

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2ND DAY OF JUNE, 2021

Deirdre L. Webster Cobb

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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. CSR 10307-20
CSC DKT. NO. 2020-2447

**IN THE MATTER OF ALEJANDRO PEREZ,
KEAN UNIVERSITY, APPOINTING AUTHORITY.**

Arthur J. Murray, Esq., for appellant Alejandro Perez (Alterman & Associates,
attorneys)

Ellen M. Horn, Esq., for respondent Kean University (Ruderman & Roth,
attorneys)

Record Closed: April 19, 2021

Decided: May 11, 2021

BEFORE SARAH H. SURGENT, ALJ:

STATEMENT OF THE CASE

Appellant Alejandro Perez (Perez) appeals from respondent Kean University's (Kean's) disciplinary action terminating his employment as a campus police officer effective March 12, 2020, after he was previously terminated effective August 23, 2019, in a related prior disciplinary action. The August 23, 2019 termination was upheld by the Office of Administrative Law (OAL), In re Perez, Kean University, 2020 N.J. AGEN LEXIS

196, initial decision, (Apr. 2, 2020), and the Civil Service Commission (CSC), final decision, ibid. (May 22, 2020), and is currently on appeal before the Appellate Division, In re Perez, Kean University, No. A-003769-19 (T2) (App. Div. filed June 11, 2020). According to Kean, should the first termination penalty be reduced by the Appellate Division, then the second termination is to become effective at the end of any lesser discipline imposed. Perez has waived the 180-day return-to-pay rule in this case from its inception, N.J.S.A. 40A:14-201a, at least until such time as the Appellate Division rules on Perez' pending appeal of his first termination.

Kean moves for summary decision. It maintains that Perez' second termination was appropriate because Perez wore and activated his body-worn camera (BWC), surreptitiously recorded his March 28, 2019 confidential internal affairs (IA) investigation interview concerning his prior disciplinary matter, and subsequently mishandled the BWC and recording, all in violation of various policies, rules, and regulations. Perez opposes the motion with various explanations for his conduct and cross-moves to place the penalty phase of this proceeding on the inactive list should he be found liable for his conduct, pending the outcome of his first termination case currently before the Appellate Division.

PROCEDURAL HISTORY

After his second termination, Perez timely requested a fair hearing. The CSC received his appeal on April 2, 2020. However, the appeal was never located at the OAL, due to the COVID-19 shutdown and related issues with mail delivery. Ultimately, the CSC forwarded the appeal to the OAL on October 28, 2020, where it was filed to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. It was assigned to this Administrative Law Judge (ALJ) on November 10, 2020.

After several telephone conferences, Kean moved for summary decision by letter-brief dated March 5, 2021, and accompanying certifications and exhibits. (R-1 to R-26). By letter-brief dated March 24, 2021 and accompanying certifications, (A-1 to A-2), Perez opposed the motion, and cross-moved to place the penalty phase on the inactive list,

pending the outcome of his current appeal before the Appellate Division. By letter-brief dated April 9, 2021, Kean replied and opposed Perez' cross-motion. Due to the ongoing COVID-19 pandemic, oral arguments were conducted remotely via videoconference on April 19, 2021. The record closed on that date.

FACTUAL DISCUSSION AND FINDINGS

These salient points are not in dispute. I therefore **FIND** the following **FACTS**:

As to Kean's policies, rules, and regulations, Kean's Department of Public Safety/Police Policy Manual (PM) Chapter 41.3.10 governs its police patrol officers' use of BWCs, and provides, in relevant part:

2. Policy

It is the policy of this Department that officers will activate the BWC when such use is appropriately related to the proper performance of their official duties and where the recordings are consistent with this directive, the law, and any applicable directives of the Attorney General and/or the Union County Prosecutor.

....

3. General Procedures

....

B. General Use of the BWC:

....

- iii. BWCs will be assigned to all sworn members working in the Patrol Bureau, or who are covering Patrol related functions, without regard to rank or other assignment. The wearing and use of BWCs for Patrol personnel is

required at all times when functional equipment is available.

- iv. BWCs may be assigned to sworn members working special events or other details, pending availability of the equipment and the verbal authorization or direction by the Officer in Charge of the detail and/or a Commanding Officer.

.....

C. Procedures for BWC Use by Sworn Members:

- i. Officers who are assigned BWC equipment must use the equipment as described in this directive unless otherwise authorized by supervisory personnel. Supervisory personnel will be required to explain deviations from this directive in writing to the Command Staff and/or the Chief of Police upon request.
- ii. Department members are only to use BWCs issued by this Department and registered to the Department through the EVIDENCE.COM service. The BWC equipment and all data, images, video, and metadata captured, recorded, or otherwise produced by the equipment is [sic] the sole property of this Department.

.....

- vii. Officers will ensure they have a properly assigned BWC prior to beginning each shift, and that the BWC is returned to the docking station located outside the Communications Center at the end of each tour of duty. NOTE: The need for BWC units to re-charge and upload/sync data precludes the "handing off" of a unit from one officer to another. BWCs which have been deployed *must* be docked for a long enough period for the data

to upload to EVIDENCE.COM (and preferably to completely recharge) before they are reassigned to another officer.

