STATE OF NEW JERSEY

In the Matters of Victor Vasquez, *et al.*, City of Hackensack, Police Department CSC Docket Nos. 2018-2793, *et al.* OAL Docket Nos. CSR 04771-18, *et al.* (Consolidated)	**DECISION OF THE CIVIL SERVICE COMMISSION**

ISSUED: JULY 21, 2021 (NFA)

The appeals of Victor Vazquez, Mark Gutierrez and Rocco Duardo, Police Officers, and Justin de la Bruyere, Police Sergeant, City of Hackensack, Police Department, of their removals effective July 20, 2017, on charges, was before Administrative Law Andrew M. Baron (ALJ), who rendered his initial decision on June 10, 2021. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellants.

Having considered the record and the attached ALJ's initial decision, including a thorough review of the extensive submissions filed in this matter, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on July 21, 2021, adopted the ALJ's Findings of Fact and Conclusions of Law and his recommendation to reverse the removals.

As noted above, the Commission thoroughly reviewed all of the submissions in this matter. However, based on the ALJ's thorough and well-reasoned determination, with which the Commission agrees, it finds no reason to specifically address any of those submissions. The Commission will only add the following. It is clear that nothing issued by the Bergen County Prosecutor in this matter called for the removal from employment of the appellants. Further, the Prosecutor indicated that any future impediment to their functioning as Police Officers would be on a case-by-case basis. Thus, while it is unfortunate that the appellants may be designated as "tainted" for certain purposes of their positions, and that may have affected certain current matters and may affect certain future matters, it does not render them incapable of performing the essential functions of their positions, on a case-by-case basis. Additionally, this impediment, which apparently served as the

basis for the contemporaneous dismissal of certain matters, cannot form a basis to impose disciplinary action. This is the case since in order for discipline to have been imposed for the dismissed matters, it would have to have been established that the appellants engaged in improprieties *in those matters*. Otherwise, as indicated previously, the Commission agrees with and adopts the ALJ's findings of fact and conclusions of law as well as his recommendation to reverse the removals.

It is noted that in *In the Matter of Victor Vazquez, et al.* (CSC, decided March 27, 2019), where the appellants faced removal based on other charges, the Commission modified the removals of Victor Vazquez and Rocco Duardo to six-month suspensions and upheld the removals of Mark Gutierrez and Justin de la Bruyere, effective May 9, 2017. As such, Victor Vazquez and Rocco Duardo, if not already, shall be immediately reinstated to employment and awarded back pay six months from their initial date of separation to their actual date of reinstatement per the above-cited decision. *See N.J.A.C.* 4A:2-2.10. However, Mark Gutierrez and Justin de la Bruyere are not entitled to these remedies as their prior removals were upheld in that decision. Further, as all the charges in these matters have been dismissed, all the appellants are entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12 for fees incurred in this matter only.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Superior Court of New Jersey, Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay or counsel fees regarding Vazquez and Duardo, or outstanding issues concerning counsel fees regarding Gutierrez and de la Bruyere are finally resolved. In the interim, as the court states in *Phillips, supra*, the appointing authority shall immediately reinstate Vazquez and Duardo to their permanent positions.

ORDER

The Civil Service Commission finds that the appointing authority's actions in removing Victor Vazquez, Mark Gutierrez, Rocco Duardo and Justin de la Bruyere were not justified. Therefore, the Commission reverses the removals. The Commission further orders that Mark Gutierrez and Rocco Duardo, per its previous decision, be granted back pay, benefits and seniority for the period six-month after their first date of separation through the date of their actual reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned, and an affidavit of mitigation shall be submitted by or on behalf of Vazquez and Duardo to the appointing authority within 30 days of issuance of this decision. All appellants are also entitled to reasonable counsel fees for this matter pursuant to *N.J.A.C.* 4A:2-2.12. Affidavits of services in support of reasonable counsel fees shall be submitted by or on behalf of

the appellants to the appointing authority within 30 days of issuance of this decision. The parties shall make a good faith effort to resolve any dispute as to the amount of back pay or counsel fees. However, under no circumstances should Vazquez's and Duardo's reinstatements be delayed pending resolution of any back pay or counsel fees dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and/or counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21ST DAY OF JULY, 2021

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

IN THE MATTER OF VICTOR VASQUEZ, CITY OF HACKENSACK, POLICE DEPARTMENT.	OAL DKT NO. CSR 04771-18 AGENCY DKT NO. 2018-2793
IN THE MATTER OF MARK GUTIERREZ, CITY OF HACKENSACK, POLICE DEPARTMENT.	OAL DKT. NO. CSR 04770-18 AGENCY DKT NO. 2018-2792
IN THE MATTER OF JUSTIN DE LA BRUYERE, CITY OF HACKENSACK, POLICE DEPARTMENT.	OAL DKT. NO. CSR 04774-18 AGENCY DKT. NO. 2018-2791
IN THE MATTER OF ROCCO DUARDO, CITY OF HACKENSACK, POLICE DEPARTMENT.	OAL DKT. NO. CSR 05819-18 AGENCY DKT. NO. 2018-2927

Charles J. Sciarra, Esq., and **Frank Cioffi, Esq.,** for appellant Rocco Duardo (Sciarra & Catrambone, attorneys)

Raymond R. Wiss, Esq., for respondent City of Hackensack (Wiss & Bouregy, attorneys)

Record Closed: March 23, 2021 Decided: June 10, 2021

BEFORE **ANDREW M. BARON**, ALJ:

STATEMENT OF THE CASE

Hackensack police officers Rocco Duardo, Justin de la Bruyere, Joseph Gonzalez, Mark Gutierrez, and Victor Vasquez were removed from their positions for allegedly engaging in conduct unbecoming a public employee, and other sufficient cause. The City says that in connection with a decision made by the Bergen County Prosecutor in 2017, that resulted in the dismissal of several outstanding indictments and Municipal Court cases in which the officers were involved, together with a directive that future cases would require a "Brady" disclosure about the officers' conduct, these individuals could no longer effectively carry out their sworn duties on behalf of the City.

PROCEDURAL HISTORY

On May 9, 2017, the City of Hackensack, (hereinafter referred to as the City,) by and on behalf of the Hackensack Police Department, served upon Officers Rocco Duardo, Justin de la Bruyere, Joseph Gonzalez, Mark Gutierrez and Victor Vasquez, Preliminary Notices of Disciplinary Action (PNDA). The Notices were signed by City Manager Ted M. Ehrenberg.

The PNDAs were issued following an internal affairs investigation conducted by the Police Department's Internal Affairs officer, Captain Peter Busciglio. These notices served to formally inform the officers of the City's intention to terminate them from their positions. In response, the officers requested a departmental hearing in the charges.

The outcome of this investigation was that the Officers had engaged in impermissible actions, in violation of law as well as the Rules and Regulations which govern all officers who work for the Hackensack Police Department. This investigation, which later became the subject of a separate proceeding before a different judge at the

Office of Administrative Law was more commonly referred to as the "64 Prospect Avenue" matter. Following several days of hearing in that case, (and after a request to hear this case first was denied) a decision was issued in that case, located at 2019 N.J. AGEN. LEXIS 46 Initial Decision (February 8, 2019).

During the course of the Internal Affairs Investigation, the matter was reviewed by the Bergen County Prosecutor to decide if any criminal charges should be filed against the officers as a result of the allegations. Although no criminal charges were filed, by letter dated July 19, 2017, the Prosecutor informed the Police Department's Officer in Charge, Francesco Aquila that the matter was being referred back to the Department and the City invoking the forty-five- day rule, pursuant to N.J.S.A. 40A:14-147.

One day later, on July 20, 2017, the Prosecutor sent another letter to Aquila to inform him that "the conduct of the officers, undermines the ability of the Prosecutor's Office in several ongoing matters in which the officers are involved. The Bergen County Prosecutor did not direct the City of Hackensack to terminate the officers, and the Prosecutor did not join the proceedings as a party to this case. The decision regarding the employment status of the officers was left to the sole discretion of the City. The prosecutor's letter advises Aquila that eight (8) criminal matters pending in Superior Court involving sixteen (16) criminal defendants were being dismissed.

The letter went on to inform Aquila that additional cases may also be impacted, and that decisions about the Officers' ability to testify in future cases would be made on a case-by-case basis, invoking the holdings in Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 450 U.S. 150, (1972). Several cases involving the same officers were also dismissed at the municipal court level after the Prosecutor directed the Municipal Prosecutor to temporarily refrain from prosecuting any matters involving these officers. (See **Exhibit R-13**, letter dated August 14, 2017.)

Although the City asked for a meeting with representatives of the Bergen County Prosecutor Office (BCPO) to seek clarification of the decisions made regarding the officers' ability to testify as well as the decision to dismiss several pending cases

involving the officers, the City did not take any formal action regarding these decisions, essentially since they came from the Chief Law Enforcement Officer of Bergen County.

The next day, Duardo filed an Order to Show Cause in the Superior Court, Chancery Division, seeking, among other things, a declaration that the Prosecutor had acted arbitrarily without due process, dismissing the PNDA against him and enjoining the City from interviewing the officers.

This application in Superior Court was unsuccessful on procedural grounds without reviewing the merits and was dismissed. The Appellate Division affirmed the decision also on procedural grounds, without addressing the merits. Among other things, the procedural deficiencies mentioned were that the Order to Show Cause with Restraints as filed, did not include Certifications from the individuals seeking relief. Respondent argued that with these actions by the Superior Court Chancery and Appellate Divisions, petitioners should be estopped from pursuing their right any further before the office of Administrative Law. I disagreed and the proceeding continued as petitioners are obligated to exhaust their administrative remedies, and the appropriate forum to do that is before the Office of Administrative Law.

Thereafter, the City served a second PNDA on the officers on September 1, 2017. This document gave notice to the officers that the City was seeking their dismissal based on all of the criminal cases which were dismissed out of concern over the officers' credibility and related Brady issues, and the need to disclose exculpatory evidence about the officers involving the underlying allegation from the 64 Prospect Street incident, and the concern about prosecuting future criminal defendants in cases in which these officers were involved.

