STATE OF NEW JERSEY

In the Matter of Matthew Dsurney
Township of South Orange Village
Police Department

CSC DKT. NO. 2021-614
OAL DKT. NO. CSR 11151-20

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: MARCH 7, 2022

The appeal of Matthew Dsurney, Police Officer, Township of South Orange Village, Police Department, removal, effective November 11, 2020, on charges, was heard by Administrative Law Judge Barry E. Moscowitz (ALJ), who rendered his initial decision on January 31, 2022, reversing the removal. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, as well as having thoroughly reviewed and considered the exceptions and made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on March 2, 2022, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision. The Commission makes only the following comments.

The ALJ's initial decision was thorough and well-reasoned and most of his findings and conclusions were based on his assessment of the credibility of the witnesses.[1] In this regard, upon its *de novo* review of the record, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts'

[1] The Commission notes that it makes no finding regarding the ALJ's determination that *N.J.S.A.* 40A:14-147 was violated. As the ALJ's determination in this matter was based on the substantive evidence in the record, which has been adopted by the Commission, and serves as the basis to reverse the charges against the appellant, this additional procedural basis should not have been broached once the ALJ made his determination on the merits.

credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See also, In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). In this matter, the exceptions filed by the appointing authority are not persuasive in demonstrating that the ALJ's credibility determinations, or his findings and conclusions based on those determinations, were arbitrary, capricious or unreasonable. As such, the Commission has no reason to question those determinations or the findings and conclusions made therefrom.

Since the charges have been dismissed, the appellant is entitled to mitigated back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10. The appellant is also entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

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 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 are finally resolved. In the interim, as the court states in *Phillips, supra,* if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Matthew Dsurney. The Commission further orders that the appellant be granted back pay, benefits, and seniority from the first date of separation to the actual date of 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 the appellant to the appointing authority within 30 days of issuance of this decision. The Commission further orders that counsel fees be awarded to the attorney for the appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2-2.12, 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 the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay 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 shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2ND DAY OF MARCH 2022

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 11151-20

2021-614

IN THE MATTER OF MATTHEW DSURNEY,
TOWNSHIP OF SOUTH ORANGE VILLAGE.

Frank C. Cioffi, Esq., for appellant Matthew Dsurney (Sciarra & Catrambone, L.L.C., attorneys)

Kyle J. Trent, Esq., for respondent Township of South Orange Village (Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys)

Record Closed: December 29, 2021 Decided: January 31, 2022

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

On June 2, 2019, appellant, Matthew Dsurney, a police officer, engaged in a vehicle pursuit. Should Dsurney be removed from his position when he reasonably believed that the motorist, who had committed numerous traffic violations, posed an immediate threat to the safety of others? No. Under South Orange Police Department Vehicular Pursuit Policy and Procedure 2.I.A., a police officer may pursue a violator when the police officer reasonably believes that the violator poses an immediate threat to the safety of others.

PROCEDURAL HISTORY

On June 2, 2019, Dsurney engaged in a vehicle pursuit, which is the subject of this case.

On June 3, 2019, respondent, the Township of South Orange Village, began its review of the vehicle pursuit, and on June 25, 2019, its investigating officer, Joseph Levanda, submitted his report to the Essex County Prosecutor's Office.

The Essex County Prosecutor's Office declined prosecution and sent that declination to the chief of police, Kyle Kroll, on August 7, 2019, which Levanda later received on September 3, 2019.

On January 14, 2020, Levanda completed his investigation, and on March 10, 2020, he completed his report. The report states that Levanda made entries on September 3, 17, and 25, 2019; October 9, and 7, 2019; November 13, 2019; and January 14, 2020. No further investigation or reporting, however, occurred between January 14, 2020, and March 10, 2020. Likewise, Levanda never notified anyone that either his investigation or report was incomplete. [1]

On March 12, 2020, respondent served Dsurney with a Preliminary Notice of Disciplinary Action, dated March 11, 2020, suspending Dsurney from the South Orange Police Department, and seeking his removal from his position as a police officer. In its notice, respondent charged Dsurney with incompetency, inefficiency, or failure to perform duties in violation of N.J.A.C. 4A:2-2.3(a)(1); insubordination in violation of N.J.A.C. 4A:2-2.3(a)(2); conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12).

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[1] For example, Levanda testified that he did not advise the Essex County Prosecutor's Office that his investigation was incomplete before he submitted his report to the Essex County Prosecutor's Office, and he did not notify Kroll that his investigation was incomplete once he received the letter from the Essex County Prosecutor's Office denying prosecution. Indeed, Levanda had no explanation why it took him so long to complete his report—other than he might have been too busy.

Respondent also charged Dsurney with violation of the following departmental rules and regulations: SOPD R&R 1:3, Oath of Office; SOPD R&R 2:6.4, Abide by All Rules; SOPD R&R 4:1.1, Standard of Conduct; SOPD R&R 4:1.5, Insubordination; SOPD R&R 4:1.6, Neglect of Duty; SOPD R&R 4:2.3, Reports; SOPD R&R 4:11.7, Operation of Departmental Vehicles; SOPD R&R 4:11.8, Emergency Call and Use of Red Light & Siren; and SOPD R&R 4:15.6, Truthfulness.

Finally, respondent charged Dsurney with violation of South Orange Policy and Procedure 2.00, Vehicle Pursuit, and the New Jersey Attorney General Guidelines on Vehicular Pursuit.

The notice specifies that on June 2, 2019, Dsurney engaged in a high-speed motor-vehicle pursuit of an all-terrain vehicle (ATV) without concern for himself and the public. The notice further specifies that Dsurney initiated and continued the pursuit without legal justification and then failed to advise headquarters about the pursuit in violation of Attorney General Guidelines and South Orange policy and procedure. Moreover, the notice specifies that Dsurney failed to terminate the pursuit when ordered, and later when he lost communication with headquarters.

The notice continues that Dsurney lied during his Internal Affairs interview when he represented (1) that he was attempting to catch up to the ATV, (2) that there was little to no traffic or pedestrians during the pursuit, and (3) that he could positively identify the ATV rider.

Finally, the notice specifies that Dsurney lied in his report when he represented (1) that he attempted to "close the gap" with the ATV, (2) that he notified headquarters multiple times that he was in pursuit of the ATV, and (3) that the cell phone recovered near the crash belonged to the rider of the ATV.

Dsurney requested a departmental hearing, which was held on August 25, 2020.

On November 11, 2020, respondent served Dsurney with a Final Notice of Disciplinary Action, dated November 11, 2020, which sustained all charges and specifications and removed Dsurney from his position as a police officer.

The Final Notice of Disciplinary Action also sustained the following additional specifications: (1) Dsurney lied during his Internal Affairs interview when he represented that he could positively identify the ATV rider from a photograph from the Motor Vehicle Commission; (2) Dsurney lied during his Internal Affairs interview when he represented that he had received no training on departmental policy and procedure regarding vehicle pursuits; and (3) Dsurney lied to the Detective Bureau when he reported that the ATV rider dropped the cell phone during the pursuit.

On December 2, 2020, Dsurney appealed the determination directly to the Office of Administrative Law for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6. On December 16, 2020, the case was assigned to me for hearing, and on June 25, August 23, and September 21, 2021, I held the hearing. Earlier dates for hearing were adjourned at the request of the parties. At the close of the hearing, the parties asked permission to file closing briefs, including the opportunity for replies.