....

- ix. Members will not edit, alter, erase, duplicate, copy, share, or otherwise distribute in any manner BWC recordings without prior written authorization and approval of the Chief of Police or his or her designee.
- x. If an officer is suspected of wrongdoing . . . , the Department reserves the right to limit or restrict the officer or other members from viewing the video file.

....

- xii. Officers shall note in their reports (Arrest, Investigation, Supplemental or Operations) when recordings were made during the incident in question and which cameral number was in use. NOTE: BWC recordings are not a replacement for written reports. . . .

D. Restrictions on using the BWC: A BWC will only be used in conjunction with official law enforcement duties. The BWC will not generally be used to record:

- i. Communications with other Department personnel, outside of calls for service defined elsewhere in this directive, without the permission of the Chief of Police or his or her designee;
- ii. Communications with University or other official legal counsel, such as Municipal or County Prosecutors, without the permission of the Chief of Police or his or her designee;

....

5. Retention and Storage of BWC Recordings

....

- B. BWC recordings being stored for criminal, civil or administrative purposes are to be processed as evidence and submitted as detailed in Chapter 83 of the Department Policy Manual. Recordings which are exported from EVIDENCE.COM for any of the above described purposes are to be burned to a DVD, logged into evidence by use of the BEAST system, and documented on a Property Report.

....

6. Review and Distribution of BWC Recordings

....

- C. Requests for Discovery of BWC recordings will be forwarded to the Records Bureau Supervisor and the Investigations Bureau Supervisor for action.
- D. Requests for copies of BWC recordings will require a subpoena or an official request from the responsible Prosecutor under the Rules for Discovery. All requests must contain the requisite specificity for the incident or event. Only the portion or portions of the incident pertinent to the request are to be provided by the Records Bureau after review by the Investigations Bureau Supervisor.

[(R-17 at 2-10) (emphases in original).]

Kean's PM Chapter 84.1.1 governs its police officers' handling of property and evidence, and provides, in relevant part:

1. Introduction

The Department of Public Safety/Police will receive property and evidence. The property and evidence procedures hereafter described shall be followed for all recovered, stolen, found, turned-in or confiscated property coming into the possession of any member of the Department.

....

5. Information Entered On Proper Report Forms

A. Property Record

All items of evidence and/or property shall be inventoried, itemized and described on a Kean University Department of Public Safety/Police Property Record. The Property Record shall reflect the amount, description and manner in which the items are marked. Upon completion of the Property Record, as with all reports, it will be left at the Communications Section for review and submission to the Records Section.

B. Accompanying Report

Details of an item's seizure or recovery and release shall be recorded on the appropriate report form(s). Accompanying reports may include, but not be limited to, Investigations Reports and Supplemental Reports.

[(R-18 at 1-3).]

Kean's police department rules and regulations (PDRR) provide, in relevant part:

3.0 General duties and responsibilities

3.1 Police officers shall:

....

3.1.3 Abide by all rules, regulations and department procedures and directives governing police officer employees.

....

3.1.6 Conduct themselves in accordance with high ethical standards, on and off-duty.

....

4.0 Rules of Conduct

4.1 General Conduct

4.1.3 Obedience to Laws and Rules. Employees shall obey all laws, ordinances, rules, policies, and procedures and directives of the department.

[(C-2 at 2-3, 5).]

As to Perez and his conduct, he was employed by Kean's Department of Public Safety & Police as a campus police officer from July 28, 2001 until his first termination effective August 23, 2019. (R-25 at 1). On March 28, 2019, Perez worked the midnight to 8:00 a.m. patrol shift, and was under investigation for conduct related to his first termination. With his then counsel Sebastian B. Ionno, Esq. (Ionno) present, Perez was interviewed by Lieutenant Thomas Hargrove (Hargrove), Kean's Internal Affairs Commander and Support Services Division Commander, from 11:42 a.m. to 11:58 a.m., on March 28, 2019. Although his March 28, 2019 patrol shift had ended at 8:00 a.m., Perez was still in uniform, was paid overtime for the duration of the interview, and was

wearing a Kean BWC in violation of PM Chapter 41.3.10 section 3.C.vii, and PDRR sections 3.1.3, and 4.1.3.

At the commencement of the March 28, 2019 interview, lonno requested Hargrove's permission to record the interview, which was granted. The parties disagree as to whether lonno asked to "audio record" versus "record" the interview, which is immaterial for purposes of this decision. Unbeknownst to Hargrove and lonno, Perez activated his BWC, and audio- and video-recorded the interview, (A-1 at 1-2; A-2 at 2; R-6 at 1; R-15), in violation of PM Chapter 41.3.10 sections 3.D.i and 3.D.ii, and PDRR sections 3.1.3, 3.1.6, and 4.1.3. At the conclusion of the interview, Hargrove noticed that Perez pressed the BWC button twice, which would activate or deactivate the device.