The second round of PNDAs referenced N.J.S.A. 40A:14-147, N.J.A.C. 4A:2-2.3 accusing them of incapacity, incompetency, inefficiency, failure to perform duties, and inability to perform duties. Also cited in the PNDA is the Hackensack Police Department Rules and Regulations.

Duardo then went back to Superior Court a second time, and on September 8, 2017 filed a second action seeking to invalidate the City's decision to terminate him. His second challenge was based on his perceived designation as a "Brady cop" which he argued was an arbitrary and capricious abuse of discretion by the Bergen County Prosecutor.

Again, no emergent relief or restraint were granted, and the City continued to proceed out of its own concerns about the ability of these officers to do their jobs, which was compounded by the actions of the Prosecutor.

On September 29, 2017, the City amended its PNDA and further charged them with illegal seizure of and conspiracy to illegally seize documents within the residence at 64 Prospect Street, Hackensack, New Jersey when they entered the residence there in December 2016.

After a departmental hearing, all of the officers were terminated from their employment with the City in a Final Notice of Disciplinary Action (FNDA) dated February 9, 2018.

The Officers then filed a request for a hearing with the Office of Administrative Law (OAL) and the Civil Service Commission (Commission). The OAL filed it 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 and N.J.S.A. 40A:14-200 et seq. With the administrative action filed and pending, the Superior Court issued an order dated March 26, 2018, denying the relief sought by Duardo on procedural grounds, ruling, among other things, that the Civil Service Commission and the Office of Administrative Law were the more appropriate forums to review and decide the matters.

After a Reconsideration Motion was also denied at the Superior Court level, the first case under the first PNDA proceeded before the Honorable. Susanna Guerrero. Judge Guerrero issued a decision, which was modified by the Civil Service Commission, essentially absolving one of the officers, increasing from four to six

months the suspension against two others, and affirming the termination of the remaining two officers. That matter is still pending before the Appellate Division.

The within case involving the termination under "Brady" concerns then proceeded. First, there were pre-hearing arguments and Orders issued concerning the scope of the proceeding and whether the City should be allowed to present its expert testimony, and whether testimony should be allowed concerning meetings held by Hackensack officials with officials from the Office of the Bergen County Prosecutor.

Before the start of the hearing, due to the complicated nature, scope and anticipated length of this case, petitioners waived their rights under the one hundred eighty (180) day rule that is normally associated with Civil Service termination cases. Hearings on the merits commenced on June 26, 2019, June 28, 2019, July 30, 2019, August 7, 2019, and August 26, 2019. Post hearing submissions were received on December 11, 2019, and oral argument was heard on December 18, 2019. Covid-19 then ensued effective March 17, 2020. Petitioners submitted additional documents for consideration in September 2020, 2021 and February 17, 2021. Supplemental argument was heard on March 23, 2021.

INTRODUCTION

From the outset, the City framed the issue to be determined as limited to upholding its decision to terminate the officers based on the determination by the Bergen County Prosecutor that the ability to do their jobs had been permanently impaired by the need to disclose their status under "Brady" in ongoing and future investigations, arrests, and related matters in which they were or would be involved.

The City says unless these officers are terminated, it will have a profound effect on the overriding issues of protecting and promoting the public interest and public safety within the City of Hackensack.

Since the BCPO is the Chief Law Enforcement Officer for Hackensack and all seventy-two (72) Bergen County municipalities, the City represented that there was no

ability to overturn the decision made by the BCPO, and on strictly narrow legal grounds, the trier of fact and law in this case is compelled to simply uphold the decision to terminate, with no ability to look into, overturn or modify the decision of the BCPO.

With little if any precedent to look to, this matter is a case of "first impression", nonetheless requiring careful and thoughtful evaluation and consideration, since the outcome on appeal is termination of five individuals from their chosen profession, essentially as their counsel argues, limiting and/or eliminating their ability to secure future employment in law enforcement.

At the time this case was heard, the underlying charges related to "64 Prospect" had already been litigated and decided. That is not before me. What is before me is whether or not the "Brady" designation, the outright dismissal of all pending cases involving the officers, and related considerations are sufficient cause to terminate the officers for what amounts to a second time.

The premise of the final BCPO determination upon is what the City used as its rationale for termination, is examined more closely here from a narrow, due process standpoint. This is especially critical because the BCPO was not joined as a party to the case, no witnesses were produced from the BCPO, and the City essentially relied on three letters from the BCPO, which were admitted into the record as admissible hearsay under OAL rules, and which formed the foundation of the City's decision to terminate the officers.

TESTIMONY AND DISCUSSION

The first witness to testify on behalf of the City was Captain Joseph Busciglio. Captain Busciglio, a veteran of the Hackensack Police Department (hereinafter referred to as the Department) was in charge of the Department's Internal Affairs Unit at the time of the incident involving these five petitioners. According to Captain Busciglio, the Department consists of approximately ninety-eight (98) officers.

Captain Busciglio further stated that on July 20, 2017, letters were forwarded to him in his capacity as Officer in Charge of Internal Affairs, from the Bergen County Prosecutor. At the time these letters were forwarded to him, he indicated that his investigation into the conduct of these officers in the related case known as "64 Prospect" was still ongoing. During his entire career in law enforcement, the Captain indicated he had never seen a letter before like the ones he reviewed from the Prosecutor involving the officers.

In the first letter, dated July 19, 2017, (**Exhibit R-11)**, stated as follows:

Dear Captain Aquila:

Your police department notified this Office's Confidential Investigations Unit of allegations involving the above referenced officer. After a thorough review of your department's internal affairs investigation of those allegations, this Office has determined that the facts do not support filing criminal charges against the subject officer. Therefore, we are referring this matter to your department to conduct an administrative internal affairs investigation in accordance with the Attorney General's Guidelines. Pursuant to N.J.S.A. 40A:14-147, the "45 day Rule" which governs how quickly administrative matters is now in effect. Please immediately notify this office if you obtain additional information relevant to this Office's decision regarding the appropriateness of this matter.

On July 20, 2017, Captain Busciglio testified that a second letter from the BCPO was forwarded to him, involving the same officers, and the same case known as "64 Prospect" which contained the following information:

Dear Captain Aquila:

As you are aware, the Bergen County Prosecutor's Office ("BCPO" or "this Office") recently concluded its review of the actions of the above-referenced Hackensack Police Department ("HPD") officers ("Subject Officers" in connection with HPD Internal Affairs Investigation No. 17-010,

which related to, among other things, allegations that the Subject Officers mishandled evidence, illegally entered 64 Prospect Avenue Hackensack, conducted an unlawful search of Apartment C7 therein, and subsequently falsified reports. While we informed you on July 19, 2017, that our review of those allegations and available evidence did not support the filing of criminal charges, against the Subject Officers at this time, we believe that their conduct undermines our ability to prosecute a number of matters in which they are involved. Simply put, their conduct undermines their credibility as law enforcement witnesses. Accordingly, after a through review of pending HPD matters, involving the above officers, must be dismissed: **(1)**.

We do not take the decision to dismiss criminal charges against seventeen Criminal defendants lightly, but the conduct of the Subject officers leaves us no other choice. It is also possible that additional cases may be impacted. Based on the holdings in Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. (1972), and their progeny, any decisions concerning the future testimony of any of the Subject Officers will be made on a case-by-case basis.

A third letter from the Prosecutor dated August 14, 2017, **(Exhibit R-13)**, was sent to Hackensack Municipal Prosecutor:

Dear Municipal Prosecutor Crusius:

This letter is to inform you that the Bergen County Prosecutor's Office, ("BCPO"), recently dismissed several Superior Court cases involving one or more of the above listed Hackensack Police Officers ("Subject Officers"). These dismissals were based in part on the holdings in Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150, and their progeny. Specifically, we have serious concerns about their credibility as law enforcement witnesses.

> Cases involving the Subject Officers may be pending in, or have been downgraded to, the Hackensack Municipal court. By this letter, we request that you temporarily refrain from prosecuting any matters involving the Subject Officers. We further request that you identify all matters before the Hackensack Municipal Court involving the subject officers. After doing so, please contact me at 201-226-5196 to set up a time to meet and review the affected matters to determine their viability. Please do not hesitate to contact me with questions or concerns as you conduct your review.

After seeing these letters, the first two of which were sent within three days of each other, and the third one to the municipal prosecutor within thirty days, Captain Busciglio also expressed concern to Captain Aquila that the officers might be limited in their ability to carry out their duties. In the same conversation, which was part of his testimony, Captain Busciglio also expressed his concern that the criminal cases which were dismissed could result in civil lawsuits being filed against the City.

Following these discussions in connection with the letters from the BCPO, Busciglio prepared PNDA's against each of the officers which were individually issued to each of them on September 1, 2017. **(EXHIBIT R-1).** The charges contained in the PNDA's included incapacity, incompetency, inefficiency, or failure to perform duties, inability to perform duties and other sufficient cause. By letter dated September 27, 2017, Buscigilio sent letters to each of the officers confirming that the charges had been investigated and sustained. **(Exhibit R-10).**

There was no explanation why, with the second letter from the BCPO in his possession concerning the concerns about the need for "Brady" disclosures, that this aspect of the case was not included in the original PNDA, instead of being the subject of a separate PNDA at a later time, nor was there an explanation as to why an attempt was not made to amend the original PNDA.

As to the "Brady" issue, which was treated separately and independent of the underlying charges connected to "64 Prospect" case, Captain Busciglio testified that the used the term "Brady" list and applied it to the officers, even though he was aware the

prosecutor did not use the term, and in a separate letter from the BCPO dated April 25, 2019 in response to an inquiry from a member of the public, the Prosecutor's office indicated that it does not maintain a "Brady" list, (emphasis added).