On December 10, 2021, the parties submitted their closing briefs, and on December 29, 2021, they submitted their replies.

FINDINGS OF FACT

Based on the testimony provided, and my assessment of its credibility, together with the documents submitted, and my assessment of their sufficiency, I **FIND** the following as fact:

Dsurney was a credible witness; Levanda was not a credible witness.

Dsurney had been a police officer in the patrol division of the South Orange Police Department for nearly four years before his removal. He was also the union

representative. Dsurney is now a paramedic and registered nurse with multiple healthcare systems.

Dsurney had been a paramedic before he became a police officer and was long used to driving emergency vehicles—having been driving such emergency vehicles since he became an emergency medical technician (EMT) in 2008—and confident about his handling of his patrol car during the pursuit that is the subject of this case. He was also comfortable testifying about it. To be sure, Dsurney had been certified as an emergency-vehicle operator well before he became a police officer and had engaged in at least two other pursuits as a police officer before he engaged in this one.

Levanda is a detective lieutenant in administration. He began his career with the South Orange Police Department in 1988 and has been a lieutenant since 2010. He began overseeing Internal Affairs in 2014 and is the one who investigated Dsurney and recommended his removal.

The two had different accounts of the incident. One lived it; the other watched it. When Levanda watched the recordings from the dashboard cameras and listened to the recordings of the radio transmissions, he formed a different opinion about what he saw and heard, so much so that when what Dsurney wrote in his vehicle pursuit report and said during his Internal Affairs interview differed from what Levanda believed he saw and heard, he charged Dsurney with lying about it.

I did not find Levanda to be a credible witness because I did not find his testimony to be reasonable. At times it was unbelievable; at times it was inconsistent; and at times it was contradictory. In short, it did not hang together.

Above all, Levanda's descriptions and characterizations of what could be seen and heard from the recordings did not match what I saw and heard from the recordings. Levanda was either mistaken or biased, and his equating or conflating reasonable differences of opinion with violations of law, including lying, was itself unreasonable in my view. Either way, I did not find his testimony to be trustworthy enough so that I could rely upon it to make these findings of fact. As a result, I reject his testimony.

Dsurney's testimony, however, made sense. It comported with what I both saw and heard from the recordings, and his judgments—even when mistaken—were at least reasonable and understandable. They were also forthright. As such, I accept Dsurney's account of the pursuit as the facts of this case and judge him based on his actions unadulterated by others.

Dsurney believed that the violator posed an immediate threat to the safety of others.

Dsurney testified that on Sunday, June 2, 2019, in the early evening, around 8:30 p.m., he was in his patrol car traveling south on Scotland Road toward the center of South Orange village, when he heard over the radio that an ATV and a motorcycle were racing down Irvington Avenue from Newark, which meant that they were headed in his direction. Dsurney further testified that as he neared the intersection of Scotland Road and South Orange Avenue from Scotland Road, he happened upon the ATV traveling toward him. Dsurney testified that he believed the ATV was traveling in a manner that posed an immediate threat to the safety of the public.

In his pursuit and incident reports, Dsurney wrote that he had heard that the ATV was traveling in an "extremely unsafe and reckless manner," and in his reports, Dsurney wrote that he saw the ATV traveling in an "extremely unsafe manner that would likely endanger and pose an immediate threat to the surrounding motoring public."[2]

Dsurney testified that upon seeing the ATV, he turned on his lights to perform a K-turn, radioed headquarters, "I got them," and pursued the ATV. Dsurney further testified that he was looking to "close the gap," that is, the distance between him and the ATV, or as Dsurney later testified, that he was attempting to "catch up" to the ATV rider. Dsurney testified that he assumed headquarters received his transmission, so he continued his pursuit.

[2] The narratives in the pursuit and incident reports are identical, save for one additional sentence at the end of the incident report, which merely states that the South Orange Rescue Squad responded to the scene.

In his pursuit and incident reports, Dsurney wrote that he made a "U-turn to close the gap with said ATV."[3]

Dsurney testified that the ATV rider, upon seeing him, drove up on the sidewalk from the street, but that the ATV rider soon returned to the road to flee.

Both Levanda and Kroll testified that at this point Dsurney should have terminated his pursuit.

Kroll testified that ATV riders and motorcycle riders often attempt to bait South Orange police officers into pursuits along the Newark-South Orange border, and that Dsurney should have known better than to have taken the bait in this instance. Kroll, however, failed to mention that this ATV rider was not along the Newark-South Orange border, and had just sped through the heart of the village in a manner that Dsurney reasonably believed posed an immediate threat to the safety of others. Nevertheless, Kroll continued with the reasons why he believed Dsurney should not have taken the bait.

Kroll explained that the ATV rider and Dsurney were heading into a residential neighborhood; that they drove at excessive speeds, nearly three times the speed limit; that they were heading toward a commuter train station; that the road over the train tracks crests, creating a blind spot on the backside of the crest; and that the pursuit itself caused the ATV rider to increase his speed.

Kroll's unwritten policy about not taking the bait and his reasons for terminating the pursuit were not unreasonable, they were merely overstated.

<u>The charges against Dsurney are overborne.</u>

At the hearing, Dsurney explained himself, and what he said made sense. He testified that no standard language exists for declaring vehicle pursuits, that he drove fast

[3] A review of the recording from the dashboard cameras, which Dsurney did not have access to when he wrote his pursuit and incident reports, reveals that it was a K-turn.

to catch up to the ATV, and that both he and the ATV rider remained in control of their vehicles—at least until the end, when the ATV rider crashed into a chain-link fence in front of the home at the fork in the road. In addition, Dsurney testified that all traffic was light that night and that all traffic yielded to them throughout. Indeed, Dsurney testified that only a couple of cars were traveling in each direction that evening and that no pedestrians were ever seen.

Dsurney specified that the intersection of Scotland Road and Montrose Avenue, which was less than half a mile down the road from where he started, was a controlled intersection, and that the traffic signal had just turned from red to green, which meant that none of the cars at the traffic light had yet moved when Dsurney and the ATV rider approached the intersection, allowing them to slow down and navigate the left turn onto Montrose Avenue without interference.

In his pursuit and incident reports, Dsurney wrote that the ATV was crossing the double yellow line into "light traffic, which posed a threat to the safety of the oncoming vehicles."

Montrose Avenue continues west until it intersects North Ridgewood Road near the border of South Orange and West Orange Township. Before then, just beyond the intersection of Montrose Avenue and Vose Avenue, where Montrose Avenue becomes West Montrose Avenue, is a commuter train station. Significantly, Montrose Avenue does crest over the train trestle before it turns into West Montrose Avenue on the other side.

Dsurney explained that he did slow down at the crest, because one cannot see over the other side of the crest, but that he saw that the ATV rider had not taken any evasive action on or around the crest, so Dsurney discerned that no one was on the other side of the crest who could be endangered.

Just as significantly, Dsurney explained that he had also slowed sufficiently so that he could have taken evasive action if he had been wrong.