Perez had not asked for, nor was he ever granted permission to record the interview with his BWC. (A-1 at 1-2). However, he claims that he "assumed" that the permission granted to lonno extended to him as well, and he further "assumed" that because he was "on duty," i.e., still in uniform and being paid overtime during the interview, he could use his BWC, notwithstanding the provisions of Kean's BWC PM Chapter 41.3.10. (A-1 at 2). Those "assumptions" pose no defense to Perez' undisputed violations not only of Kean's BWC PM Chapter 41.3.10, but also Kean's property and evidence PM Chapter 84.1.1, along with PDRR sections 3.1.3, 3.1.6, and 4.1.3.

In Kean's reply brief and at oral arguments, Kean conceded that Perez had the right to record the interview, both as derived from Hargrove's permission to lonno to record, and pursuant to the New Jersey Attorney General November 2017 Internal Affairs Policy & Procedures (NJIAPP), (C-1 at 38). The relevant guideline states that

[i]f the subject officer wishes to record the interview, he or she may do so, and a copy of the recording shall be made available to the department upon request, at the agency's expense. Agencies should consider adopting a policy requiring officers to inform the agency or internal affairs investigator if the officer plans to record the interview.

[ibid. (emphasis added).]

Kean also conceded that it had no policy requiring Perez to inform Hargrove that he intended to record the interview, but maintained that Perez improperly used Kean's BWC to record, rather than using a personally-owned recording device. That the NJIAPP requires an officer "shall" provide a copy of a self-recorded IA interview to the department upon request certainly contemplates that an officer would use a personally-owned recording device, rather than a BWC, because the department could access an uploaded BWC recording without the target officer's assistance.

During oral arguments, the parties agreed that Perez was "on duty," because he was required to attend the IA interview, but that he was not on active "patrol duty," as his patrol shift had ended at 8:00 a.m., more than three hours and forty minutes before the interview commenced. Hargrove had not issued a BWC to Perez at the end of Perez' patrol shift. Indeed, Perez was required to return the BWC to Kean's docking station at the end of his shift at 8:00 a.m., for recharging and uploading BWC recording purposes. He had not done so, in violation of PM Chapter 41.3.10 section 3.C.vii, and PDRR sections 3.1.3, 3.1.6, and 4.1.3. His excuse claiming that "many patrolmen at Kean . . . take home their BWC at the end of a shift without docking it," (A-1 at 3), is no defense to his admitted violation of that clearly written policy prohibiting such conduct.

Later on the day of the interview, Hargrove requested via an email to Ionno that he turn over any BWC recording Perez may have made of the confidential IA interview. Neither Perez nor Ionno responded to that request, in violation of the NJIAPP requirement that an officer's recording of an IA interview "shall be made available to the department upon request." (C-1 at 38). Upon further investigation, Hargrove discovered not only that Perez had taken Kean's BWC home with him after the IA interview, but that he did not dock it for uploading and recharging until March 28, 2019, at 11:29 p.m., before the beginning of his March 29, 2019 midnight to 8:00 a.m. shift, in violation of PM Chapter 41.3.10 section 3.C.vii, and PDRR sections 3.1.3, 3.1.6, and 4.1.3. .

Perez did not have the authority to access his uploaded BWC recording and needed the assistance of another officer (the AXON officer) who had authorized access to the AXON EVIDENCE.COM system where BWC recordings are uploaded and stored. Perez was senior to the AXON officer by approximately seventeen more years as a Kean police officer. Between 11:38 p.m. and 11:45 p.m., the AXON officer, at Perez' surreptitious request, accessed the recording, (R-16), burned a CD copy, and gave that copy to Perez, in violation of PM Chapter 41.3.10 sections 3.C.ii, 3.C.ix, 6.C., and 6D, and PDRR sections 3.1.3, 3.1.6, and 4.1.3. The AXON officer was later disciplined for his own misconduct that was instigated by Perez' improper request.

Perez did not document his own conduct in any fashion, in violation of PM Chapter 41.3.10 sections 3.C.xii and 5.B, PM Chapter 84.1.1 sections 1, 5A, and 5B, and PDRR sections 3.1.3, 3.1.6, and 4.1.3. Instead, Perez took the CD copy and later provided it to his now-former attorney, Ionno, in violation of PM Chapter 41.3.10 section 3.C.ix. He also did not provide or cause to be provided a copy to Hargrove until almost three months after Hargrove's request, in violation of the above-described NJIAPP requirement.