Finally, Busciglio also added towards the end of his testimony that, while he is employed by the City of Hackensack Police Department, in essence he reports to and works for the Bergen County Prosecutor, who serves as the Chief law Enforcement Officer of Bergen County. He further indicated that although the Prosecutor did not direct the City to terminate the officers, he was directed to proceed with administrative actions to determine what if any discipline was appropriate in regard to their employment with the City.

When asked during cross-examination if he knew the implications of the BCPO letters on the careers of the officers, Busciglio candidly admitted he did not know. He also indicated that the investigation he conducted did not include an analysis of what could be done with the officers. As to the issue of the Brady" disclosures referenced by the BCPO, Busciglio admitted he was aware these disclosures happen all the time, and the letters from the BCPO, did not mention the need to terminate the officers. (emphasis added).

Busciglio also testified that his investigative report did not include information of the impact of "Brady" in relation to these officers, and the impact of potential lawsuits.

The next witness for the City was City Manager Ted Ehrenburgh. Part of his duties in his words, "he is the ultimate decision-maker" when it relates to filing disciplinary charges against police officers. Before assuming the role of City Administrator, Mr. Ehrenburgh served as Police Chief in Washington Township for eleven years, including prior service there as an Internal Affairs Officer. He also served for seven years as Borough Administrator for Bloomingdale, and three years as Township Administrator in Bloomfield. In between these jobs, he also served as a consultant to several municipalities to review and make recommendations regarding their police departments.

In addition to Captain Busciglio, Mr. Ehrenburg testified that he reviewed the letters from the BCPO. He referred to the first letter of July 17,2017 as a "kickback" letter, when the Chief Law Enforcement Officer of a county decides whether they are going to pursue or decline to process criminal charges against an officer.

In further support of his decision to issue PNDA's and seek termination of the officers, Mr. Ehrenberg testified that he believed the officers were no longer allowed to testify in any cases, which is a key component of being a police officer .He went on to say there was no way to sanitize or whitewash what occurred, and after the BCPO determined this Brady classification for the officers, there was not much else use they had to the municipality. Part of his decision to terminate rose out f his fear of exposing the City to lawsuits. Yet, despite Captain Busciglio' s testimony concerning his belief that the officers had been placed on a "Brady list," Mr. Ehrenburg testified that he never saw a "Brady list", and in a meeting with representatives of the BCPO, they indicated they do not maintain a "Brady list" He also acknowledged that he took this action on his own, and that there was nothing in the letters received from the BCPO that stated the officers could not testify. He came away from the meeting with the belief that since the BCPO had determined these officers were no longer credible, they had a legal impairment in fulfilling their duties. He also cited taxpayer concerns as part of his reason for recommending termination, in that officers whose financial packages amount to two hundred thousand dollars, ($200,000) a year, could not simply be re-assigned to administrative duties for the balance of their careers.

Ehrenburg also discussed his recollection of a meeting he had with representatives of the BCPO some time after receiving the respective letters. Although there is no written memorial of the meeting, Mr. Ehrenburg indicated he recalled being told that even though the letters stated future decisions would be made on a case-by-case basis, the officers would not be allowed to testify. He was also told it was the City's right to terminate the officers, but that the BCPO does not maintain a "Brady list" (emphasis added). Finally, Ehrenburg expressed his surprise that virtually all of the outstanding complaints and indictments involving the officers had been dismissed.

The final witness called by the City was its expert, Glenn Miller. After extensive discussion and debate about whether his reports, (R-15 and R-25) respectively, and testimony was relevant, a ruling was made to allow his appearance.

This was Mr. Miller's first appearance testifying as an expert in a case. He indicated that he never had been involved in a "Brady" case. But he has significant experience in the hiring process of police officers. His prior experience in law enforcement includes serving as a Troop Commander with the New Jersey State Police. He was then promoted to the position of Major where he was in charge of field operations for approximately two thousand (2,000) troopers. After his retirement from the State Police, he became the Police Chief at Stockton University, where he served until 2013. Returning to public service, he then served as Chief of Detectives for the Ocean County Prosecutor's Office, where he was involved in making decisions on which cases should be prosecuted.

Miller testified that one of the key functions of a police officer is the ability to testify in court with credibility. This obligation extends to the taking of statements from witnesses and defendants, and the ability to ensure that a criminal case in which the officer is involved reaches an appropriate disposition. During his testimony, he went on to describe the inability to testify credibly as a form of "legal disability", meaning the officer cannot fully perform his duties.

Miller was also asked about the impact of new Attorney General Guidelines which came out independent of this case, regarding honesty being a critical component of the job function of members of law enforcement, and that prosecutors are required to conduct an independent review of certain information obtained from an internal affairs investigation to determine if it has to be turned over to defense counsel. The directive goes on to say that if an officer is unable to participate in a criminal prosecution, the prosecutor has an obligation to advise the agency whether the officer's disability is limited to one case, a line of cases or all criminal matters.

When asked on cross-examination for more details of his opinion of the recently issued Attorney General Guidelines, not only did he say they do not apply to

municipalities such as Hackensack, but he admitted the guidelines do not require a department to terminate an officer, nor does it bar an officer from testifying.

No witnesses or representatives were called to testify from the Bergen County Prosecutor's Office, and the Officers did not testify.

During the proceeding, but completely unrelated to this case, the Attorney General, to whom all County Prosecutors report, issued new guidelines on how to handle cases in which "Brady" may be invoked.

FINDINGS OF FACT

1. The City of Hackensack is one of seventy-two towns located in Bergen County, and is one of its largest municipalities with a population of over forty-four (44) thousand residents.

2. Hackensack is served by a police department of approximately one hundred (100) officers.

3. At all times relevant herein, Rocco Duardo, Victor Vasquez, Justin de la Bruyere, Mark Gutierrez, and Joseph Gonzalez were officers who had served for several years with the Hackensack Police Department.

4. On December 28, 2016, all five officers were involved in a warrantless search at a property located at 64 Prospect Avenue, {hereinafter referred to as "64 Prospect).

5. As a result of alleged wrongdoing by the officers in connection with that matter, the Police Department commenced an Internal Affairs Investigation, and reported the matter to the Office of the Bergen County Prosecutor, (BCPO) who serves as the Chief Law Enforcement Officer for Bergen County.

6. Thereafter, on May 9, 2017, the City served a first Preliminary Notices of Discipline, (PNDA's) on all five officers related to their conduct at the site known as "64 Prospect."

7. Two other superior ranking officers who were also at the scene of "64 Prospect" did not have to defend themselves against charges, and both retired shortly after the incident.
8. As was their right, the officers sought a departmental hearing on the charges, and the investigation continued.

9. With the first investigation still ongoing, after reviewing the matter from a criminal standpoint, on July 19, 2017, the BCPO forwarded a letter, **(Exhibit R-11)** to the City wherein a determination was made that no criminal charges would be filed against the officers.

10. However, the next day, July 20, 2017, another letter, (**Exhibit R-12)** was sent, stating, among other things, that as a result of the officers conduct, a number of criminal cases against defendants in which the officers were involved would be dismissed. The letter went on to say that any decisions regarding future testimony by these officers would be made on a case-by-case basis.

11. A similar letter dated August 14, 2017, **(Exhibit R-13)**, was sent by the BCPO to the Hackensack Municipal Prosecutor, alerting her to the same concerns about pending cases involving the officers and directing her to wait on further prosecutions in cases in which the officers were involved until an evaluation could be made. Ultimately, those cases were dismissed as well.

12. With the first PNDA pending regarding the alleged conduct at "64 Prospect", the City sent a second and separate PNDA on September 1, 2017, **(Exhibit R-1)**, alleging:

13. The second PNDA that is the subject of this proceeding sought termination of the officers solely based on the impact of Brady and Giglio, and the City's belief that the officers' future ability to do their jobs would be impaired by their past conduct and the need to evaluate their ability to testify on a case-by-case basis.

14. Both the Investigation analysis prepared by Captain Busciglio on 9/27/17, and the related Internal Affairs Investigation Report of same date, also prepared by Captain Busciglio refer throughout to the officers being placed on a "Brady" list and for being responsible for the dismissal of several outstanding cases. Despite correspondence from the BCPO that future cases involving the officers will be examined on a case-by-case basis, these documents conclude there is a "real danger" if the existence of the penalties they incurred in connection with "64 Prospect" have to be disclosed in future proceedings. These documents and the BCPO letters formed the basis of the City's decision to bring a second round of charges against the officers, with termination being the sole penalty sought.

15. No explanation was given why a second PNDA was required, with the first case still pending, and/or why if it was feasible, the City did not simply seek to amend the first PNDA, hearings for which had not yet commenced.

16. Neither the City nor the officers were given an opportunity to challenge or question the decision by the BCPO to dismiss multiple outstanding charges, and/or challenge whether formal or informal the "Brady" designation that now applied to these officers. Officer Duardo attempted to challenge the decision of the BCPO in Superior Court, but his challenge was denied on procedural grounds emphasis added, **(Exhibit R-40)** by the Appellate Division, since, among other things, the pleadings were not verified and certified by an interested party. No determination was made on the substance of the pleadings, either in the Law Division or in the Appellate Division..

17. As a result of the letters, a second Internal Affairs investigation was opened by Captain Busciglio, Chief of Internal Affairs with the Hackensack Police Department.

18. This resulted in a second PNDA being issued, and ultimately a second FNDA after the charges relating to the "Brady" designation were sustained, resulting in a second penalty, this one being termination of all five officers.

19. Following several days of hearing before another ALJ on the first PNDA, four of the five officers received penalties in various degrees ranging from thirty (30) to one hundred fifty (150) days of suspension.

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20. The Civil Service Commission increased Officer Vasquez's penalty and did the same for Officer Duardo.

21. The case against Gonzalez was ultimately dismissed, but like the others, he retained the "stigma" of being identified as a "Brady" officer.

22. Prior to the commencement of the hearing in this case, the officers waived their rights under the one hundred eighty (180) day rule, normally associated with Civil Service termination cases.