The train station is a commuter station, but as Dsurney noted, it was early Sunday night in the late spring, early summer, one of the lightest travel times of the week, and all was quiet in and around the train station. In fact, no one can be seen driving or walking in or around that station—or up or down the entirety of Montrose and West Montrose Avenue for that matter. Parenthetically, Dsurney also noted that he has navigated that crest over the train trestle countless times throughout his personal and professional life, including times with his lights and sirens activated.

In his pursuit and incident reports, Dsurney wrote that the traffic was "extremely light."

Dsurney testified that when he reached the end of West Montrose Avenue, he turned right onto North Ridgewood Avenue, heading north toward West Orange. Dsurney further testified that the intersection of West Montrose Avenue and North Ridgewood Avenue is a wide intersection with long views in all directions, and that he saw no traffic of any kind in any direction. As a result, Dsurney testified that he was able to continue his pursuit unimpeded and without incident.

Dsurney described the conditions along North Ridgewood and South Valley Road just as they appeared on the recordings from the dashboard cameras. (North Ridgewood Road turns into South Valley Road in West Orange.) Dsurney also described the manner in which he drove on these roads just as honestly.

Dsurney testified that he controlled his vehicle during his pursuit with the skills and abilities that he learned and gained from his training and experience driving emergency vehicles, not only as a police officer but also as an EMT and paramedic. Dsurney specified that he crossed the yellow lines to keep his path as straight as possible, and that he straddled the yellow lines to keep his vehicle as balanced as possible. He also noted that he slowed his rate of speed at every intersection and at every turn. Dsurney convincingly conveyed his comfort and confidence about negotiating these turns, clearing these intersections, and driving these vehicles in such situations, repeating that he has been driving emergency vehicles in emergency situations since he became an EMT as a teenager.

In fact, it was only when the ATV rider feigned right at the fork on South Valley Road in West Orange, in an attempt to fool Dsurney into continuing down South Valley Road, that the ATV rider lost control of his ATV and crashed into the chain-link fence in front of the home at 19 South Valley Road.

In his pursuit and incident reports, Dsurney wrote that the ATV rider "failed to negotiate the curve."

Dsurney testified that after the crash, the ATV rider "jumped up" and turned to face him, that he and the ATV rider "locked eyes," but that the ATV rider jumped the fence and fled on foot. Dsurney explained that he had come to a stop approximately fifteen to twenty feet before the fence, and that the ATV rider had fallen forward approximately ten feet, so that he and the ATV rider were approximately thirty feet apart when they locked eyes. Dsurney continued that the ATV rider was wearing a motocross helmet with no visor, so he could see the ATV rider's facial features from his lips to his forehead. Dsurney added that he could see the ATV rider's dreadlocks coming out from beneath his helmet, and that he could observe the ATV rider's build and clothes.

Dsurney further testified that he saw more during his foot pursuit when the ATV rider took off his helmet and looked back at him, at which point Dsurney could confirm that the ATV rider had a full head of dreadlocks, as well as get a fuller look at the ATV rider's face.

In his pursuit and incident reports, Dsurney wrote that the ATV rider was a "black male with long dreds, wearing a dark colored shirt and light jeans," and that he fled east and then north again on South Valley Road.

Dsurney testified that he ran after the ATV rider, but fell along a curve on the sidewalk. In his pursuit and incident reports, Dsurney wrote that he fell on the uneven sidewalk while chasing the ATV rider. Dsurney further testified that he never "closed the

gap" between the ATV rider and him while on foot, but that he did not fall behind either.[4] In his pursuit and incident reports, Dsurney also wrote that the ATV rider, while fleeing on foot, started to shed his riding gear, throwing his helmet to the ground.

Having lost visual contact, Dsurney radioed headquarters and returned to the scene to secure it. Dsurney testified that he radioed the sergeant, Sgt. Michael Cucciniello, to contact the Detective Bureau to process the scene, but was advised that no one from the Detective Bureau was able to process the scene because it was Sunday, and the Detective Bureau is closed on Sundays. As a result, Dsurney processed the scene himself.

Dsurney testified that he saw pieces of a motocross helmet and a cell phone near the ATV where it had crashed, and items of personal clothing and protective gear where the ATV rider had thrown them. Dsurney further testified that he is not trained in processing crime scenes, so he simply collected the items, placed them in his car, and brought them to headquarters for processing there. In his pursuit and incident reports, Dsurney wrote that a glove and a vest were recovered at the scene, that the ATV was towed to the South Orange Police Security Garage for further processing, and that "the ATV rider's phone was found on the ground next to the crashed ATV, as well as pieces of his helmet."

Having never been trained in processing crime scenes, it never occurred to Dsurney that the cell phone could have belonged to someone else or that it could have been stolen. Both Levanda and Kroll criticized Dsurney for not considering those possibilities, and for assuming that it belonged to the ATV rider. Again, this criticism was not unreasonable. It was just overstated. Indeed, Levanda acknowledged on cross-examination that it was fair to assume that it was a "high probability" that the cell phone belonged to the ATV rider.

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[4] The term "close the gap," used by Dsurney to describe the attempt to reduce the distance between Dsurney and the ATV rider while pursuing on foot, is the same term Dsurney used to describe his attempt to reduce the distance between him and the ATV rider when he pursued the ATV rider in his patrol car.

Dsurney continued that he firmly believed that he had gotten a good enough look at the ATV rider through the opening of his motocross helmet to identify him as the person in the photograph that detective Zavant Bryant later showed him and represented to him was the owner of the cell phone.

In addition, Dsurney wrote in his pursuit and incident reports that the resident at 15 South Valley Road had video footage of a male matching his description of the ATV rider at time stamp 20:30:22.

Levanda, however, never secured the video footage.[5] Levanda also never went to the scene to measure whether such an identification from the distance Dsurney estimated was possible. Moreover, it was Bryant, not Dsurney, who was responsible for identifying the ATV rider, and it was Bryant, not Dsurney, who failed to identify the ATV rider through a photo array.[6]

South Orange denied Dsurney access to the recordings of the incident.

Upon his return to headquarters, Dsurney was immediately reprimanded for the pursuit. His pursuit, incident, and property reports followed. Dsurney, however, was denied access to the recordings of the pursuit. Dsurney had asked for the recordings so he could write his reports as accurately as possible, but his request was denied in total. Dsurney implied that this denial of access was intentional because any discrepancy between what he wrote in his reports and what Levanda could glean from the recordings resulted in a charge of untruthfulness.

Similarly, any discrepancy between what Dsurney said to Levanda during his Internal Affairs interview and what Levanda could glean from the recordings also resulted

[5] Levanda later testified that he was advised by the lieutenant in charge of the Detective Bureau that the homeowner never recorded the footage or that it no longer existed.

[6] Fortuitously, the cell phone rang when Bryant was processing it. Through a conversation with the person who called, Bryant was able to obtain an address of the cell-phone owner, and, later, a photograph of the cell-phone owner from the Motor Vehicle Commission (MVC). Ultimately, it is this lone photograph from the MVC that Bryant showed Dsurney to identify the ATV rider. Thus, it was Bryant, not Dsurney, who failed to identify the ATV rider through a photo array.

in a charge of untruthfulness. Curiously, the Internal Affairs interview did not take place until four months after the pursuit—during which time Dsurney was still denied access to the recordings. Meanwhile, Levanda had scrutinized them.

