 1986. He has taken some college credits. He has worked as a waiter and as a bartender. He started doing work at the hospital and eventually joined the Camden City Police Department. He was given a psychiatric evaluation, which he passed, when he joined the force. He never saw a psychiatrist or psychologist before the times relevant to the present matter nor has he ever sought the services of any mental health professional. He was hired for the police academy in August of 1998 and was promoted two times while with Camden City. April 30, 2013 was his last day with the City, when that department ended operations. He was never disciplined while employed by the City.

Appellant was involved in several critical incidents where he was injured over the course of his career. He received a laceration to his leg in 1999. He tore an ACL while undercover in 2001. In 2011 he was almost shot and killed. With the first two incidents he was treated medically and cleared to return to work.

Appellant then described the 2011 critical incident. Appellant received information about an anticipated drug deal. He was warned that the suspect might be armed and set up a surveillance operation. The force was shorthanded at the time due to preparations for the merger into the County Police Department. Accordingly, while no one was in a position to offer back-up, they decided to proceed with the operation. Appellant, and those with him, approached the suspect. He put his hands in his pockets and would not show them to the officers. He threw a bag into the trunk, went to the passenger side, got into the car and fled. Another suspect was driving the car. A high-speed chase ensued for several blocks. Subsequently the suspect exited the car and ran, his hands still in his pockets. The appellant pursued.

Appellant dove to grab the suspect but missed. He landed hard, the impact knocking his gun from his hand. Both individuals reached for the gun. Appellant retrieved his own gun and the suspect took off again, the appellant in pursuit. During the chase the appellant noticed that his leg was hurting. He was hobbling. Both parties had turned a corner when the suspect turned around and fired a shot at the appellant. He missed but aimed again to take a second shot. Appellant thought he was dead, but the suspect's gun jammed. The suspect ran off—another officer in pursuit—and the appellant retrieved the suspect's gun. He saw it had malfunctioned. He described it as "stove piped." The shot had gone off, but the bullet had fizzled.

The suspect was apprehended. Appellant called it a good night as there was an arrest, they got the gun, and they recovered a lot of drugs. That's the job. That was the first time that he had ever been shot at. As a result of the incident he tore his hamstring. He was out of work for two to three weeks. He returned to light duty for a long time until the following spring when he was physically cleared for full return by the doctors after he achieved maximum medical improvement (MMI).

Appellant states that a few days after the incident he had a hard time sleeping. He was having nightmares and reliving the incident; questioning certain aspects. On his own initiative he went to risk management. They indicated they did not provide the service that he was looking for and that he had to do it on his own. He said he blew it off. Colleagues suggested that he see an attorney for a workers' compensation claim and as a result he went to see a doctor whom he was referred to by his attorney. This was probably one to five months after the incident. He saw the doctor once for assessments. The City then sent him one to two months later for evaluation with Dr. Kelly in December 2011 and Dr. Patel in January 2012. He was treating with the doctors into the spring until he was cleared. He was on light duty for the entire time he was receiving mental health treatment. He was released by both Dr. Kelly and Patel around June 2012 as having achieved MMI. He continued with Dr. Kelly under his own insurance. He saw her once a month continuously until the end of his career.

On May 1, 2013, the Department transitioned from Camden City into the Camden County Police Department which is not a Civil Service appointing authority as the City was. A new psychiatric evaluation was performed to join the County force. Dr. Kelly does perform those evaluations but did not administer the appellant's due to the treating relationship. Appellant cannot remember who did administer his psychiatric evaluation but recalls that he did pass even though he was still under treatment with Dr. Kelly.

With the County Police Department, appellant started as a patrolman. He was promoted to sergeant and then promoted again to lieutenant in August 2013. He is no longer employed by the County Police Department. His last day of going to work was May 15, 2014. He was never disciplined. Appellant described two additional "critical incidents" which occurred, one in January 2014, and the other in March 2014.