By a Preliminary Notice of Disciplinary Action (PNDA) dated August 19, 2019, Perez was notified of a litany of charges against him. (R-1). The local disciplinary hearing was held on December 9, 2019, and most of the charges were sustained. (R-2 at 2). On March 24, 2020, Kean issued a Final Notice of Disciplinary Action (FNDA) terminating Perez' employment with Kean effective March 12, 2020. (R-2 at 1-2). The sustained charges were:

-
1. N.J.A.C. 4A:2-2.3(a)6: Conduct unbecoming a public employee;
 2. N.J.A.C. 4A:2-2.3(a)8: Misuse of public property, including motor vehicles;
 3. N.J.A.C. 4A:2-2.3(a)12: Other sufficient cause;
 4. [PDRR] 3.1.3: Abide by all rules, regulations and departmental procedures and directives governing police officer employees;
 5. PDRR 3.1.6: Conduct themselves in accordance with high ethical standards, on and off-duty;

6. PDRR 4.1.3: Obedience to Laws and Rules. Employees shall obey all laws, ordinances, rules, policies, and procedures and directives of the department;
7. Kean PM Chapter 41.3.10 et seq.: Body Worn Cameras;
8. Kean PM Chapter 84.1.1 et seq.: Handling of Property and Evidence; and
9. Implicit Standard of Good Behavior. (R-2 at 2).

The gist of Perez' legal argument is that Kean's summary decision motion should be denied because "the nature and extent" of Hargrove's permission to lonno to "record" the IA interview "is highly relevant" as to whether "Kean waived its ability to complain that Perez recorded the IA interview with his BWC." Perez offered no contest as to the other charges. Perez' argument that he was a third-party beneficiary of the oral "contract" between Hargrove and lonno when Hargrove granted lonno permission to record the interview was abandoned at oral arguments, when Kean conceded that Perez had the right to record the interview under the NJIAPP, just not with Kean's BWC.

Perez further argues that should he be found liable for his conduct, the penalty determination in this matter should be placed on the OAL inactive list, pending the outcome of his first termination appeal currently before the Appellate Division, essentially, in the interest of judicial economy, and because it would permit him to argue for a lesser penalty than termination in this case, should the Appellate Division reduce his first termination penalty. Kean counters that should the FNDA charges be sustained in this case, immediate termination is warranted regardless of the outcome of Perez' termination case currently before the Appellate Division, and that Kean is entitled to finality with respect to this case so that it may assess and address departmental staffing needs.

LEGAL ANALYSIS AND CONCLUSIONS

I.

A summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to

any material fact challenged and that the moving party is entitled to prevail as a matter of law.” N.J.A.C. 1:1-12.5(b). That rule is substantially similar to the summary judgment rule embodied in the New Jersey Court Rules. See R. 4:46-2; Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

In Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

[A] determination whether there exists a “genuine issue” of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The “judge’s function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”

[Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)).]

In evaluating the merits of the motion, “[a]ll inferences of doubt are drawn against the movant and in favor of the opponent of the motion.” Judson, 17 N.J. at 75. However, “[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.” N.J.A.C. 1:1-12.5(b).

Having reviewed the parties’ submissions and heard their oral arguments, I **CONCLUDE** that no genuine issues of material fact exist which require a plenary hearing to determine whether Perez is guilty of the FNDA charges, and if so, the appropriate penalty to be imposed. This matter is therefore ripe for summary decision.

I further **CONCLUDE** that Perez has failed to demonstrate the good cause required by N.J.A.C. 1:1-9.7(a) to place the penalty determination in this case on the inactive list pending the outcome of his first termination appeal currently before the Appellate Division.

II.

A civil service employee's rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. The Act is an inducement to attract qualified individuals to public service positions and is to be liberally construed toward attainment of merit appointments and broad tenure protections. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576, 581 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583, 586 (App. Div. 1972). However, "[t]here 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).

Indeed, a civil service employee who commits a wrongful act related to their employment may be subject to discipline, which may be a reprimand, suspension, or removal from employment, depending upon the incident. N.J.S.A. 11A:1-2c; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2(a). Public entities should not be burdened with an employee who fails to perform their duties satisfactorily or engages in misconduct related to their duties. N.J.S.A. 11A:1-2c. Thus, a public entity may impose major discipline upon a civil service employee, including termination/removal from their position. N.J.S.A. 11A:1-2c; N.J.A.C. 4A:2-2.2(a).

In appeals concerning major disciplinary action such as termination, the appointing authority bears the burden to prove the FNDA charges by a preponderance of the competent credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (internal quotation marks omitted). The evidence must

“be such as to lead a reasonably cautious mind to a given conclusion.” Bornstein v. Metro Bottling Co., 26 N.J. 263, 275 (1958). OAL hearings on civil service removal appeals are de novo, both as to guilt and the penalty to be imposed. Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980); W. New York v. Bock, 38 N.J. 500, 522, n.1, n.3 (1962).

Police officers are held to a higher standard of conduct than ordinary citizens. In re Phillips, 117 N.J. 567, 576-77 (1990); In re Emmons, 63 N.J. Super. 136, 141-42 (App. Div. 1960). “An officer cannot complain that he is being held up as a model of proper conduct; it is one of the obligations he undertakes upon voluntary entry into the public service. His obligations are greater if he desires to maintain his position as police officer.” Emmons, 63 N.J. Super. at 141-42. Law enforcement employees represent “law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public.” Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965).