Dsurney did not receive written guidance about vehicle pursuits until after the pursuit.

Both Levanda and Kroll testified that South Orange policy and procedure regarding vehicle pursuit follow the Attorney General Guidelines regarding such pursuits, and during his testimony Levanda pointed out the pertinent parts of each policy and procedure.

Authorization for Pursuit

To begin, Levanda noted that South Orange's policy and procedure do not authorize a pursuit for motor-vehicle offenses unless the operation of the violator's vehicle poses an immediate threat to the safety of others:

> I. AUTHORIZATION TO PURSUE:
>
> A Police Officer has the authority, at all times, to attempt the stop of any person suspected of having committed any criminal offense or traffic violation. The Officer's decision to engage in a pursuit when the violator refuses to stop should always be undertaken with an awareness of the degree of risk to which the Law Enforcement Officer exposes himself/herself and others and weighs this against the need for an immediate apprehension.
>
> A. A Police Officer may only pursue when the officer reasonably believes that the violator has
>
> 1. Committed a crime of the first or second degree; or
>
> 2. Has committed an offense enumerated in Appendix A of this policy; or
>
> 3. When the Police Officer Reasonably believes that the violator poses an immediate threat to the safety of the public or other Police Officers.

> 4. Pursuit for motor vehicle offenses is not authorized under the above criteria unless the violator's vehicle is being operated so as to pose an immediate threat to the safety of another person.
>
> [Section 2.I.A (underscored for emphasis).]

Subsection B makes this explicit:

> B. South Orange Police Officers are not authorized to pursue any vehicle whose operator is attempting to flee or elude the police unless the pursuit would otherwise be authorized under the provisions provided above in paragraph "A".
>
> [Section 2.I.B (underscored for emphasis).]

Meanwhile, Subsection C enumerates the circumstances a police officer must consider before undertaking a vehicle pursuit—including his or her driving skills and his or her familiarity with the roads:

> C. In the event one of the authorization requirements is satisfied, a pursuit should not be automatically undertaken. The Officer still must evaluate the circumstances by considering the following factors:
>
> . . . .
>
> 5. Likelihood of successful apprehension.
>
> 6. Whether the identity of the violator is known to the point where later apprehension is possible.
>
> 7. Degree of risk created by pursuit.
>
> 8. Volume, type, speed, and direction of vehicular traffic.
>
> 9. Nature of the area: Residential, Commercial, School Zone, Open Highway, etc.
>
> 10. Population density and volume of pedestrian traffic.

> 11. Environmental factors such as weather and darkness.
>
> 12. Road conditions: Construction, Poor Repair, Extreme Curves, Ice, etc.
>
> 13. Police Officer Characteristics: Driving Skills, Familiarity with Roads, and Condition of the Police Vehicle.

[Section 2.I.C (underscored for emphasis).]

Dsurney testified that he believed that the ATV rider posed an immediate threat to the safety of others and that he was confident in his driving skills and familiarity with the roads, whereas Levanda and Kroll testified that the degree of risk created by the pursuit outweighed the need for apprehension. Both judgments are reasonable. Yet, respondent seeks to terminate Dsurney for this exercise of judgment and reasonable difference of opinion.

Termination of Pursuit

Levanda noted that under South Orange's policy and procedure, once a pursuit is undertaken, it may also be terminated—especially if the continued pursuit constitutes an unreasonable risk, the officer is ordered to do so, or radio communication is lost between the pursuing officer and headquarters:

> II. TERMINATION OF THE PURSUIT:
>
> The decision to abandon pursuit may be the most intelligent of course action. Officers must continuously question whether the seriousness of the crime or offense justifies continuing the pursuit. An officer will not be censured when, in the officer's opinion, continued pursuit constitutes an unreasonable risk.
>
> A. The pursuing Officer shall terminate the pursuit given any factor set forth here:
>
> 1. If instructed to do so by a Supervisor.
>
> 2. If the Officer believes that the danger to the pursuing Officer(s) or the public outweighs

> the necessity for immediate apprehension of the violator.
>
> 3. If the violator's identity is established to the point where later apprehension may be accomplished and where there is no immediate threat to the safety of the public or Police Officers, or
>
> 4. If the pursued vehicle's location is no longer known or the distance between the pursuing vehicles and the violator's vehicle become so great that further pursuit is futile.
>
> 5. If there is a person injured during the pursuit and there are no Police or Medical Personnel able to render assistance.
>
> 6. If there is clear and unreasonable danger to the Police Officer or the public. Clear and unreasonable danger exists when the pursuit requires that the vehicle be driven at excessive speeds or in any other manner which exceeds the performance capabilities of the pursuing vehicle(s) or Police Officers involved in a pursuit.
>
> 7. If advised of any unanticipated condition, event, or circumstance [that] substantially increases the risk to public safety inherent in the pursuit.
>
> 8. If radio communications are lost between the pursuing Police Vehicles and Police Headquarters.

[Section 2.II.A (underscored for emphasis).]

Dsurney testified that he did not receive this guidance until after the pursuit, and that he told this to Levanda during his interview with him. Dsurney explained that the acknowledgement form he signed at the departmental training was used as an attendance sheet—not as a receipt of South Orange policy and procedure regarding vehicle pursuit. This was significant because South Orange policy and procedure differ from the Attorney General Guidelines.

Under South Orange policy and procedure, a lack of communication between an officer and headquarters requires the termination of a pursuit, whereas the Attorney General Guidelines contain no such provision.

This was significant, because as Dsurney further explained, he was only aware of the Attorney General Guidelines—which only state that the pursuing officer must communicate information that might be helpful in the pursuit, not that the pursuit must be terminated if radio communication is lost between the pursuing officer and headquarters:

> II. ROLE OF THE PURSUING OFFICER
>
> . . . .
>
> C. Once the pursuit has been initiated, the primary unit must notify communications and a superior officer providing as much of the following information as is known:
>
> 1. Reason for the pursuit.
>
> 2. Direction of travel, designation and location of roadway.
>
> 3. Identification of the violator's vehicle: year, make, model, color, vehicle registration number and other identifying characteristics.
>
> 4. Number of occupants.
>
> 5. The speed of the pursued vehicle.
>
> 6. Other information that may be helpful in terminating the pursuit or resolving the incident.
>
> [AG Guidelines II.C.]

To underscore his compliance with this provision, Dsurney repeated on cross-examination that he communicated as much of this information as he could to headquarters during the pursuit.

Dsurney also repeated on cross-examination that issues existed the night of the incident concerning radio transmissions, and that a "dead zone" existed along Montrose and West Montrose Avenues between Scotland Road and North Ridgewood Road—which is why he tried to contact headquarters twice along that route, having received no transmission after the first attempt.

Finally, Dsurney repeated on cross-examination that he wanted to stay focused on pursuing the ATV rider and controlling his car.

Kroll testified that the above policy and procedure require a supervisor to determine whether a pursuit should continue, and that a police officer should never initiate the pursuit of an ATV. South Orange policy and procedure, however, do not state that. They do not require a supervisor to determine whether a pursuit should continue—just as South Orange policy and procedure do not state that a police officer should never initiate the pursuit of an ATV—at least not in such absolute terms.