With regard to the January 2014 incident, appellant received a report of shots fired and he responded. On the way to the scene he saw a car with the lights off. Thinking it might possibly be related to the incident he made a traffic stop. He asked the driver to turn on the lights. The driver indicated that it was not his car, that it was a friend's. He was not in possession of any papers. Appellant was alone at this time until a rookie, Officer Blair, arrived on the scene as backup.

The passenger in the car was jittery and refused to get out of the car. He then jumped out of the car, pushed Blair and took a swing at the appellant. Both officers grabbed him. There was snow on the ground and all three individuals fell to the ground. Blair was on the ground with the suspect on top of him and the appellant on top of the suspect. The suspect was fighting. The officers were calling for help but in the scuffle the radio was switched to a non-used channel. The suspect grabbed Blair in the groin and would not let go. The appellant was punching the suspect, but he still would not let go. More officers arrived on the scene and subdued the suspect. They searched him and found that he had a semi-automatic weapon in his possession. There was no celebration this time. The next day appellant went to see the doctor and his blood

pressure was through the roof. He went to see Dr. Kelly, but he did not take any time off after this incident.

Appellant next described the second additional incident, which occurred in March of 2014. At the end of appellant's shift, a report was received of "shots fired—officer involved." Appellant responded. By the time he arrived the suspect had been shot by the officer but was still alive. The officer was dazed. The appellant lost it and could not take command of the scene even though he was senior officer on scene. He left the scene. He called Dr. Kelly to try and get the other officers involved help so that they didn't suffer like he did. He did not miss any work.

Appellant explained he started drinking after the initial 2011 incident. He was a social drinker before then but after that event he started having two tall glasses to help him sleep, but it did not really help. He started drinking rum and coke at first but then he switched to vodka because it was easier to hide. Dr. Kelly tried to get him into AA from the beginning. After the January 2014 incident his drinking increased. He kept the vodka bottle with him and drank anytime that he could.

He states that alcohol was involved with the May 7, 2014, incident. The charges were resolved by way of conditional discharge. He received PTI as a first-time offender. He was charged in the Cherry Hill Municipal Court. He admitted guilt and successfully completed the conditional discharge which included one year of probation. He went into crisis and had a nervous breakdown on May 16, 2014. He went to see Dr. Kelly who arranged to get him into Kennedy Crisis Center. Kennedy Crisis Center released him after several hours. He often thought of killing himself after the March 2014 incident. On one occasion he actually had a gun in his mouth, but he heard his kids come home and did not go through with it.

The following Monday he received a summons in the mail. He and his wife looked at it. He had no idea what it was about. He had no recollection of the incident. Cherry Hill Police called and asked him to come in. He said no. He called the County Police

Department, but the chief was not in. Appellant had another breakdown. His wife drove him to Kennedy Crisis. He was admitted. He subsequently moved to Hampton House for seven days. His wife made arrangements for him to go to Transitions in Florida which is a thirty-day program where he was treated for his alcoholism, PTSD and the suicidal tendencies. He did not treat with Dr. Kelly again after that incident. She said that they could arrange visits but when he returned from Florida she told him that it was a conflict. He has been treating in Philadelphia with Dr. Jones for four or five months. He described himself as a functioning alcoholic. The drinking kept him level-headed although he was suffering panic attacks.

Appellant filed for accidental disability benefits in July 2014, effective August 2014, due to the 2011 incident. He attended AA as needed. He has not had any alcohol since May 18, 2014. He tried PI work but found it to be too much like police work and therefore difficult to do. He has worked helping a local contractor and delivering for Federal Express.

He believes he should be disciplined but he does not believe that he should be removed. What he did was unforgivable. He has to live with it. He knows that he could not come back to work, but he needs a shot with the Pension Board. Mentally he could not do the job. Appellant is not seeking back pay. He is just asking for the opportunity to go before the Pension Board and have them hear his case and feels that removal will deny him the opportunity. He believes he was a good cop with a clean discipline record.