In quasi-military settings such as police departments, it is of paramount importance to maintain strict discipline of employees. Rivell v. Civil Serv. Comm’n, 115 N.J. Super. 64, 72 (App. Div. 1971); Newark v Massey, 93 N.J. Super. 317, 323 (App. Div. 1967). Indeed, “a finding of misconduct by a police official need not be predicated on the violation of any particular department rule or regulation,” as “an ‘implicit standard of good behavior . . . devolves upon one who stands in the public eye as the upholder of that which is morally and legally correct.’” Phillips, 117 N.J. at 576 (quoting Emmons, 63 N.J. Super. at 140).

In this case, the FNDA sustained each of the following nine charges against Perez, terminating his employment effective March 12, 2020. (R-2).

1. N.J.A.C. 4A:2-2.3(a)6: Conduct unbecoming a public employee

“Conduct unbecoming a public employee” is an elastic phrase which has been broadly defined as conduct that adversely affects the morale or efficiency of the

governmental unit, or has the tendency to destroy the public's respect for public employees and the public's confidence in the operation of government services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); Emmons, 63 N.J. Super. at 140. As stated in my factual findings, Perez violated numerous provisions of PM Chapter 41.3.10, PM Chapter 84.1.1, PDRR sections 3.1.3, 3.1.6, and 4.1.3, and the NJIAPP requirement to produce the BWC recording upon Hargrove's request, all of which undermines the public trust bestowed upon police officers. Moreover, I **CONCLUDE** that Perez' misconduct demonstrably adversely affected both the morale and efficiency of Kean's police department. Perez' misconduct triggered entirely new IA investigations by Hargrove, both for himself and the AXON officer who was also disciplined, thus necessarily deflating the morale and efficiency of the department.

I therefore **CONCLUDE** that Kean has met its burden to prove by a preponderance of credible evidence that Perez' misconduct was conduct unbecoming a public employee which warrants discipline, pursuant to N.J.A.C. 4A:2-2.3(a)6.

2. N.J.A.C. 4A:2-2.3(a)8: Misuse of public property, including motor vehicles

Misuse of public property has been broadly defined as deliberately using public property incorrectly, "for other than its intended or reasonable[y] foreseeable purpose, or, in a manner that is not objectively foreseeable," for an improper purpose or one's own private gain. In re Gray, Gloucester County, Dep't of Emergency Response, 2014 N.J. AGEN LEXIS 241, 8,10 (May 27, 2014) (quoting In re Shea, County of Sussex, 2008 N.J. AGEN LEXIS 405, 9 (June 13, 2008), adopted Comm'r, (July 23, 2008)). Kean's "BWC equipment and all data, images, video, and metadata captured, recorded, or otherwise produced by the equipment is [sic] the sole property" of Kean's police department. PM Chapter 41.3.10.3.C.ii. As stated in my factual findings, Perez misused that public property by failing to return the BWC to the docking station at the 8:00 a.m. end of his March 28, 2019 patrol shift, by possessing the BWC when he was not on patrol duty and not authorized to possess it, by using it to record his IA interview, by taking the BWC home with him after the interview, and by inducing the AXON officer to upload and burn

a copy of the recording to a CD, which Perez then took possession of, and distributed to his former attorney, all in violation of PM Chapter 41.3.10 sections 2, 3.C.i, 3.C.ii, 3.C.vii, 3.C.ix, 3.C.xii, 3.D.i, 3.D.ii, 5.B, 6.C, and 6.D. I **CONCLUDE** there is no question that Perez' use of Kean's BWC and its recording was deliberate, and for improper purposes and his own private gain, rather than any performance of his official duties.

I therefore **CONCLUDE** that Kean has met its burden to prove by a preponderance of credible evidence that Perez misused public property, which warrants discipline, pursuant to N.J.A.C. 4A:2-2.3(a)8.

3. N.J.A.C. 4A:2-2.3(a)12: Other sufficient cause

Other sufficient cause has been described as other conduct not specifically delineated in N.J.A.C. 4A:2-2.3(a) which would "violate[] the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." In re Boyd, Cumberland County Dep't of Corrs., 2019 N.J. CSC LEXIS 621, 121 (July 3, 2019), adopted Comm'r, id. at 1-2 (Aug. 14, 2019). N.J.A.C. 4A:2-2.3(a)12 is essentially a catchall provision for why an employee may be subject to major discipline. As stated in my factual findings and discussed immediately above, Perez violated numerous provisions of PM Chapter 41.3.10, PM Chapter 84.1.1 sections 1, 5A, and 5B, PDRR sections 3.1.3, 3.1.6, and 4.1.3, and the NJIAPP requirement to produce the BWC recording upon Hargrove's request, all of which demonstrates "other sufficient cause."

I therefore **CONCLUDE** that Kean has met its burden to prove by a preponderance of credible evidence that Perez' misconduct constituted other sufficient cause which warrants discipline, pursuant to N.J.A.C. 4A:2-2.3(a)12.