Activation of Lights and Sirens

Levanda continued that once a pursuit is undertaken, the officer must immediately activate the lights and sirens of the patrol car and notify headquarters. The information that the officer must provide to headquarters is listed in South Orange policy and procedure Section 2.III.A. It includes a description of the vehicle and the conditions of the road:

> III. PROCEDURES FOR THE PURSUING OFFICER:
>
> The decision to initiate and/or continue a pursuit requires weighing the need to immediately apprehend the violator against the degree of risk to which the officer and others are exposed as a result of the pursuit. Upon commencement of a pursuit, the pursuing officer will immediately activate emergency lights, audible warning device, and headlights.
>
> A. Once the pursuit has been initiated, the primary unit must notify Headquarters and provide as much of the following information known:

> 1. Reason for the pursuit.
>
> 2. Direction of travel, designation, and location of roadway.
>
> 3. Identification of the violator's vehicle: Year, Make, Model, Color, Vehicle Registration Number, and other identifying characteristics.
>
> 4. Number of occupants.
>
> 5. The speed of the pursued vehicle.
>
> 6. Other information that may be helpful in terminating the pursuit or resolving the incident.
>
> B. If violator is being pursued out of the Township of South Orange, the officer must immediately notify headquarters and request permission to continue. The officer may continue the pursuit until a supervisor determines if the pursuit is to be continued or terminated.

[Section 2.III.]

Levanda, however, was picayune about the lights and sirens. If Dsurney was, in fact, in pursuit of the ATV rider upon seeing him, by activating his lights and initiating his K-turn, then Dsurney was in violation of policy and procedure in failing to activate his sirens as well. This is Levanda's position. Yet, whether Dsurney failed to activate his sirens when he activated his lights is not clear from the recordings. The sirens cannot be heard on the recordings until Dsurney approaches the train station, and Dsurney did not testify that he affirmatively activated his sirens when he activated his lights. Thus, for purposes of this decision, a preponderance of the evidence exists that Dsurney did not activate his sirens when he activated his lights, and a preponderance of the evidence exists that Dsurney did not activate his sirens until he approached the train station. Nevertheless, such a finding negates Levanda's assertion that Dsurney lied in his report when he represented that he attempted to "close the gap" with the ATV.

"Close the Gap"

Neither South Orange policy and procedure nor the Attorney General Guidelines regarding vehicle pursuit use the phrase "close the gap." The documents, however, do use the phrase "close the distance." In those documents, the phrase "close the distance" is a term of art. In South Orange policy and procedure, it is contained in Section 2.IV.F., and in the Attorney General Guidelines, it is contained in Section III.E. The provisions are identical, and state that the officer intending to stop a vehicle shall close the distance between the officer and the violator—when possible—before activating lights and sirens. Thus, the provisions are neither absolute nor absolutist.

Here is South Orange policy and procedure:

> IV. VEHICULAR PURSUIT RESTRICTIONS:
>
> . . . .
>
> E. To diminish the likelihood of pursuit, a police officer intending to stop a vehicle for any violation of the law shall, when possible and without creating a threat to public safety, close the distance between the two vehicles prior to activating emergency lights and an audible device. Police officers shall recognize that while attempting to close the distance and prior to the initiation of a pursuit and the activation of emergency lights and an audible device, they are subject to all motor vehicle laws governing the right of way (e.g., N.J.S.A. 39:4-91 and -92).

[Section 2.IV.F (underscored for emphasis).]

Here is the Attorney General Guideline:

> III. VEHICULAR PURSUIT RESTRICTIONS
>
> . . . .
>
> E. To diminish the likelihood of pursuit, a police officer intending to stop a vehicle for any violation of the law shall, when possible and without creating a

> threat to public safety, close the distance between the two vehicles prior to activating emergency lights and an audible device. Police officers shall recognize that while attempting to close the distance and prior to the initiation of a pursuit and the activation of emergency lights and an audible device, they are subject to all motor vehicle laws governing the right of way (e.g., N.J.S.A. 39:4-91 and -92).

[Section III.E (underscored for emphasis).]

Accordingly, when Dsurney used the phrase "close the gap," he did not mean the term of art "close the distance." First, Dsurney did not mean the term of art because he did not use the term of art. He used the colloquial "close the gap," which meant the familiar "catch up." Second, Dsurney did not mean the term of art because Dsurney did not know that term of art. As Dsurney testified, he did not receive the policy and procedure that identify and define this term of art until after this incident.

Third, Dsurney did not mean the term of art "close the distance" because it was not possible to do what the term of art means. As all the evidence reveals, as soon as Dsurney happened upon the ATV rider, the ATV rider fled, and Dsurney activated his lights to make a K-turn to "catch up" to him. Thus, it was not possible for Dsurney to "close the distance" before activating his lights and sirens.

Reasonable people can disagree about whether Dsurney should have pursued the ATV rider, but reasonable people cannot disagree about what Dsurney meant when he wrote and said "close the gap," so for Levanda to insist to this day that what Dsurney really meant when he wrote and said "close the gap" was the term of art "close the distance" perhaps undermines Levanda's credibility more than anything else.

Levanda was either mistaken or biased in his testimony and beliefs.

Levanda reviewed the pursuit, incident, and property reports. The property report simply states that the department recovered a "white/red Yamaha ATV," a "red, black and blue Fox helmet," a "red iPhone," a "red Fox motocross glove," a "blue USA Nike t-shirt," and a "white and red riding vest." Levanda also reviewed the recordings from the

dashboard cameras and the recordings of the radio transmissions. All were memorialized in his report.

At the hearing, Levanda described what he heard and saw from the recordings. Levanda testified that it was twilight, 8:30 p.m. on a weekend night, and that the traffic was "light," which was "normal," when he observed Dsurney perform a U-turn to pursue an ATV rider.[7] Levanda commented that he saw Dsurney speed after the ATV rider at 63 mph in a 25-mph zone on the wrong side of the road without his sirens while three cars were coming toward him. Levanda continued that Dsurney made a left onto West Montrose Avenue toward the train station without stopping at the intersection, and that Dsurney activated his siren only when he approached the train station.

Levanda characterized West Montrose Avenue as a winding, residential street, noting that a pedestrian had been struck and killed on that road near the train station only a year or two before this pursuit, which was a significant factor for both Levanda and Kroll, fueling their sharp criticism of the pursuit.

Levanda further testified that Dsurney turned right at the end of West Montrose Avenue onto North Ridgewood Avenue, but commented that Dsurney "blew through" the stop sign. Levanda acknowledged that only sixty to ninety seconds had passed to this point, but continued that both the ATV rider and Dsurney crossed the double yellow line along the road before the ATV rider crashed at the fork in the road and ran away. Levanda noted that Dsurney ran after the ATV rider but tripped during his pursuit and lost sight of the suspect at the corner.

Levanda summarized his concerns: Dsurney elected to pursue an ATV, which is not a safe vehicle; Dsurney had trouble communicating with headquarters; both vehicular and pedestrian traffic existed; and Dsurney traveled more than two times the speed limit, crossing double yellow lines.

[7] As stated previously, Dsurney performed a K-turn.

In short, Levanda asserted that the ATV rider was not alleged to have committed a criminal offense, and implied that the risk of pursuit outweighed the need for apprehension.