23. Although Captain Busciglio used the term "Brady list" as applied to these officers, he knew the BCPO did not maintain such a list, nor did the BCPO direct the Hackensack Police Department to terminate the officers.

24. As he conducted his investigation, the Captain did not know the implications of the BCPO letters on the careers of the officers, and he did not do an analysis if the charges were sustained, as to what other options were available should they remain as employees of the Hackensack Police Department.

25. City Manager Ted Ehrenburg, (now deceased), was the ultimate decision-maker for the City when it came to whether to file charges against members of the Hackensack Police Department.

26. Ehrenburg had extensive experience in law enforcement and in municipal government, serving first as chief of Internal Affairs and Police Chief in another jurisdiction, and as business administrator for two other municipalities.

27. Although the letters the City received from the BCPO indicated otherwise, Ehrenburg after meeting with representatives of the BCPO, Ehrenburg believed the officers would never be able to testify in court again.

28. As Administrator, Ehrenburg never saw a "Brady" list, and acknowledged that he took the action to terminate based on several factors, including but not limited to his belief the officers would no longer be able to fulfill their job obligations.

29. The Administrator was very surprised with the number of charges, indictments and complaints involving the officers that were dismissed at the county and local level. No detail or analysis was provided as to the rationale for these multiple dismissals, and/or whether the case-by-case approach referred to in the July 20th, 2017 letter from the BCPO was utilized.

30. Seeking clarification and out of concern for potential lawsuits against the City, and for any future role for the officers, Mr. Ehrenburg sought a meeting with representatives of the BCPO

31. There was no memorialization of this meeting, but the Administrator came away from the meeting that he had no alternative but to go forward with a second effort to terminate the officers based solely on the implications of "Brady."

32. Like Mr. Ehrenburg, the City's expert, Glenn Miller also had an extensive background in law enforcement.

33. Mr. Miller served as a Major with the New Jersey State Police, he was Chief of Police at Stockton University, and he also spend time as Chief of Detectives with the Ocean County Prosecutor's Office.

34. Mr. Miller had never testified as an expert before this appearance at the Office of Administrative law.

35. Although Mr. Miller had no experience with Brady cases, he believed that these officers could no longer fulfill their duties, since a key component of

their job was to make sure that any criminal case in which they were involved reached an appropriate disposition.

36. Miller did not attempt to communicate with members of the BCPO to gain further insight to how the "Brady" determination was reached.

37. The basis of Miller's opinion regarding the impact of the officers' credibility was strictly based on his review of the letters from the BCPO.

38. Miller did not believe that certain Attorney General Guidelines developed independent of this case, applied to local police departments.

39. On December 4, 2019, Attorney General Law Enforcement Directive 2019-6, effective March 1, 2020, was issued to all County Prosecutors, which spells out in detail how to address "Brady" and "Giglio" situations. Throughout this document, it refers to these situations being reviewed on a case-by-case basis.[1i]

Based on the testimony, evidence, Findings of Fact, and Law below, **I FIND** that the City has not met its burden and the charges resulting in termination **are not sustained.**

LEGAL ANALYSIS AND CONCLUSIONS

N.J.S.A. 11A:1-1 through 12-6, the "Civil Service Act," established the Civil Service Commission in the Department of Labor and Workforce Development in the Executive Branch of the New Jersey State government. N.J.S.A. 11A:2-1. The Commission establishes the general causes that constitute grounds for disciplinary action, and the kinds of disciplinary action that may be taken by appointing authorities against permanent career service employees. N.J.S.A. 11A:2-20. N.J.S.A. 11A:2-6 vests the Commission with the power, after a hearing, to render the final administrative decision on appeals concerning removal, suspension or fine, disciplinary demotion, and termination at the end of the working test period, of permanent career service employees.

[1] Although Attorney General Directive 2019-6 was discussed during Glenn Miller's testimony and other parts of the case, through oversight it appears neither side introduced or marked the document as an Exhibit.

N.J.A.C. 4A:2-2.2(a) provides that major discipline shall include removal, disciplinary demotion, and suspension or fine for more than five working days at any one time. An employee may be subject to discipline for a number of reasons enumerated in N.J.A.C. 4A:2-2.3(a), including "conduct unbecoming a public employee" and "other sufficient cause." In appeals concerning such major disciplinary actions, the burden of proof is on the appointing authority to establish the truth of the charges by a preponderance of the believable evidence. N.J.A.C. 4A:2-1.4; N.J.S.A. 11A:2-21; Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

The officers are charged with conduct unbecoming a public employee, violation of Department rules and regulations and other sufficient cause. Conduct unbecoming an employee need not "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) (citation omitted).

In the present matter, the conduct of the officers is not the primary focus, rather it is the determination by the Chief Law Enforcement Officer of Bergen County, whose actions were justified and understandable, that caused the City of Hackensack to discharge the officers a second time, after they had already been discharged in connection with their conduct itself.

It is from that limited procedural perspective that I must decide the case and determine whether or not the officers received due process in connection with the City's determination to discharge them a second time based on its conclusion that the officers were no longer capable of carrying out their sworn duties.

Police officers are held to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576–77 (1990). See also In re Carter, 191 N.J. 486, 2007, which stands for the premise that " a police officer is a public employee who must present an image of personal integrity and dependability." This higher

standard of conduct is one of the obligations a police offer undertakes upon voluntary entry into the public service. In re Emmons, 63 N.J. Super. 136 (App. Div. 1960). A police officer's primary duty is to enforce and uphold the law, and a police officer "represents 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." Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). The obligation to act in a responsible manner is especially compelling in a case involving a law enforcement official. In re Philips, supra, 117 N.J. at 576.

In this type of proceeding, the appointing authority, Hackensack, has the burden of proving the charges by a preponderance of the evidence. N.J.A.C. 4A:2-1.4 (a). See also: In re Michelle Adams, Camden Vicinage, Judiciary, 2019 CSC LEXIS 216. Appeals before the Civil Service Commission are de novo hearings. N.J.S.A. 11A:2-13. See also: West New York v. Brock, 38 N.J. 500 (1962).

The Civil Service Commission may increase or decrease the penalty imposed by the appointing authority, though removal cannot be substituted for a lesser penalty. N.J.S.A. 11A:2-19. When determining the appropriate penalty, the Commission must utilize the evaluation process set forth in West New York v. Bock, 38 N.J. 500 (1962), and consider the employee's reasonably recent history of promotions, commendations, and the like, as well as formally adjudicated disciplinary actions and instances of misconduct informally adjudicated. Accordingly, my review of the case is de novo, and I am not bound by a prior penalty determination.

The Commission did just that in the "64 Prospect" case, when it upheld the determination by another ALJ that one officer should be completely absolved, two others should have their penalties increased from four to six months, and the remaining two should have their terminations upheld.

The Civil Service system was designed, among other things, to establish and orderly process, requiring proper notice to public employees, of potential disciplinary charges they may be facing due to allegations of improper conduct. Pursuant to this process, a public employee is entitled to "plain notice" of the factual basis for the charges.

Pepe v. Twp. Of Springfield, 337 N.J. Super, 94, (App. Div. 2001). See also: In re Torsiello, 2018 N.J. Super, Unpub. LEXIS 1460 (App. Div. 2018).

Here, the City alleges under various aspects of N.J.A.C. 4A:2-2.3 et. seq that the officers are guilty of Incompetency, inefficiency, or failure to perform duties, Inability to perform duties and Other sufficient cause.

In addition, the City also bring charges based on Incapacity and disobedience of rules and regulations established for the governance of the Hackensack Police Department. **(Exhibits R-1, R-20 and R-21).** Yet, since citing the out of jurisdiction cases of Neri and Hubacz, the allegations and ultimate determination in the "46 Prospect" case, which undisputedly gave rise to the second set of allegations involving "Brady" and "Giglio" are not relevant to the matter before me. (emphasis added).

Although the officer conduct at "64 Prospect" and the recommendation for termination in this case are clearly intertwined, the City seeks to distinguish the two suggesting that while the conduct in "46 Prospect" forms the factual predicate for the first set of disciplinary charges, the charges in this case emanate from the actions of a third party, specifically the BCPO, emphasis added. As such, that third party determination, over whom neither the City nor the officers have any control, renders the officers unable to carry out their duties.

While the conduct at "64 Prospect" for which the officers have already paid a price is not to be condoned, it is the lack of ability to challenge the third party determination, that these officers are essentially designated formally or not as "Brady" officers, which gives rise to the concern that a permanent designation of this type, violates the officers due process rights under the U.S. Constitution and the New Jersey Constitution respectively, as it essentially will permanently impede or impair the officers' ability to secure employment in law enforcement or a related field. So, it is anything but a "red herring" as the City suggested throughout argument and its brief.

The City further argues neither I nor the Commission have the jurisdiction or power to overturn or modify the decision of the Chief Law Enforcement Officer, who has

permanently affixed a designation to these officers, without doing so formally, and without any ability to challenge the designation and the resulting fallout from the dismissal of multiple cases at the County and Municipal Court level. In fact, the City argues that the second termination in connection with the "Brady" designation, must be considered independent of the first case, and another penalty, termination of all the five officers should be upheld and cannot be challenged because it was based on different grounds. I **CONCLUDE** that to do so, based strictly on an determination by a third party that cannot be challenged amounts to a violation of their due process constitutional safeguards, and is a form of civil "double jeopardy" due to fact that the penalties were already assessed and acted upon in the "64 Prospect" case, and the City did not incorporate this aspect of its case against the officers as part of that case. Thus, while the City argued that the officers should be estopped from continuing their appeal because they had attempted to litigate the case in Superior Court, (where it was dismissed on procedural, not substantive grounds), the estoppel doctrine should actually be applied to the City, which had already litigated the case before the OAL and the Civil Service Commission, with appropriate penalties having been assessed.