4. PDRR 3.1.3: Abide by all rules, regulations and departmental procedures and directives governing police officer employees

The foregoing factual findings and the within legal analyses conclusively establish that Perez did not “[a]bide by all rules, regulations and departmental procedures and directives governing police officer employees.

I therefore **CONCLUDE** that Kean has met its burden to prove by a preponderance of credible evidence that Perez violated PDRR 3.1.3, which warrants discipline.

5. PDRR 3.1.6: Conduct themselves in accordance with high ethical standards, on and off-duty

Ethics is defined as “[t]he duties a good person ought to perform. Ethics is the sum of what a good person would do either in general or in a specific situation.” Wolters Kluwer Bouvier Law Dictionary Desk Edition, [https://advance.lexis.com/document/answercarddocument/?pdmfid=1000516&crid=c148623a-7d82-496d-a6b0-dd46bee41a64&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5FXB-8NH0-011T-Y181-00000-00&pdcontentcomponentid=422309&pddoctitle=Bouvier+Law+Dictionary+-+Ethics+\(Ethical\)&pditab=allpods&ecomp=bzt4k&prid=d72e1804-f91a-474a-adf6-31875ef1e1b6](https://advance.lexis.com/document/answercarddocument/?pdmfid=1000516&crid=c148623a-7d82-496d-a6b0-dd46bee41a64&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5FXB-8NH0-011T-Y181-00000-00&pdcontentcomponentid=422309&pddoctitle=Bouvier+Law+Dictionary+-+Ethics+(Ethical)&pditab=allpods&ecomp=bzt4k&prid=d72e1804-f91a-474a-adf6-31875ef1e1b6), (last visited Apr. 30, 2021). The foregoing factual findings and the within legal analyses conclusively establish that Perez did not conduct himself “in accordance with high ethical standards, on and off-duty,” as Perez committed numerous acts of misconduct with Kean’s BWC and recording, both on and off-duty.

I therefore **CONCLUDE** that Kean has met its burden to prove by a preponderance of credible evidence that Perez violated PDRR 3.1.6, which warrants discipline.

6. PDRR 4.1.3: Obedience to Laws and Rules. Employees shall obey all laws, ordinances, rules, policies, and procedures and directives of the department

The foregoing factual findings and the within legal analyses conclusively establish that Perez did not “obey all . . . rules, policies, and procedures and directives of the department.”

I therefore **CONCLUDE** that Kean has met its burden to prove by a preponderance of credible evidence that Perez violated PDRR 4.1.3, which warrants discipline.

7. Kean PM Chapter 41.3.10 et seq.: Body Worn Cameras

The foregoing factual findings and the legal analysis in section II.2., above, conclusively establish that Perez violated sections 2, 3.C.i, 3.C.ii, 3.C.vii, 3.C.ix, 3.C.xii, 3.D.i, 3.D.ii, 5.B, 6.C, and 6.D. of PM Chapter 41.3.10.

I therefore **CONCLUDE** that Kean has met its burden to prove by a preponderance of credible evidence that Perez violated eleven sections of PM Chapter 41.3.10, which warrants discipline.

8. Kean PM Chapter 84.1.1 et seq.: Handling of Property and Evidence

The foregoing factual findings conclusively establish that Perez violated sections 1, 5.A., and 5.B. of PM Chapter 84.1.1, by failing to follow Kean's property and evidence procedures, failing to make a property record of the CD recording, and failing to issue an accompanying report about the CD recording.

I therefore **CONCLUDE** that Kean has met its burden to prove by a preponderance of credible evidence that Perez violated three sections of PM Chapter 84.1.1, which warrants discipline.

9. Implicit Standard of Good Behavior

As previously noted, "a finding of misconduct by a police official need not be predicated on the violation of any particular department rule or regulation," as "an 'implicit standard of good behavior . . . devolves upon one who stands in the public eye as the upholder of that which is morally and legally correct.'" Phillips, 117 N.J. at 576 (quoting Emmons, 63 N.J. Super. at 140). However, it is axiomatic that a police officer is not "morally and legally correct," and violates the implicit standard of good behavior, when he commits multiple acts of misconduct both on and off-duty, as Perez did in this case with Kean's BWC and its recording.

I therefore **CONCLUDE** that Kean has met its burden to prove by a preponderance of credible evidence that Perez violated the implicit standard of good behavior, which warrants discipline.

III.

Once a determination has been made that an employee violated a statute, rule, or regulation concerning their employment, the concept of progressive discipline requires consideration. In re Stallworth, 208 N.J. 182, 195-96 (2011); Bock, 38 N.J. at 523. When deciding what disciplinary action is an appropriate penalty, the fact finder shall consider the nature of the sustained charges and the appellant's past record. Bock, 38 N.J. at 523-24. The employee's past record is said to encompass their reasonably recent history of promotions or commendations on the one hand, and on the other hand, any "formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated . . . by having been previously called to the attention of and admitted by the employee." Ibid. Consideration as to the timing of the most recently adjudicated disciplinary history should also be given. Id. at 524.