Levanda later underscored that the roads on which Dsurney pursued the ATV rider were residential and winding—and that one of them contained a blind trestle with a recent history of a pedestrian death, while another one contained a sharp bend in a foreign jurisdiction unfamiliar to Dsurney.

Levanda testified that he also took issue with the radio transmissions because he asserted that no one knew about the pursuit until Dsurney had reached North Ridgewood Avenue, and that Dsurney should have communicated more often and with more detail. But this was only partially true. Perhaps Dsurney could have communicated more often and with more detail, but the entire pursuit was only two minutes and ten seconds, and as Dsurney testified, he had to concentrate on his driving, keeping both hands on the wheel, which made that kind of communication more difficult. Levanda gave Dsurney absolutely no allowance for this.

Dsurney had also contacted headquarters from the start, radioing headquarters, "I got them on Scotland," but Levanda criticized Dsurney for not using more precise language.

This too was picayune, for there was context to this communique.

Less than a minute earlier, forty-one seconds earlier to be precise, Cucciniello transmits—for all patrol officers to hear—that he had "two guys racing," but that he had "lost sight" of them:

> Cucciniello: I have two guys racing. Looks like an ATV going eastbound on Irvington Ave going towards . . . they turned on Prospect going towards the Avenue.
>
> Headquarters: Received.

Cucciniello:	I'm not pursuing. They just went flying down Irvington Ave.
Headquarters:	Headquarters to 824.
Simpson:	Enroute.
Cucciniello:	I lost sight of them, but it looks like they turned on Prospect toward South Orange Avenue.

[R-5 at 6.]

Thirteen seconds later, Dsurney radios headquarters, "I got them on Scotland." Less than a minute later, forty-six seconds to be exact, Dsurney again radios headquarters, "817 to Headquarters," which headquarters received because it responds, "Come in 817." At this time, Dsurney provides headquarters with his update, "817 to Headquarters, attempting to stop that ATV on North Ridgewood."

Headquarters, however, did not receive this update.

Since headquarters did not receive this update, headquarters attempts to contact Dsurney, "Headquarters to 817," and Cucciniello intercedes, "817, are you pursuing them on North Ridgewood?"

Dsurney receives this transmission and responds, "817, I'm on South Valley doing 50 mph in the City of West Orange," and Cucciniello advises Dsurney to terminate the pursuit—but the ATV crashes immediately thereafter.

To repeat, Dsurney had testified on direct examination that he knew that there is a dead zone along Montrose and West Montrose Avenues between Scotland Road and North Ridgewood Road, which is why he tried to contact headquarters twice along that route, having received no transmission after the first attempt, and the entire pursuit lasted only two minutes and ten seconds, with communication between Dsurney and headquarters, as previously described, either garbled or lost, which Levanda did not

acknowledge during his direct examination, but later admitted during his cross-examination.

Indeed, on cross-examination, Levanda agreed that the ATV rider was driving in a manner that posed an immediate threat to the safety of others, but maintained that the risk of pursuit outweighed the need for apprehension.

He also maintained that Dsurney's statement, "I got them on Scotland," only thirteen seconds after Cucciniello stated that the two riders were headed in the same direction Dsurney was headed, could not possibly mean that Dsurney had taken over the pursuit or had initiated the pursuit.

The language "I got them on Scotland" is imprecise, but for Levanda to foreclose the possibility that Cucciniello had lost the two riders and that Dsurney had taken over the pursuit is unreasonable, especially since the ATV rider was driving in a manner that posed an immediate threat to the safety of others.[8]

Cucciniello would have pursued the ATV rider under these circumstances as well.

Cucciniello is a former police officer with the South Orange Police Department, having retired on June 1, 2021, as part of a settlement with respondent concerning disciplinary charges, including allegations of dishonesty, but Cucciniello was still a sergeant and Dsurney's superior on the date of the incident, and, like Dsurney, I found him to be a credible witness. Cucciniello answered every question that was asked of him candidly, including questions concerning the disciplinary charges levied against him and the settlement agreement that he entered into with respondent, so if Cucciniello was biased against respondent, as respondent suggests, I detected none of it at any point during his testimony. In fact, Cucciniello was just as forthcoming on cross-examination as he was on direct examination and just as amiable. As such, all attempts to impeach

[8] Cucciniello would later testify that he had spotted the ATV rider and motorcycle racing while he was standing outside his car, so Cucciniello did not lose them in a pursuit, which Dsurney took over, but that is exactly how it sounded in the moment based on the radio transmission.

his credibility were overreach and only served to strengthen his trustworthiness and reliability.

Cucciniello testified that he was walking to his car when he saw the ATV rider and motorcycle rider racing down Irvington Avenue, and he transmitted this information over the radio for all to hear. Cucciniello commented that he too would have pursued the ATV rider because he too thought that the ATV rider was driving in a manner that posed an immediate risk to others, but he was outside his car so he could not do so. In addition, Cucciniello testified that he too had issues receiving transmissions that evening. Cucciniello explained that he believed it was due to a part that was missing from the antenna on his patrol car, which is why he believed that Dsurney did not hear him when he ordered Dsurney to terminate the pursuit. Incidentally, Cucciniello added that he too has pursued motorists on the same roads at these same speeds.

Although Cucciniello was not in the patrol car with Dsurney during the pursuit, he did review the video and radio transmissions, and in doing so gave ballast to the absolutist position of both Levanda and Kroll that Dsurney never should have pursued the ATV rider, because Cucciniello would have exercised the same judgment.

Cucciniello also gave ballast to the position of both Levanda and Kroll that Dsurney should have heeded Cucciniello's order to terminate his pursuit, because Cucciniello corroborated that Dsurney did not hear him.

Finally, Cucciniello gave ballast to the position of both Levanda and Kroll that Dsurney never should have driven at the speeds at which he did in pursuit of the ATV rider, because Cucciniello has engaged in similar pursuits over the same roads at similar speeds.

In short, Cucciniello proves that reasonable police officers may differ when it comes to the exercise of judgment in the fulfilment of their duties as police officers.[9]

[9] At the very least, Dsurney cannot be charged with disobeying an order he did not hear.

Bryant, not Dsurney, failed to identify the ATV rider through a photo array.

Levanda testified that he also took issue with the identification procedure in this case for three reasons. First, Levanda believed that Dsurney could not have identified the ATV rider through the motocross helmet. Second, Levanda believed that Dsurney should have identified the ATV rider through a proper array. Third, Levanda believed that Dsurney should have been 100 percent certain that the cell phone belonged to the ATV rider before attempting to identify the ATV rider through it.

Once again, this is a matter of context and interpretation. To remind, Levanda admitted on cross-examination that it was fair to assume that the cell phone belonged to the ATV rider. More significantly, it was Bryant, not Dsurney, who was responsible for identifying the ATV rider. More pointedly, Dsurney testified that Bryant showed him the lone photograph later that same week, either Thursday or Friday, as it was either his first or second day back to work after the pursuit on Sunday, and that he identified the ATV rider as the one pictured. Thus, it was Bryant, not Dsurney who failed to identify the ATV rider through a photo array.