Since West New York v. Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct: to support the imposition of a more severe penalty for a public employee who engages in habitual misconduct, and to mitigate the penalty for a current offense. In re Hermann, 192 N.J. 19, 30–33 (2007). However, in an instance where an employee commits an act that is sufficiently egregious, removal may be appropriate notwithstanding the lack of a prior history of infractions. See, e.g., In re Hermann, supra, 192 N.J. 19. According to the Supreme Court, progressive discipline is a worthy principle, but it is not subject to universal application when determining a disciplined employee's quantum of discipline. Id. at 36.

> Although progressive discipline is a recognized and accepted principle that has currency in the [Civil Service Commission's] sensitive task of meting out an appropriate penalty to classified employees in the public sector, that 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 reviewing an agency head's choice of penalty 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.
>
> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580, 410 A.2d 686 (1980); Bowden v. Bayside State Prison, 268 N.J. Super. 301, 306, 633 A.2d 577 (App. Div. 1993), certif. denied, 135 N.J. 469, 640 A.2d 850 (1994).
>
> [Id. at 33–34.]

In addition, "[o]ur appellate courts also have upheld dismissal of employees, without regard to whether the employees have had substantial past disciplinary records, for engaging in conduct that is unbecoming to the position," and the Appellate Division has "affirmed the dismissal of a police officer for infractions that went to the heart of the officer's ability to be trusted to function appropriately in his position. Cosme v. E. Newark Twp. Comm., 304 N.J. Super. 191, 206, 698 A.2d 1287 (App. Div. 1997), certif. denied, 156 N.J. 381, 718 A.2d 1210 (1998)." Id. at 34–35.

The theory of progressive discipline is not a fixed and immutable rule to be followed without question, as some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007). The Supreme Court has noted that "the question for the courts is 'whether such punishment is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness.'" Ibid. (quoting In re Polk License Revocation, 90 N.J. 550, 578 (1982)). The Supreme Court also noted that the Appellate Division has likewise acknowledged and adhered to this principle, where the acts charged, regardless of prior discipline, warranted the imposition of the sanction. Id. at 485.

The City contends that the officers' conduct, the dismissal of several ongoing cases, and the need to inform defense counsel in future cases under "Brady" goes to

the heart of their ability to be trusted, and has irretrievably damaged their image and their ability to maintain the respect and confidence of the public. But that issue has already been decided on different grounds in the related case where one of the five officers received no discipline, two received a six-month suspension, and two were outright terminated.

The Fourteenth Amendment has a substantive due process component that "protects specific fundamental rights of individual freedom and liberty from deprivation at the hands of arbitrary and capricious government action." Gutzwiller v. Fenik, 860 F.2d 1317, 1328 (6th Cir. 1988). The principle of substantive due process, founded in the federal Constitution, U.S. Const. amend XIV, § 1, and found in the New Jersey State Constitution, N.J. Const. art. I, § 1, protects individuals from the 'arbitrary exercise of the powers of government' and 'governmental power [. . .] being used for [the] purposes of oppression.'" Felicioni v. Admin. Office of the Courts, 404 N.J. Super. 382, 392, 961 A.2d 1207 (App.Div.2008) (quoting Daniels v. Williams, 474 U.S. 327, 331, 106 S. Ct. 662, 665, 88 L. Ed. 2d 662, 668 (1986)), certif. denied, 203 N.J. 440, 3 A.3d 1228 (2010)

The New Jersey Constitution declares that "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. Const. art. I, ¶ 1. The guarantee of substantive due process requires that a statute reasonably relate to a legitimate legislative purpose and not impose arbitrary or discriminatory burdens on a class of individuals. See State in Interest of C.K., 233 N.J. 44, 73 (2018).

Under New Jersey's Article I, Paragraph 1, as under the Fourteenth Amendment's substantive due process analysis, determining whether a fundamental right exists involves a two-step inquiry. First, the asserted fundamental liberty interest must be clearly identified. Second, that liberty interest must be objectively and deeply rooted in the traditions, history, and conscience of the people of this State." Lewis v.

Harris, 188 N.J. 415, 435 (2006) (citation omitted) (citing King v. S. Jersey Nat'l Bank, 66 N.J. 161, 178 (1974)).

The constitutional guarantee does not protect individuals from *all* governmental actions that infringe on liberty or property in violation of the law. See Id. (quoting Rivkin v. Dover Twp. Rent Leveling Bd., 143 N.J. 352, 366, 671 A.2d 567 (1996)). Significantly, "substantive due process is reserved for the most egregious governmental abuses against liberty or property rights, abuses that 'shock the conscience or otherwise offend... judicial notions of fairness... [and that are] offensive to human dignity.'" Id. (quoting Rivkin, supra, 143 N.J. at 366); see also Chainey v. Street, 523 F.3d 200, 219 (3d Cir. 2008) ("To establish a substantive due process claim, a plaintiff must prove the particular interest at issue is protected by the substantive due process clause and the government's deprivation of that protected interest shocks the conscience."). Although it is settled that state-created property interests, including some contract rights, are entitled to protection under procedural due process, "not all property interests worthy of procedural due process protection are protected by the concept of substantive due process." Sutton v. Cleveland Bd. of Educ., 958 F.2d 1339, 1350-1351(6d Cir. 1992).

In Nicholas v. Pennsylvania State Univ., the Third Circuit joined most circuit courts in holding that public employment is not itself a fundamental property interest entitled to substantive due process protection. Nicholas v. Pennsylvania State Univ., 227 F.3d 133, 142-143 (2000) (listing cases). The court determined that "it cannot be reasonably maintained that public employment is a property interest that is deeply rooted in the Nation's history and traditions. Nor does public employment approach the interests implicit in the concept of ordered liberty like personal choice in matters of marriage and family." Id. at 143.

The right to employment *opportunity*, although not a fundamental right, however, "remains a Fourteenth Amendment liberty interest that is protected against arbitrary governmental interference." Hampton v. Mow Sun Wong, 426 U.S. 88, 102-03 (1976).

Whether characterized as a liberty interest or a property right, the right to employment opportunity is protected under the New Jersey Constitution. Greenberg v. Kimmelman, 99 N.J. 552, 570-571 (1985); *see also* Cameron v. International Alliance of Theatrical Stage Employees, 118 N.J. Eq. 11, 22-23 (E. & A. 1935); Lane Distribs., Inc. v. Tilton, 7 N.J. 349, 362 (1951); Kravis v. Hock, 136 N.J.L. 161, 164 (E. & A. 1947). However, the Court noted in Kimmelman that "[t]he right to a particular job, unlike the right to work in general, has never been regarded as fundamental." Id. at 573.

The protectible interest "stems from the substantive due process notions implicit in article 1, paragraph 1 of the New Jersey Constitution." Ballou v. State of New Jersey, 148 N.J. Super. 112, 121 (App.Div.1977), aff'd, 75 N.J. 365 (1978); Hutton Park Gardens v. West Orange Town Council, 68 N.J. 543, 560 (1975). Notwithstanding that protection, the right to employment opportunity is subject to reasonable measures to promote the general welfare under both the federal constitution, Schware v. Board of Bar Examiners, 353 U.S. at 238-39 and the New Jersey Constitution, In re Polk, 90 N.J. 550, 562-63 (1982).

Consequently, impairment of future employability by operation of state law can independently constitute a deprivation of a "liberty" interest entitled to protection under the Fourteenth Amendment. Such protection ordinarily consists of a hearing "to clear any damage to [the employee's] reputation." Williams v. Civil Service Commission, 66 N.J. 152, 157 (1974); accord, Codd v. Velger, 429 U.S. 624 (1977). In certain cases, removal from public service may impose a stigma that may seriously affect their liberty to seek future employment in a position which falls within the domain of the civil service regulations. Williams, supra at 157. A liberty interest can be implicated where the state has "imposed on [the plaintiff] a stigma or other disability that foreclosed [their] freedom to take advantage of other employment opportunities." Roth, supra at 573. Liberty, among other things, can denote the ability and freedom "to engage in any of the common occupations of life." Id. Disabilities which restrict an employee's freedom to seek future employment, and which are imposed because of their dismissal from employment with the government, can constitute a substantial deprivation of liberty

protected by procedural due process. Campbell v. Atlantic County Board of Freeholders, 145 N.J. Super. 316, 328 (1976).

In Campbell, supra, the plaintiff was appointed the Emergency Employment Administrator as an unclassified civil servant by a resolution of the defendant board of freeholders (the "Board"). The position was subsequently transferred to Department of Administration for Federal and State Grants and Aid. Plaintiff was responsible for the administration of matters arising under the Federal Emergency Employment Act of 1971, which involved substantial interaction with the U.S. Department of Labor. While employed, the plaintiff was indicted by a grand jury. The plaintiff was discharged without prior notice or hearing by resolution of the Board, which referred only to the recommendation of the U.S. Department of Labor. The plaintiff was subsequently acquitted at a jury trial of all charges brought against him in the indictment. The plaintiff challenged the legality of his dismissal, based in part on the Due Process Clause of the Fourteenth Amendment, and sought damages and an order restoring him to his position.

The Court rejected the plaintiff's first contention that he had a property interest protected by the Due Process Clause in his position as Administrator. The court found that no contract of employment was created, and there was insufficient evidence to support a finding that the plaintiff held a property interest in his position. Campbell at 326. The plaintiff next contended that interests in liberty were implicated here in two ways – first, because he was socially stigmatized and suffered damage to his reputation and standing in the community, and second, because has suffered disabilities restricting the employment opportunities available to him after his dismissal. Id. at 327. The court affirmed that that these types of liberty interests have been recognized by the U.S. Supreme Court in Roth, supra. at 573-575, and the New Jersey Supreme Court, Williams, supra at 156-157. See Id.

As to the plaintiff's reputation and standing in the community, the Court found that it did "not constitute the type of deprivation of liberty protected by the Due Process Clause." Id. Specifically, the Court found that the Plaintiff had been indicted by a grand jury, and held a position involving substantial interaction with the Federal Government as an unclassified civil servant, at the pleasure of the Board. His dismissal was triggered by a recommendation from an official department of the federal government concerned with the program the plaintiff was administering out of legitimate concern for the integrity of the program. The Board's action in response, the Court found, were not unreasonable. Id.