On cross-examination appellant states that after the June 2011 incident the first doctor he saw told him that he had PTSD and that he needed treatment, and that is why the City sent him for treatment. Dr. Kelly knew that he had a drinking problem but did not know how bad it was. He would report to Dr. Fenishore that he was having two to three Bacardi and Coke's per night which he states was accurate at the time. He began drinking more heavily immediately after the January 2014 incident. That is when he started keeping vodka in the car.

He pled guilty to the charges stemming from the May 7, 2014, incident even though he did not remember the incident. He did not want to make the young woman or the witnesses to the incident relive it. Additionally, he did not have the money to litigate. To this day he does not remember the incident, but he does believe it happened. He was attending a training earlier in the day on the date in question. On May 8 he was back at work, teaching a class

Appellant had a breakdown on May 16, 2014. He maintains that there was no specific trigger and that he was not aware that his picture was posted that day on the Cherry Hill Police Department Facebook page. He believes that was a coincidence. He experienced suicidal thoughts which began after the March 2014, incident although he never told Dr. Kelly about them. He explained that it's something that is hard to admit, even to a therapist. Before the January 2014 incident appellant would describe himself as a "drinker." After that incident he believes he was a functioning alcoholic. He experienced more blackouts after the March 2014 incident. He stayed out late so as to avoid everybody (his wife, kids, etc.).

He believes he should not be terminated because incidents like the one that is the subject of the disciplinary matter never occurred before, although he acknowledges that he cannot be certain that it never happened. On his first visit to Kennedy he was released right away even though he reported that he was suicidal. On the second visit he was diagnosed with alcoholism. When told that the report said that he drank socially he noted that that was his history. Appellant was surprised that he was released on May 16, 2014. After his second visit he was admitted and sent to Hampton House. On May 7, 2014, he was in a blackout. Appellant does remember getting home late that evening. He was drunk and he recalls his wife turning out the lights. He started drinking after class that day, which was his M.O. He does not remember the end of class or any time thereafter until he got home. He estimates that it is about forty-five minutes to an hour from class to Starbucks. It is possible that they class ended early. He did all of his drinking in the car. It is possible that he drank half the bottle of vodka in that time.

He agrees that he is not fit to be a police officer. He is not looking to return to his job. He is looking to "get a shot at getting a pension." He reviewed his disability pension denial letter (R-13) which notes that he was qualified for deferred retirement whereby he could receive his pension after his fifty-fifth birthday. He acknowledged that a disability pension would pay more and that he is currently appealing that denial. He admits to committing conduct unbecoming and admits that he needs to be sanctioned. Appellant believes that a 180-day suspension is appropriate and believes that such would give him a chance to go to the Pension Board but acknowledged that there is no reason that he should have his job back.

On redirect he states that the vodka bottle in his car was usually a 1-liter bottle, although sometimes it was a smaller bottle. He notes that the Kennedy records are not a part of the record in this matter but that the pension letter is.

On re-cross he states that he had to hide his drinking from his wife. Therefore, any liquor he bought was limited by whatever cash he had. He admits that it is possible that he drank after leaving Starbucks and before he went home, causing the blackout and potentially was not that drunk while at Starbuck's.

Most of the relevant facts are not in dispute in this matter. Appellant does not dispute the allegations laid out in the FNDA which comprise the substance of the disciplinary matter. Accordingly, I **FIND** that on May 7, 2014, Gonzalez exposed himself and masturbated in view of a young female patron in a Starbucks in Cherry Hill, New Jersey. I further **FIND** that he was issued a summons and charged with lewdness in Cherry Hill Municipal Court. I further **FIND** that he pled guilty and received a conditional discharge, which he satisfied.