Bryant did not testify at the hearing, but his report was admitted into evidence. In his report, Bryant recounted that Dsurney reported that the ATV rider dropped his phone while fleeing, and both Levanda and Kroll rightly criticized both Bryant and Dsurney for reporting this when neither saw the ATV rider drop the phone, but both Levanda and Kroll were mistaken, because Dsurney did not report that the ATV rider dropped his phone while fleeing. Dsurney reported that he found the cell phone near the ATV at the crash scene and assumed it was the ATV rider's phone, something that Levanda, once again, acknowledged on cross-examination was fair to assume. Above all, Dsurney is not charged with falsely identifying the ATV rider, but with lying in his report for omitting this assumption, which is a mischaracterization. A lie is an intentional act to mislead. No evidence exists whatsoever that Dsurney omitted this assumption with the intent to mislead.

Still, Dsurney is charged with lying in his report that he could identify the ATV rider, which is based on Levanda's belief that Dsurney could not do so. Yet Levanda never

went to the scene to explore this. For example, Levanda acknowledged on cross-examination that he never measured the distance between Dsurney and the ATV rider in an attempt to simulate whether such an identification was possible or probable.

No one disputes that Dsurney should have been presented with a photo array. But both Levanda and Kroll fail to acknowledge that Dsurney is not the one who was responsible for making the identification and has no training in this kind of detective work. Moreover, they insist that the patrolman be held responsible for the mistake by their detective.[10]

Dsurney did not lie.

For Levanda and Kroll, the gravamen of their recommended disciplinary action against Dsurney is their difference of opinion, which Levanda and Kroll conflate as lies. During their testimony, both Levanda and Kroll summarized these so-called lies. As the investigator, Levanda was more specific. He testified that Dsurney lied because he and Dsurney had two different definitions of "close the gap"—and that difference made Dsurney a liar; because he and Dsurney had two different descriptions of the vehicular and pedestrian traffic on the night of June 2, 2019—and that difference made Dsurney a liar; because he and Dsurney had two different understandings of the training Dsurney received before the pursuit—and that difference made Dsurney a liar; and because he and Dsurney had two different beliefs about how Dsurney could have identified the ATV rider—and that difference made Dsurney a liar. Thus, Levanda concluded that because of these lies—and the fact that Dsurney maintained throughout the investigation that his actions were justified—progressive discipline must be bypassed and Dsurney must be removed from his position, notwithstanding the fact that Dsurney has no prior discipline. Indeed, Levanda readily testified that he was irritated that Dsurney showed no contrition during his investigation and would not bow to him.

[10] Bryant has already been disciplined for his failure to identify the ATV rider through a photo array.

Yet on cross-examination, Levanda contradicted himself: He agreed and acknowledged that Dsurney did not need authorization to pursue the ATV rider, that the ATV rider posed an immediate threat to others, that Cucciniello had alerted all officers to the threat, and that no particular requirement exists for specifically communicating such a vehicular pursuit.

Levanda further agreed and acknowledged that Dsurney began his pursuit on Scotland Road at 37 mph, that the cars Dsurney did encounter on Scotland Road were encountered at 37 mph, not 69 mph, and that they yielded to him by pulling to the side of the road.

Indeed, Levanda agreed and acknowledged that no cars were on the road when Dsurney accelerated to 69 mph on Scotland Road.

Levanda also agreed and acknowledged that Dsurney slowed down to 29 mph when he turned left onto Montrose Avenue from Scotland Avenue, and that the intersection of Scotland Avenue and Montrose Avenue was clear because the light had just turned from red to green on Scotland Avenue.

Moreover, Levanda agreed and acknowledged that the train station was not busy when Dsurney passed it because it was 8:28 p.m. on a Sunday night and no vehicular or pedestrian traffic existed at or near the train station—or anywhere along the entire length of West Montrose Avenue to North Ridgewood Avenue.

To continue, Levanda agreed and acknowledged that Dsurney had slowed to 47 mph at the top of the train trestle, that Dsurney had slowed to 28 mph when he turned right onto North Ridgewood Avenue, and that the intersection was clear because the intersection is a wide intersection.

To be sure, Levanda agreed and acknowledged that headquarters did (in fact) know that Dsurney was in pursuit of the ATV rider, that issues did (in fact) exist with the radio transmissions that night, and that Dsurney did not (in fact) receive the transmission from headquarters to terminate the pursuit.

Levanda also agreed and acknowledged that the time stamps from the radio transmissions and the dashboard cameras were not in synchronization, that the Detective Bureau did not process the scene, and that a high probability existed that the cell phone belonged to the ATV rider.

Finally, Levanda agreed and acknowledged that he interviewed Dsurney for the first time four months after the incident, that Dsurney had no prior discipline, and that Dsurney had never been criticized or critiqued for any of his previous pursuits, which merely underscores the fact that differences in an accounting would be more likely.

Above all, it underscores the fact that Levanda provided testimony that must be rejected.

CONCLUSIONS OF LAW

In appeals concerning major disciplinary action, the appointing authority bears the burden of proof. N.J.A.C. 4A:2-1.4(a). The burden of proof is by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), and the hearing is de novo, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980). On such appeals, the Civil Service Commission may increase or decrease the penalty, N.J.S.A. 11A:2-19, and the concept of progressive discipline guides that determination, In re Carter, 191 N.J. 474, 483–86 (2007). Thus, an employee's prior disciplinary record is inherently relevant to determining an appropriate penalty for a subsequent offense, In re Carter, 191 N.J. at 483, and the question upon appellate review 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," Id. at 484 (quoting In re Polk, 90 N.J. 550, 578 (1982) (internal quotes omitted)). Indeed, progressive discipline may only be bypassed when the misconduct is severe, when it renders the employee unsuitable for continuation in the position, or when the application of progressive discipline would be contrary to the public interest—such as when the position involves public safety and the misconduct causes risk of harm to persons or property. In re Herrmann, 192 N.J. 19, 33 (2007).

In this case, no justification exists to bypass progressive discipline. The alleged misconduct in this case is a difference of opinion. Moreover, the alleged misconduct did not cause the risk of harm to persons or property that the case law contemplates.

Reasonable people (and reasonable police officers) can disagree whether Dsurney should have undertaken his pursuit, and reasonable people (and reasonable police officers) can disagree whether Dsurney should have terminated the pursuit once he had undertaken it, but such a reasonable difference of opinion among people (and police officers) does not warrant discipline, let alone removal.

More pointedly, the Preliminary Notice of Disciplinary Action, which was sustained in the Final Notice of Disciplinary Action, specifies that on June 2, 2019, Dsurney engaged in a high-speed motor-vehicle pursuit of an ATV without concern for himself and the public. This is not true. Dsurney testified that he believed the ATV rider posed an immediate threat to the safety of others. I agree. Thus, I **CONCLUDE** that Dsurney did not engage in a high-speed motor-vehicle pursuit of an ATV in violation of the Attorney General Guidelines and South Orange policy and procedure or in violation of any statute or regulation.

The notice further specifies that Dsurney initiated and continued the pursuit without legal justification and then failed to advise headquarters about the pursuit in violation of the Attorney General Guidelines and South Orange policy and procedure. This is not true either. As I found above, Dsurney had legal justification to engage in the pursuit, and as Dsurney testified, he did attempt to advise headquarters about the pursuit. Thus, I **CONCLUDE** that Dsurney did not initiate and continue the pursuit in violation of the Attorney General Guidelines and South Orange policy and procedure or in violation of any statute or regulation.