While the plaintiff was indicted, the indictment itself, the Court noted, may had injured the plaintiff's reputation, and those charges were leveled by the grand jury. Id. at 328. He was afforded the opportunity to clear those charges. Id. The Court found that the Board's action did not give rise to the type of injury to reputation protected by procedural due process. Id. The Court noted that "liberty is not offended by dismissal from employment itself, but instead by dismissal based upon an unsupported charge which could wrongfully injure the reputation of an employee." Id. (quoting Arnett v. Kennedy, 416 U.S.157). The board made no such charges here and, in that respect, was not obliged to provide plaintiff "an opportunity to clear his name." Id. (quoting Roth, *supra* at 573).

The Court, however, found that consideration of the second type of liberty interest asserted by the plaintiff – a hindrance which restricted an employee's freedom to seek future employment as a consequence of his dismissal from government, could "constitute a substantial deprivation of liberty protected by procedural due process." Id. at 328. The plaintiff had called the Court's attention to N.J.A.C. 4:1-8.14, which authorized the Secretary and Chief Examiner of the Civil Service Commission to take various actions restricting access to positions in the classified civil service with respect to "prospective employees" who had previously been removed from the public service. Id. Thus, the Court concluded that because this same provision applied to the plaintiff, he was deprived of an interest in liberty protected by procedural due process. See Id.

In evaluating what process is due, the Court opined that the type of hearing must be determined according to the circumstances of this case – an intensely fact-based and flexible inquiry. Id. at 330. The Court concluded that, given the amount of time since the plaintiff's dismissal, and the limited issues presented, there was no reason to require a separate hearing before the Board. Id. Rather, the Court retained jurisdiction for a hearing as to the appropriateness of the plaintiff's discharge under *N.J.A.C.* 4:1-8.14 may be conducted before this court, and a full evidentiary hearing could be held, at plaintiff's option, to establish the circumstances of his removal from the public service and their relevance to the application of *N.J.A.C.* 4:1-8.14. Id.

In Roth, supra, the Court addressed the relationship between reputation and the due process clause. The plaintiff, a university professor who was not rehired following the end of his one-year appointment, alleged that "the failure of University officials to give him notice of any reason for non-retention and an opportunity for a hearing violated his right to procedural due process of law." Roth at 569. The Court held that no liberty interests were implicated because, in declining to hire the plaintiff, the State neither made "any charge against him that might seriously damage his standing and associations in the community" nor "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." Id. at 573. Had the State done either, however, the Court found that "a different case" would have been presented. Id. at 573-74.

Under the U.S. Constitution, to make out a due process claim for deprivation of a liberty interest in reputation, a plaintiff must show a stigma to their reputation, plus a deprivation of some additional right or interest. See Hill v. Borough of Kutztown, 455 F. 3d 225, 236 (3d Cir. 2006). This has come to be known as the "stigma-plus" test. In the public employment context, the "stigma-plus" test has been applied to mean that when an employer "creates and disseminates a false and defamatory impression about the employee in connection with his termination," it deprives the employee of a protected

liberty interest. Id. When such a deprivation occurs, the employee is entitled to a name-clearing hearing. See id.

Under the State Constitution, the New Jersey Supreme Court has similarly found protectible interests in both privacy and reputation. See Doe v. Poritz, 142 N.J. 1, 105 (1995). However, the Court's analysis "differs from that under the Federal Constitution only to the extent that [it] find[s] a protectible interest in reputation without requiring any other tangible loss." Id. In fulfilling its responsibility for interpreting the New Jersey Constitution, the New Jersey Supreme Court has generally been more willing to find State-created interests that invoke the protection of procedural due process than have our federal counterparts. Doe at 104 (quoting N.J. Parole Bd. v. Byrne, 93 N.J. 192, 208 (1983)). In interpreting the State Constitution, the Court looks "to both the federal courts and other state courts for assistance. . . . [but] [t]he ultimate responsibility for interpreting the New Jersey Constitution . . . is [theirs]." Greenberg, supra at 568.

The New Jersey Constitution does not explicitly enumerate the right to possessing or protecting reputation. Doe, supra at 105. That right was understood to be guaranteed by Article I, paragraph 1 of the Constitution of 1844. Id. The right of a person to be "secure in his reputation . . . is a part of the right of enjoying life and pursuing and obtaining safety and happiness which is guaranteed by our fundamental law." Neafie v. Hoboken Printing & Publishing Co., 75 N.J.L. 564, 567E. & A.1907); Bednarik v. Bednarik, 18 N.J.Misc. 633, 650 Ch.1940) ("The Constitution of New Jersey deals with [the right to personal privacy and security] in Art. 1, plac. 1. The immunity 'consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.'"), overruled on other grounds by Cortese v. Cortese, 10 N.J. Super. 152, 160, 76 A.2d 717 (App.Div.1950)). The New Jersey Supreme Court has concluded that "where a person's good name or reputation are at stake because of what the government is doing to that person . . . sufficient constitutional interests are at stake." Doe, supra at 105. See also Grodjesk v. Jersey City Medical Ctr., 135 N.J. Super. 393, 411-12 (Ch.Div.1975) (finding that plaintiff surgeons were entitled to due

process where censure by executive committee of publicly funded hospital damaged their reputation and professional standing).

In Doe, the Court conclude that under both the Federal and State Constitutions, the Community Notification Laws, which provides for notice to the community of the presence of convicted sex offenders, implicated protectible liberty interests in privacy and reputation, and therefore trigger the right to due process. Doe at 106. However, the Court held that the case did not "deal . . . with the question of substantive constitutional deprivation." Id. at 99. Rather, one's right to be free of arbitrary and abusive governmental damage to his reputation under the New Jersey state constitution is protected only by procedural due process guarantees. Id.

Weighing the Matthews v. Eldridge factors, discussed *infra*, the Court further held that a judicially hearing was mandated *prior to* community notification under the Community Notification Law. First, the Court found that private interests in privacy and reputation are significant. Doe at 107. Second, the Court found that additional safeguards would ensure that deprivations of those interests occur only when justified by the risk posed by the offender. Id. Finally, the Court determined that State interest in prompt classification and notification will not seriously be burdened by additional safeguards, and any resulting burden is justified by the benefits of ensuring accurate classification. Id.

The Court noted that, even if principles of due process did not require that individuals classified as sex offenders under the law be granted a pre-notification hearing, such process would be required by considerations of fundamental fairness. Doe at 109. New Jersey's doctrine of fundamental fairness "serves to protect citizens generally against unjust and arbitrary governmental action, and specifically against governmental procedures that tend to operate arbitrarily. [It] serves, depending on the context, as an augmentation of existing constitutional protections or as an independent source of protection against state action." State v. Ramseur, 106 N.J. 123, 377, 524

A.2d 188 (1987) (Handler, J., dissenting). This doctrine is not appropriately applied in every case but only in those instances where the interests are particularly compelling. Doe at 109. The doctrine is

> "an integral part of due process, and is often extrapolated from or implied in other constitutional guarantees. The doctrine effectuates imperatives that government minimize arbitrary action and is often employed when narrowed constitutional standards fall short of protecting individual defendants against unjustified harassment, anxiety, or expense."
>
> [State v. Yoskowitz, 116 N.J. 679, 731 (Handler, J., dissenting)]

In In re Allegations of Sexual Abuse at] East Park High School, 314 N.J. Super. 149, (App. Div. 1998), the Appellate Division found that if the New Jersey Department of Youth and Family Services substantiates a child abuse charge against a teacher resulting in the inclusion of their name in the Central Registry, the teacher was entitled to an administrative hearing to contest the finding. Id. at 159-66. The Court recognized that "[t]he loss of [a teacher's] good reputation, when the Central Registry information is shared with even a few private citizens, will irrevocably injure [the teacher's] previous good name[,]" and "[a]ccording to [Doe, supra], this injury . . . , standing alone, is a protectible private interest under the New Jersey Constitution." Id. at 162-63. The Court's reference to Doe in East Park High School recognized a teacher's right to procedural due process in such circumstances.

Termination of a public employee in a second proceeding arising out of the same conduct when major misconduct has already been assessed amounts to a civil form of double jeopardy and violates a longstanding concept of fundamental fairness recognized by the New Jersey Supreme Court.

I CONCLUDE that this case, analyzed and interpreted on strictly procedural grounds, calls for a different result than outright termination, as not only does it impact the officers' current employment, but it will also have a significant impact on their future employment in their chosen field of law enforcement or a related field.

The concept of fundamental fairness is employed when the scope of a constitutional protection has not been extended to a defendant. See: State v. Yoskowitz, 116 N.J. 679. The Court in Yoscowitz determined that principles of fundamental fairness and reasonable expectations are the underpinnings of our system which protects against second prosecutions and multiple punishments for the same offense. (emphasis added).

The primary considerations "should be fairness and fulfillment of reasonable expectations in light of the constitutional and common law goals. State v. Currie 41 N.J. 531 (1964). By pursuing a second PNDA and ultimately terminating the officers, it seems clear the City violated these sacred principles that have long been recognized and respected by New Jersey Courts.

The Fourteenth Amendment of the United States Constitution and Article 1, Paragraph 1 of the New Jersey State Constitution provide "every person possesses the 'unalienable rights' to enjoy life, liberty, and property, and to pursue happiness." Lewis v. Harris, 188 N.J. 415, 442 (2006). Article I, paragraph 1 of the New Jersey Constitution does not enumerate the right to due process, but protects against injustice and, to that extent, protects "values like those encompassed by the principle[] of due process." Greenberg, supra at 577. Whether a right is recognized as a property right subject to due process protection is a question of State law. See Capua v. City of Plainfield, 643 F. Supp. 1507, 1520 (D.N.J. 1986). If one has a property right in continued employment, the State cannot deprive him or her of this property without due process. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, (1985); see also Mosca v. Cole, 384 *F. Supp.* 2d 757, 767 (D.N.J. 2005) ("When protected interests are implicated, the right to some kind of prior hearing is paramount." (internal quotation marks and citations omitted)), *aff'd*, 217 *Fed. Appx.* 158 (3d. Cir. 2007). While "the legislature may elect not to confer a property interest in [public] employment, it also may not

constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." Arnett v. Kennedy, 416 U.S. 134, 167 (1974).