Appellant's description of three critical events, occurring in June 2011, January 2014, and March 2014, was not disputed or controverted. Accordingly, I accept, adopt and **FIND** as fact his description of those events. The expert medical testimony of Dr. Glass was not rebutted. Therefore, I **FIND** that appellant suffers from post-traumatic

stress disorder, alcohol abuse disorder, and major depressive disorder. While there is no reason to disbelieve Dr. Glass's testimony as to the causes of these various conditions, the causes are also not material to this matter and therefore I decline to make a finding of such.

I do not, however, find credible, appellant's testimony that he did not remember the incident in question. Credibility is best described as that quality of testimony or evidence which makes it worthy of belief. The Supreme Court of New Jersey considered the issue of credibility in In Re Estate of Perrone, 5 N.J. 514 (1950). The Court pronounced:

> Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.
>
> [Ibid. at 522]

See also Spagnuolo v. Bonnet, 16 N.J. 546, (1954), State v. Taylor, 38 N.J. Super. 6 (App. Div.1955).

In order to assess credibility, the witness' interest in the outcome, motive or bias should be considered. Furthermore, 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).

Appellant's breakdown and first visit to Kennedy Crisis Center occurred the same day that his picture was posted on the Cherry Hill Police Department's Facebook page. To the point, his claim that he was not aware of that just did not hang together and the timing seems somewhat serendipitous. To the extent that Dr. Glass's testimony supports the argument of the blackouts, he admits it is based upon the subjective reporting to him by appellant. The witness statements and the video of the incident do not give the

impression that appellant was drunk at the time, undercutting his assertion that he was in blackout and does not remember the incident.

LEGAL ANALYSIS

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).

The respondent has charged appellant with violations of N.J.A.C. 4A:2-2.3(a)6, (conduct unbecoming a public employee); and N.J.A.C. 4A:2-2.3(a)3, inability to perform duties.

"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 N.J. 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. 532, 555 (1998) [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 NJ. Super. 136, 140 (App. Div. 1960).

In the present matter, the record reflects that appellant, while seated at a table in a Starbucks, took down his pants, fully exposing himself, and proceeded to pleasure himself while staring at a female patron seated at a nearby table. While appellant does not dispute the conduct, he claims to not remember the incident because he was blackout drunk. This clearly constitutes behavior which could adversely affect the morale of the facility and undermine public respect in the services provided. Accordingly, I **CONCLUDE** that the appointing authority has proven, by a preponderance of credible evidence, that the charge of N.J.A.C. 4A:2-2.3(a)6 (conduct unbecoming a public employee), should be and is hereby **SUSTAINED.**

With regard to the violation of N.J.A.C. 4A:2-2.3(a)(3), inability to perform duties, the record reflects that appellant's own medical expert's opinion is that appellant cannot and should not be returned to duty. Appellant himself does not dispute this. Coupled with the examples offered by respondent's witnesses as to the specific duties of the job that cannot be performed by respondent, I **CONCLUDE** that respondent has proven by a preponderance of the competent, credible evidence, the charge of inability to perform duties, and that the charge must be **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. 500, 522 (1962)). 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. 500, 523-524 (1962).

As the Supreme Court explained in In re Herrmann, 192 N.J. 19, 30 (2007), "[s]nice 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 Hermann, 192 N.J. at 30-33 (citations omitted).]

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. 474 (2007)

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 Civil Service Commission (Commission) 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, 208 (2011). 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 Commission for reconsideration.

Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

Furthermore, it has been held that termination without progressive discipline is appropriate in circumstances where an employee cannot competently perform the work required of his position. Klusaritz v. Cape May Cty., 387 N.J. Super. 305, 317 (App. Div. 2006), certif. denied, 191 N.J. 318 (2007). In Klusaritz, the panel upheld the removal of a principal accountant on charges of inability to perform duties, among other things, based on proof that the employee had consistently failed to perform the duties of his position in a timely and proper manner, and had also failed or refused to accept direction with respect to performance of these duties.