The theory of progressive discipline is not a fixed rule to be followed without question. In re Carter, 191 N.J. 474, 484 (2007). "[S]ome disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." Ibid. The question for the fact finder is whether the disciplinary action is so disproportionate to the offense, considering all of the circumstances, to shock one's sense of fairness. Ibid. Removal has been upheld where the acts charged, with or without prior disciplinary history, have warranted imposition of the sanction. Ibid. Hence an employee may be removed, without regard to progressive discipline, if their conduct was egregious. Ibid.; In re Herrmann, 192 N.J. 19, 33-34 (2007).

Sworn law enforcement officers are recognized as a "special" kind of public employee. Armstrong, 89 N.J. Super. at 566. Their primary duty is to enforce and uphold the law, exercise tact, restraint, and good judgment, and represent law and order to the

citizenry. Ibid. Hence, they must present an image of personal integrity and dependability to garner the respect of the public. Ibid.

Kean maintains that removal is appropriate in this case because Perez' misconduct was egregious, making the concept of progressive discipline inapplicable. Perez concedes that even if progressive discipline applies, "it is virtually impossible for Perez to argue for any penalty short of removal for the charges levied in this matter," in light of Perez' prior removal. I agree with both sentiments.

I **CONCLUDE** that Perez' misconduct was so egregious as to warrant automatic removal, without regard to progressive discipline. While Perez was being actively investigated and interviewed for the misconduct which triggered his first removal, he committed further multiple acts of surreptitious misconduct with Kean's BWC and its recording. He also took advantage of the lower-ranking AXON officer in perpetuating that misconduct. Perez does not possess the heightened judgment, integrity, and ethical standards required to be a police officer.

Even if the concept of progressive discipline were applied, I **CONCLUDE** that Perez' misconduct in this case warrants removal, as there is no greater penalty that could be imposed after Perez' first removal. N.J.A.C. 4A:2-2.2. Perez' prior disciplinary history, which he does not dispute, is extensive and includes:

1. His first termination effective August 23, 2019, for: (a) his February 6, 2019 misconduct of engaging in a profanity-laced tirade on a recorded police telephone line about a student who required medical assistance, leaving his duty weapon and police radio unattended in a public place for a prolonged period of time, and failing to return to duty upon being reunited with his gun and radio; and (b) his March 28, 2019 misconduct of lying during the BWC-recorded IA interview at issue in this matter about resuming his patrol duties on February 6, 2019. He was specifically found guilty of incompetency, inefficiency or failure to perform duties, N.J.A.C. 4A:2-2.3(a)1, conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)6, neglect of duty, N.J.A.C. 4A:2-2.3(a)7, and

violating Kean PDRR sections 3.1.3, 4.1.3, and 6.1.1 (failure to adhere to the PDRRs), 3.1.6 (ethical conduct), 3.1.9 and 4.1.1 (performance of duty), 4.8.1, 4.8.3, and 4.8.4 (service weapons and equipment), 4.12.6 (truthfulness), and 1.3.9 as well as PM Chapter 81.3.1 (firearm safety and portable radio use). (R-20 at 14). Although Perez' first termination is currently on appeal in the Appellate Division, it may still be considered in this penalty determination, Johnson v. State Dep't of Corrs., No. A-4382-993T (App. Div. July 3, 2001) (slip op. at 8-9), and it is particularly noteworthy that the misconduct which is the subject of this matter took place less than two months after the misconduct which led to Perez' first termination;

2. A negotiated six-day suspension without pay in October and November of 2013 for making numerous insubordinate and unprofessional comments on Kean's Info-Cop System for chats and messaging amongst officers. Perez specifically admitted his guilt in an October 23, 2013 settlement agreement with Kean to incompetency, inefficiency or failure to perform duties, N.J.A.C. 4A:2-2.3(a)1, insubordination, N.J.A.C. 4A:2-2.3(a)2, conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)6, misuse of public property, including motor vehicles, N.J.A.C. 4A:2-2.3(a)8, other sufficient cause, N.J.A.C. 4A:2-2.3(a)12, violations of PDRR sections 3.1.3 (abide by all rules, regulations, and departmental procedures), 3.1.6 (high ethical standards), 4.1.6 (insubordination), 4.1.7 (conduct toward other department employees), 4.6.3 (prohibited activity on duty), and a violation of Kean's Police Department General Order 81.1.1.9F (use of chat and messaging functions of the Info-Cop System). Perez' conduct was deemed to be "reprehensible." (R-22);

3. A negotiated two-day suspension without pay in January 2010 for his March 2009 misconduct by failing to prepare an Operations Report about a psychiatric duty call when he was required and explicitly ordered to do so. Perez specifically admitted his guilt in a December 14, 2010 settlement agreement with Kean to insubordination, N.J.A.C. 4A:2-2.3(a)2, neglect of duty, N.J.A.C. 4A:2-2.3(a)7, other sufficient cause, N.J.A.C. 4A:2-2.3(a)11, and violating PDRR sections 4.1.1 (performance of duty), and 4.1.6 (insubordination). (R-23); and

4. An official written reprimand on May 28, 2009 for his January 30, 2009 verbal and physical abuse of two female students in a Kean dormitory lobby. After a departmental hearing, Perez was found guilty of N.J.A.C. 4A:2-2.3(a)6, conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)11, other sufficient cause, and violating PDRR section 4.10.1 (courtesy). (R-24).