The "root requirement" of the Due Process Clause has been described by the Court "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." Boddie v. Connecticut, 401 U.S. 371, 379 (1971). When a plaintiff challenges the actions of a state on due process grounds, a Court is obligated to make two determinations: "whether the State has deprived the claimant of a protected property interest," and "whether the State's procedures comport with due process." Marshall v. Lauriault, 372 F.3d 175, 185 (3d Cir. 2004) (quoting Lujan v. G & G Fire Sprinklers, Inc., 532 U.S. 189, 195 (2001)). Overall, it is a fact-sensitive inquiry. In re Stoecker, 2012 N.J. Super. Unpub. LEXIS 445 (2012).

The Third Circuit has emphasized that due process requires that the notice provide the degree of specificity necessary for the employee to have "'the opportunity to determine what facts, if any, within his knowledge might be presented in mitigation of or in denial of the charges.'" McDaniels v. Flick, 59 F.3d 446, 457 (3d Cir. 1995) (citing Gniotek v. Philadelphia, 808 F.2d 241, 244 (3d Cir. 1986)). This notice need only be given so far in advance of the pre-termination hearing "to allow the officer a chance to present his side of the story." Gniotek, supra at 244.

In determining whether a State's procedures comported with the requirements of the Constitution, courts balance (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) "the Government's interest." Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

The Civil Service laws "are designed to promote efficient public service, not to benefit **errant employees**." (emphasis added). State-Operated School Dist. of City of Newark v. Gaines, 309 N.J. Super. 327, 334 (1998). The welfare of the people "as a

whole, and not exclusively the welfare of the civil servant, is the basic policy underlining the statutory scheme." Id. New Jersey's public employees enjoy the unique protection of their jobs by operation of the Civil Service Act, N.J.S.A. 11A:1 to 12, which grants broad tenure protection is extended to all appointees. Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 145 (1965).

A property interest in a public sector job arises when the employee has "a legitimate entitlement to . . . continued employment" as determined by the laws of the state in which he works. Elmore v. Cleary, 399 F.3d 279, 282 (3d Cir. 2005) (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701 (1972)). When threatened with major disciplinary action, such as termination, the State cannot, without violating an officer's constitutional rights, deprive an officer of the position without due process of law. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985). Such a deprivation must "'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" Id. at 542 (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)). A tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. See Id. at 532. To require more than this prior to termination "would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." Id. These requirements reflect well-established due process rights that attach to employment by state governments.

Specifically, public employees in New Jersey are entitled to due process in the disciplinary process. See N.J.S.A. 11A:2-13. Public employees are entitled to fair notice and an opportunity to be heard. Id. Fair notice means notice of the disciplinary charges and the basis upon which those charges are justified. Id. The legislative purpose of the statute "is to provide the [public employee] with procedural due process by affording him notice of the charge and the opportunity to prepare and present a defense." Pizzullo v. Twp. of Hamilton, No. A-2548-96T5, slip op. at 10 (N.J. App. Div. 1998). The importance of proper notice cannot be understated, even at the administrative level, because "the Civil Service Act mandates review only of the adverse decision of the appointing authority as stated in the final notice of disciplinary action, since that is what

the employee appeals to the Board." Hammond v. Monmouth County Sheriff's Dept., 317 N.J. Super. 199, 206 (App. Div. 1999). To otherwise allow a broadening of the charges beyond those contained in the Final Notice "would be to surcharge the right to appeal with a cost which violates any decent sense of due process or fair play." Id. Fair notice means notice of the disciplinary charges and the basis upon which those charges are justified. N.J.S.A. 11A:2-13.

Pursuant to the Act, the Civil Service Commission adopts and enforces the regulatory rules governing disciplinary action. The appointing authority may only discipline an employee for incompetency, inefficiency or failure to perform duties; inability to perform duties; neglect of duty; or other sufficient cause. N.J.A.C. 4A:2-2.3(a). Appellant, if not previously provided plain notice of the specific factual allegations, cannot be found guilty based on said specifications. Aside from some unrelated exceptions, an agency seeking to impose major discipline upon a civil service employee must provide the employee written notice. N.J.A.C. 4A:2-2.5. Before an employee may be disciplined, they must be served with a Preliminary Notice of Disciplinary Action ("PNDA") setting forth the charges and a statement of facts supporting them and be given an opportunity for a hearing prior to imposition of major discipline. N.J.A.C. 4A:2-2.5(a). Removal, demotion, or suspension or fine for more than five working days at any one time constitutes "major discipline." N.J.A.C. 4A:2-2.2(a).

Hearings "shall be held before the appointing authority or its designated representative." N.J.A.C. 4A:2-2.6(a). The employee may be represented by an attorney or authorized union representative, and the parties "shall have the opportunity to review the evidence supporting the charges and present and examine witnesses. The employee shall not be required to testify, but an employee who does testify will be subject to cross-examination." N.J.A.C. 4A:2-2.6(b)(c). The appointing authority must make a decision on the charges and provide the employee either by personal service or certified mail with a Final Notice of Disciplinary Action ("FNDA") within twenty days of the hearing, which may be extended for good cause. N.J.A.C. 4A:2-2.6(d). Factors determining the degree of discipline include the employee's prior disciplinary record and

the gravity of the instant misconduct. West New York v. Bock, 38 N.J. 500, 522-24 (1962).

The Third Circuit has emphasized that constitutional due process requires that the notice provide the degree of specificity necessary for the employee to have "'the opportunity to determine what facts, if any, within his knowledge might be presented in mitigation of or in denial of the charges.'" McDaniels v. Flick, 59 F.3d 446, 457 (3d Cir. 1995) (citing Gniotek v. Philadelphia, 808 F.2d 241, 244 (3d Cir. 1986)). Such notice need only be given so far in advance of the pre-termination hearing in order to allow the officer a chance to present his side of the story." Gniotek, supra at 244.

It has been emphasized that "properly stated charges are a sine qua non of a valid disciplinary proceeding." West New York v. Bock, 38 N.J. 500, 522 (1962). It is thus elementary that an employee "cannot legally be tried or found guilty on charges of which he has not been given plain notice by the appointing authority." Id. Specificity of the factual allegations "is not merely a technical requirement, but rather a fundamental attribute of due process." Fabian v. Town of North Bergen, CSV 3198-97, Initial Decision (August 24, 1998), adopted, MSB (October 14, 1998) <http://lawlibrary.rutgers.edu/oal/search.html>. As such, the issues litigated at the hearing must not differ substantially from those delineated in the notice. In Dep't of Law & Pub. Safety v. Miller, 115 N.J. Super 122 (App. Div. 1971)

Generally, courts look to the content of the PNDA and FNDA to determine whether the stated specifications match the reasoning used to sustain the charges. See Hammond v. Monmouth County Sheriff's Dept., 317 N.J. Super. 199, 206 (App. Div. 1999). The standard, however, is ultimately whether an appellant had "plain notice" of the factual basis for the charges. See Pepe v. Twp. of Springfield, 337 N.J. Super. 94, 97 (App. Div. 2001). In sum, these procedural requirements reflect the established due process rights that attach to employment by state governments. I/M/O Lyndon Johnson

City of Long Branch, Dept. of Pub. Safety, OAL Dkt. No. CSV 03234-13, Initial Decision (Aug. 12, 2013), adopted, Comm'r (Oct. 18, 2017).

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The New Jersey Constitution contains a similar provision: "No person shall, after acquittal, be tried for the same offense." N.J. Const. art. I, ¶ 11. The New Jersey Supreme Court has consistently interpreted the State Constitution's double-jeopardy protection as coextensive with the guarantee of the federal Constitution. See State v. Miles, 229 N.J. 83, 92 (2017); State v. Schubert, 212 N.J. 295, 304 (2012); State v. Barnes, 84 N.J. 362, 370 (1980). Although the language of U.S Constitution and the New Jersey Constitution differ, "they have come to be recognized as substantially coextensive in principle and scope." State v. Ebron, 61 N.J. 207, 214-15 (1972) (citing State v. Farmer, 48 N.J. 145, 168 (1966), cert. denied, 386 U.S. 991 (1967); State v. Williams, 30 N.J. 105, 122 (1959)). Individuals are constitutionally protected against being tried twice for the same offense. See State v. Loyal, 164 N.J. 418, 435 (2000).

The principle that no person is to be placed in jeopardy "more than once for the same offense" traces its roots to a variety of early sources. United States v. Wilson, 420 U.S. 332, 339-42 (1975); State v. Currie, 41 N.J. 531, 535-36; *see generally*, Michael Kline, Wading in the Sargasso Sea: The Double Jeopardy Clause, Non-Capital Sentencing Proceedings, and California's "Three Strikes" Law Collide in Monge v. California, 27 Pepp. L. Rev. 861, 863-65 (2000) (discussing lengthy history of common law double jeopardy protections compared to more recent legislative history of double jeopardy). The Fifth Amendment of the United States Constitution embodies that principle, and it is binding on the states by virtue of the Fourteenth Amendment. State v. Ebron, 61 N.J. 207, 214-15 (1972) (citing Benton v. Maryland, 395 U.S. 784, 796 (1969)).

The Double Jeopardy Clause contains three protections for defendants. It protects against (1) "a second prosecution for the same offense after acquittal," (2) "a second prosecution for the same offense after conviction," and (3) "multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969). Common to all three protections is the notion of "same offense." As such, the primary concern when reviewing a double-jeopardy claim is "whether the second prosecution is for the same offense involved in the first." State v. Yoskowitz, 116 N.J. 679, 689 (1989) (quoting State v. De Luca, 108 N.J. 98, 102, cert. denied, 484 U.S. 944, 108 S. Ct. 331, (1987)).