In the present matter, respondent has brought and sustained charges of violations of N.J.A.C. 4A:2-2.3(a)6, (conduct unbecoming a public employee); and N.J.A.C. 4A:2-2.3(a)3 (inability to perform duties). Appellant suggests that imposing a penalty less than removal will potentially put him in better position with the Pension Board. The record and the procedural

history reflect that an appeal of the denial of appellant's application for a disability pension was transmitted to the OAL, and although never consolidated was managed in concert with the present matter. However, the transmitting agency recalled the file and consequently the OAL has no jurisdiction over the pension matter. Furthermore, even if the pension matter remained at the OAL—the disciplinary charges are to be adjudged within their own context.

Appellant asserts that there is no harm to respondent by imposing a 180-day suspension, while noting that the critical incident which caused the disability he is asserting in his pension application predates the charges at issue in this matter, while any and all medical evidence of that disability post-date the charges. Respondent argues that appellant is asking for consideration for a financial benefit and notes that the behavior alone warrants removal even if he had not been arrested and charged. I agree.

The record reflects that appellant's disciplinary record was unremarkable prior to the incident that is the subject of this matter. However, despite appellant's lack of significant disciplinary history, the behavior described herein certainly constitutes misconduct that is severe; that is unbecoming to the employee's position; and that renders the employee unsuitable for continuation in the position. It is not disputed that appellant cannot return to his job. Respondent has adequately described how appellant, the Department, and its public safety/law enforcement mission would be compromised were he to return to the job. Appellant's medical expert and appellant himself have also testified that he could not return to the job and that he is not seeking to.

Considering the foregoing, the testimony, evidence and arguments in this matter, I am compelled to **CONCLUDE** that the respondent has proven, by a preponderance of credible evidence, that appellant is unfit for duty and thus does not have the ability to properly perform his duties and engaged in conduct so egregious that application of progressive discipline is not appropriate. I further conclude that respondent has presented the basis for appellant's removal from employment, and that such removal should be **AFFIRMED**.

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)6 (Conduct unbecoming a public employee); and N.J.A.C. 4A:2-2.3(a)3 (inability to perform duties). I therefore **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.

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 29, 2020
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/mph

APPENDIX

LIST OF WITNESSES:

For appellant:

Benito Gonzalez
Dr. Gary Glass

For respondent:

Joseph Wysocki

LIST OF EXHIBITS:

Joint Exhibits:

J-1	Preliminary Notice of Disciplinary Action 31-A (Amended), dated March 23, 2015 (part of respondent's Exhibit R-8)
J-2	Final Notice of Disciplinary Action 31-B, dated April 15, 2015 (part of respondent's Exhibit R-8)
J-3	Final Notice of Disciplinary Action 31-C, dated April 15, 2015 (part of respondent's Exhibit R-8)
J-4	Joint Stipulations of Fact

For appellant:

P-1	Curriculum Vitae of Dr. Gary Michael Glass
P-2	Report of Dr. Gary Michael Glass, October 22, 2017

For respondent:

R-1	Internal Affairs Report
R-2	Police Report of Cherry Hill Police Department
R-3	Audiotaped interview of A.N.
R-4	Audiotaped Interview of P.A.
R-5	Video of Starbucks, May 7, 2014
R-6	Criminal Complaint Summons
R-7	Municipal Court Disposition
R-8	Preliminary and Final Notices of Disciplinary Action
R-9	Camden County Police Department Rules and Regulations
R-10	Civil Service Job Description
R-11	Accidental Disability Retirement Application
R-12	Letter from Division of Pensions
R-13	Denial of Accidental Disability
R-14	Email from Division of Pensions and Benefits
R-15	Letter from Division of Pensions and Benefits re: Appeal
R-16	Report of Dr. Daniel B. LoPreto
R-17	Appellant's Answers to Respondent's Interrogatories
R-18	Kennedy Crisis Center Reports