Kean also notes that PDRR section 6.1.2 gives notice that “[r]epeated violations of the rules of conduct shall be indicative of employees’ disregard for their duty and may be cause for dismissal. This shall apply regardless of the type or severity of the offenses.” (C-2 at 17). It is noteworthy that during his eighteen-year tenure with Kean, Perez’ pattern of misconduct commenced in his eighth year of service, and continued and escalated in severity until his first termination effective August 23, 2019.

Under the totality of these facts and circumstances, I **CONCLUDE** that termination is the only appropriate penalty in this matter, both under the egregious misconduct and progressive discipline standards.

ORDER

It is therefore:

ORDERED that Kean’s motion for summary decision is hereby **GRANTED**; and it is further;

ORDERED that Perez be removed from his position as a Kean police officer; and it is further;

ORDERED that Perez’ cross-motion to place the penalty phase of this matter on the inactive list pending the outcome of his current appeal before the Appellate Division of his first termination is hereby **DENIED**; and it is further;

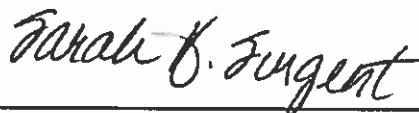
ORDERED that Perez' petition of appeal is hereby **DISMISSED**.

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 11, 2021
DATE



SARAH H. SURGENT, ALJ

Date Received at Agency:

May 11, 2021 (emailed)

Date Mailed to Parties:

SHS/mel

APPENDIX

EXHIBITS

For the Judge:

- C-1 New Jersey Attorney General Internal Affairs Policy & Procedures Table of Contents and page 38 revised November 2017
- C-2 Kean Police Department Rules & Regulations

For Appellant:

- A-1 Certification of Appellant Alejandro Perez dated March 23, 2021
- A-2 Certification of Sebastian Ionno, Esq., dated March 23, 2021

For Respondent:

- R-1 PNDA and attachment dated August 19, 2019
 - R-2 FNDA and attachment dated March 24, 2020
 - R-3 Kean Police Department Internal Affairs Findings and Disposition dated July 11, 2019
 - R-4 Kean Police Department Internal Affairs Findings and Disposition dated May 29, 2019
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- R-5 Kean Police Print Daily Rosters dated March 28 and March 29, 2019
 - R-6 Email from Lt. Thomas Hargrove to Sebastian Ionno, Esq., dated March 28, 2019
 - R-7 Body Worn Camera Video Categorizations on AXON EVIDENCE.COM database system

- R-8 Evidence audit trail on AXON EVIDENCE.COM database system dated March 28, 2019
- R-9 Emails between Lt. Thomas Hargrove and the AXON officer dated May 21, 2019
- R-10 Email between Lt. Thomas Hargrove and Dt. Sgt. Mark Anacker dated July 10, 2019
- R-11 Email between Lt. Thomas Hargrove and Kean Campus Police Records Bureau Supervisor Sonia Yantin dated July 11, 2019
- R-12 Kean Police CAD log printed on July 10, 2019
- R-13 Kean Police Temporary Room Log dated March 19, 2019 to July 18, 2019
- R-14 Letter from Sebastian B. Ionno, Esq., to Ellen M. Horn, Esq., dated June 24, 2019
- R-15 CD copy of Perez' BWC recording of his March 28, 2019 IA interview, forwarded to Ellen M. Horn, Esq., by Sebastian B. Ionno, Esq., on June 24, 2019
- R-16 CD copy of Perez' BWC recording of his March 28, 2019 IA interview, uploaded to Kean's AXON EVIDENCE.COM system database on March 28, 2019
- R-17 Kean PM Chapter 41.3.10 governing BWCs
- R-18 Kean PM Chapter 84.1.1 governing handling of property and evidence
- R-19 FNDA dated August 21, 2019
- R-20 In re Perez, Kean University, 2020 N.J. AGEN LEXIS 196, initial decision, (Apr. 2, 2020)
- R-21 In re Perez, Kean University, 2020 N.J. AGEN LEXIS 196, final decision, (May 22, 2020)

- R-22 In re Perez Disciplinary Action Settlement Agreement and related documents, dated October 23, 2013
- R-23 In re Perez Disciplinary Action Settlement Agreement and related documents, dated December 14, 2009
- R-24 FNDA – Official Written Reprimand dated May 28, 2009

**R-25 Certification of Meaghan Lenahan in Support of Motion for Summary
Decision dated March 5, 2021**

**R-26 Certification of Ellen M. Horn, Esq., in Support of Motion for Summary
Decision dated March 5, 2021**