The U.S. Supreme Court first announced its test for determining whether a second prosecution is for the same offense in Blockburger v. U.S, 284 U.S. 299, 304 (1932). The Court developed what came to be known as the same-elements test – namely, that if each statute at issue requires proof of an element that the other does not, they do not constitute the same offense and a second prosecution may proceed.

The Blockburger same-elements test was the exclusive test for same-offense determinations until the U.S. Supreme Court decided Illinois v. Vitale, 447 U.S. 410, 421 (1980). There, the Court indicated that facts could possibly require more than a mechanical analysis of the elements of the two statutes. Id. The Court contemplated that a second prosecution could be barred if it relied on the same *evidence* used to prove an earlier charge. Id. This decision "created controversy among state and federal courts over whether the traditional Blockburger test has been expanded. State v. Yoskowitz, 116 N.J. 679, 690 (1989).

The New Jersey Supreme Court read this as creating an alternative to Blockburger's same-elements test to create a new same-evidence test, and the U.S. Supreme Court reached the same conclusion in Grady v. Corbin, 495 U.S. 508, 510 (1990). See Miles, supra at 93. The Supreme Court subsequently eliminated the same-evidence test altogether in favor of the Blockburger same-elements test, finding the

same-evidence unworkable without creating numerous exceptions. See Dixon, supra at 710.

In Miles, supra, the New Jersey Supreme Court reevaluated its double-jeopardy jurisprudence in light of the Dixon's return to the same-elements test. The Court thereby resolved the question of which test applies in New Jersey courts "by adopting the same-elements test as the sole double-jeopardy analysis, thereby realigning New Jersey law with federal law." Miles at 160. The Court noted that it "no longer recognize the same-evidence test as a measure of whether two offenses constitute the same offense." Id. The Court clarified that the same-elements test "analyzes the elements of the competing statutes to determine if each contains an element the other does not" and "[i]f each statute contains at least one unique element, the subsequent prosecution may proceed." Id. The Court justified its reasoning by highlighting the "noteworthy benefits of the same-elements test," particularly that "the test is effortlessly applied at early stages of prosecution; it is capable of producing uniform, predictable results; and it aids defendants by reducing multiple court appearances." Id. at 96.

Based on all of the foregoing testimony, facts, evidence and law, **I CONCLUDE** the City **has not** sustained its burden that the officers should be terminated.

I FURTHER CONCLUDE that the second termination of these officers under the "Brady" theory was arbitrary and capricious and prejudicial to the "root requirement" of due process that an individual cannot be deprived of a liberty or property interest, (in this case their career and reputation) without a hearing. And since the officers were not afforded a hearing on the "Brady" designation itself, and the resulting case dismissals, their removal from public service jobs imposed a "stigma" that will impact their ability to secure future jobs in either law enforcement or related fields such as security. Therefore, **I CONCLUDE** that the impairment of future employability constitutes a deprivation of a liberty interest.

Accordingly, under all the circumstances, I **FURTHER CONCLUDE** that removal is not the appropriate penalty, and that the penalty each of these officers has already been assessed due to their conduct, is more appropriate under the totality of the circumstances.

In no way should this decision be construed as either condoning the underlying acts of the officers that led to significant penalties in the first case, and ultimately termination in this case. This decision should also not be interpreted as a criticism of the Chief Law Enforcement Officer of Bergen County, whose unchallengeable determination at the time, wherein disclosure of these officers actions became mandatory for existing cases, and future matters on a "case by case" basis, and the dismissal of several outstanding cases in which the officers made arrests, leaving the City with what it felt was no alternative other than to terminate the officers again, strictly along the limited "Brady" lines.

Our system of hiring, disciplining and ultimately terminating public employees is based on fundamental due process rights contained within the United States Constitution and the New Jersey Constitution respectively. Interpreting the due process clauses inherent within each of those documents, **I CONCLUDE** that the officers were not fully afforded the opportunity to challenge the "Brady" designation, although not placed on a "Brady" list, essentially led them to become "Brady" officers, with no way of undoing such a classification, thereby substantially limiting them from carrying out their sworn duties as police officers in future cases, and seriously impairing their ability to transfer to another jurisdiction's police department, either inside or outside New Jersey, and perhaps preventing them from performing law related jobs in the private sector as many officers do, while still working as officers, or after they retire. These potential limitations on these individuals' ability to work in their chosen field, are not what was contemplated by the due process rights as set forth in the U.S. Constitution, the New Jersey Constitution and the New Jersey Civil Service Law.

Moreover, **I FURTHER CONCLUDE**, that the City' decision to bring two separate PNDA's against the officers suggesting each case must be viewed independently was also flawed, and amounted to the equivalent of a civil form of "double jeopardy" in a

sense that after discipline had already been assessed against four of the five officers, they faced a second penalty in connection with the same conduct due to the "Brady" determination and the dismissal of criminal charges in virtually all of the outstanding cases in which these officers were involved. The City did not explore whether it had the ability to amend the first PNDA to include the "Brady" aspect of the case, so that everything was considered together.

While the City suggests petitioners' argument that they were placed on a "Brady" list is a "red herring", **I CONCLUDE**, the opposite is true. The July 20th letter from the BCPO tells the City that the officers' ability to testify in future cases will be reviewed on a "case by case basis". Internal affairs investigations and reciprocal discovery are a normal part of the criminal case process. So, while it may have been an inconvenience in future cases to decide if information about the officers' conduct at "46 Prospect" had to be disclosed, the City's use of this requirement to terminate the officers outright, especially when the officers and the City have nowhere to go to challenge the "Brady" designation, which the City says is not a formal designation, **I CONCLUDE** constitutes an arbitrary, capricious and prejudicial determination which cannot be sustained.

ORDER

It is hereby **ORDERED** that the termination of the officers based on charges of Incompetency, inefficiency or failure to perform duties, inability to perform duties, other sufficient cause and violation of the Rules of the Hackensack Police Department, based on an Investigative report that the officers were placed on a "Brady list, together with a conclusion that the officers were responsible for the dismissal of several outstanding criminal cases, among other things, is hereby **NOT SUSTAINED AND IS REVERSED.** It is therefore further **ORDERED** that the penalty of removal of Officers Rocco Duardo, Justin de la Bruyere, Joseph Gonzalez, Mark Gutierrez, and Victor Vasquez from their public employment is **NOT SUSTAINED AND REVERSED.**

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.

June 10, 2021
DATE

ANDREW M. BARON, ALJ

Date Received at Agency: June 10, 2021

Date Mailed to Parties: June 10, 2021
mmm

APPENDIX

WITNESSES

For Petitioner:

None

For Respondent:

Captain Peter Busciglio

City Administrator Ted Ehrenburgh

Richard Miller, Expert

EXHIBITS IN EVIDENCE

For Petitioner:

P-1 Duardo letter brief 8/15/18 Docket BER-L-5522-17

P-2 City Brief in Opposition to Duardo OTSC

P-3 Bergen County Prosecutor's Office Brief BER-L-5522-17

P-4 Transcript of OTSC before Hon. Gregg A. Padovano 11/16/17

P-5 Transcript of Motion 6/15/18

P-6 Decision of Hon. Susanna Guerrero 2/11/19

P-7 Decision of Civil Service Commission 4/8/19

P-8 AG Guidelines re: Brady and Giglio 6/18/19

P-9 Parts of recorded proceedings 6/12/18

P-10 Parts of recorded proceedings 6/14/18

P-11 Superior Court Essex County

P-12 Newspaper article

For Respondent:

R-1 9/1/17 PNDAs

R-2 IA Complaint dated 8/28/17

R-3 9/27/17 IA Investigation report

R-4 9/27/17 IA Investigation and Conclusions

R-5 8/28/17 Notifications to officers

R-6 IA Investigation attachment log

R-7 IA Case checklist and summary

R-8 IA Investigation plan

R-9 IA Investigation review sheet

R-10 IA Notification of Findings from Captain to officers

R-11 7/19/17 BCPO letters re: no prosecution

R-12 7/20/17 BCPO letter to Captain Aquilla

R-13 8/14/17 BCPO letter to Municipal Prosecutor

R-14 8/29/17 Wiss letter to counsel for officers

R-15 June 6, 2017 Report of Expert Glenn Miller

R-16 12/6/17 U.S. District Court Civil Complaint (Sharif)

R-17 4/16/18 U.S. District Court Civil Complaint (Martin)

R-18 NJ Civil Service Commission Job Specifications for Police Officers

R-19 Hackensack Police Department Rules and Regulations

R-20 6/26/18 FNDAs to Officers, Vasquez, Gutierrez, Gonzalez and de la Bruyere

R-21 4/10/18 FNDA to Officer Duardo

R-22 A.G. Guidelines pp. 43-44 re: IA Policy and Procedure

R-23 5/1/19 Hackensack Police Roster by Division

R-24 6/18/19 A.G. Policy on disclosure of Exculpatory and Impeachment Evidence in Criminal Cases

R-25 6/24/19 Glenn Miller supplemental report

R-26 2/8/19 Judge Guerrero Initial Decision "64 Prospect"

R-27 4/8/19 Final Administrative Decision Civil Service Commission "64 Prospect"

R-28 5/23/19 Notice of Appeal

R-29 Notice of Cross Appeal

R-30 9/8/17 Second Amended Verified Complaint (Duardo)

R-31 3/26/17 Order and Opinion of Hon. Gregg A. Padovano (Duardo)

R-32 7/23/18 Order and Opinion Judge Padovano re: Duardo Reconsideration

R-33 8/2/18 Notice of Appeal (Duardo)

R-34 5/9/17 "64 Prospect PNDAs

R-35 5/29/17 "64 Prospect Amended PNDAs

R-36 4/25/19 BCPO OPRA letter

R-37 Glenn Miller resume

R-38 McCracken Civil case decision (Ehrenburgh)

R-39 July 12th letter

R-40 Appellate Division Decision