Moreover, the notice specifies that Dsurney failed to terminate the pursuit when ordered and later when he lost communication with headquarters. This too is not true. A preponderance of the credible evidence shows that Dsurney did not receive the order to terminate the pursuit until the end of the pursuit, and that Dsurney did not know the policy and procedure to terminate the pursuit once communication was lost.

Nevertheless, Dsurney knew that communication was lost. Thus, I **CONCLUDE** that Dsurney technically violated this very particular policy and procedure, for which Dsurney should be trained, not removed from his position as a police officer.[11]

The notice continues that Dsurney lied during his Internal Affairs interview when he represented (1) that he was attempting to catch up to the ATV, (2) that there was little to no traffic or pedestrians during the pursuit, and (3) that he could positively identify the ATV rider. As I also discussed above, Dsurney did not lie. He did attempt to catch up to the ATV, there was little to no traffic or pedestrians during the pursuit, and as Dsurney testified, he believed that he could positively identify the ATV rider. Thus, I **CONCLUDE** that Dsurney did not lie in violation of the Attorney General Guidelines and South Orange policy and procedure or in violation of any statute or regulation for his reasonably held belief.

Finally, the notice specifies that Dsurney lied in his report when he represented (1) that he attempted to "close the gap" with the ATV, (2) that he notified headquarters multiple times that he was in pursuit of the ATV, and (3) that the cell phone recovered near the crash belonged to the ATV rider. To repeat, Dsurney did not lie because he did attempt to close the gap, that is, he did not attempt to "close the distance," as a term of art. He merely attempted to catch up to the ATV. Likewise, Dsurney did not lie because he did attempt to notify headquarters multiple times that he was in pursuit of the ATV. Moreover, Dsurney did not lie that the cell phone recovered near the crash belonged to the ATV rider, because as Levanda acknowledged on cross-examination, it was fair to assume that the cell phone recovered near the crash belonged to the ATV rider. Thus, I **CONCLUDE** that Dsurney did not lie in violation of the Attorney General Guidelines and South Orange policy and procedure or in violation of any statute or regulation for his choice of words in his reports.

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[11] This is exactly what the Essex County Prosecutor's Office recommended after it had reviewed the case on August 7, 2019, well before South Orange filed its Preliminary Notice of Disciplinary Action, and is similar to what the Essex County Prosecutor's Office recommended for Bryant when it recommended that Bryant be retrained in identification procedures.

The Final Notice of Disciplinary Action also sustained the following additional specifications: (1) Dsurney lied during his Internal Affairs interview when he represented that he could positively identify the ATV rider from a photograph from the Motor Vehicle Commission; (2) Dsurney lied during his Internal Affairs interview when he represented that he had received no training on departmental policy and procedure regarding vehicle pursuits; and (3) Dsurney lied to the Detective Bureau when he reported that the ATV rider dropped the cell phone during the pursuit. Once again, Dsurney did not lie. As Dsurney testified, he believed that he could identify the ATV rider from the photograph Bryant presented to him. I also believe Dsurney that he received substandard training on department policy and procedure regarding vehicle pursuits. Moreover, Dsurney did not lie to the Detective Bureau that the ATV rider dropped the cell phone during the pursuit, because Dsurney never wrote or stated that. He simply found the cell phone near the crash and assumed it belonged to the ATV rider, which Levanda acknowledged on cross-examination was fair to assume. Thus, I **CONCLUDE** that Dsurney did not lie in violation of the Attorney General Guidelines and South Orange policy and procedure or in violation of any statute or regulation for his choice of words during his Internal Affairs interview.

Finally, I address a threshold issue last. Dsurney argues that this case should be dismissed because respondent failed to conclude its investigation within forty-five days in violation of N.J.S.A. 40A:14-147, as well as the collective bargaining agreement between the respondent and the Police Benevolent Association, which includes this provision. Under the statute, a complaint concerning internal rules and regulations shall be filed no later than the forty-fifth day after the date on which the person filing the complaint obtained sufficient information to file it. It also includes the proviso that the forty-five-day limit shall begin on the day after the disposition of the criminal investigation:

> A complaint charging a violation of the internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. The 45-day time limit shall not apply if an investigation of a law enforcement officer for a violation of the internal rules or regulations of the law enforcement unit is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State. The 45-day limit

> shall begin on the day after the disposition of the criminal investigation. The 45-day requirement of this paragraph for the filing of a complaint against an officer shall not apply to a filing of a complaint by a private individual.
>
> [N.J.S.A. 40A:14-147.]

In this case, Levanda began his review on June 3, 2019, and submitted his report to the Essex County Prosecutor's Office on June 25, 2019. The Essex County Prosecutor's Office declined prosecution and sent that declination to Kroll on August 7, 2019, which Levanda received on September 3, 2019. Yet Levanda did not complete his investigation until January 14, 2020, and his report until March 10, 2020. Moreover, no further investigation or reporting occurred between January 14, 2020 (the date Levanda completed his investigation) and March 10, 2020 (the date Levanda completed his report). Thus, the latest date respondent had sufficient information to file its complaint against Dsurney was January 14, 2020, and the latest date respondent had to serve Dsurney with the Preliminary Notice of Disciplinary Action was February 28, 2020.

Since respondent did not serve Dsurney with the Preliminary Notice of Disciplinary Action until March 12, 2020, I **CONCLUDE** that respondent filed the charges concerning its internal rules and regulations in violation of N.J.S.A. 40A:14-147, and that those charges should be **DISMISSED**.

Even if this last conclusion is rejected by the Civil Service Commission, these charges concerning internal rules and regulations should still be dismissed for all the reasons that preceded it.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that all the charges against Dsurney be **DISMISSED**, that Dsurney be **REINSTATED** to his position of police officer, and that Dsurney be **AWARDED** all requisite back pay, benefits, attorney fees, and costs associated with this case.

I further **ORDER** that Dsurney be retrained in vehicle pursuits once he returns to his position as police officer.

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 case. 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 under 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.

January 31, 2022
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: January 31, 2022

Date Mailed to Parties: January 31, 2022

dr

APPENDIX

Witnesses

For Appellant:

Michael Cucciniello

Matthew Dsurney

For Respondent:

Joseph Levanda

Kyle Kroll

Documents

For Appellant:

P-1 Preliminary Notice of Disciplinary Action dated March 11, 2020

P-2 Final Notice of Disciplinary Action dated November 11, 2020

P-3 Letter from Jessica Apostolou to Kroll dated August 7, 2019

P-4 Email from Dan Grasso to Kroll, Stephen Dolina, and Levanda dated June 3, 2019

P-5 Vehicle Pursuit Report by Dsurney dated June 2, 2019

P-6 Incident Report by Dsurney dated June 2, 2019

P-7 Continuation Report by Zavaian Bryant June 22, 2019

P-8 Property Report by Dsurney dated June 2, 2019

P-9 Administrative Submission by Cucciniello dated June 2, 2019

P-10 Internal Affairs Complaint Notification by Levanda dated June 5, 2019

P-11 Letter from Levanda to Dsurney dated September 25, 2019

P-12 Administrative Investigation Form signed by Dsurney on October 2, 2019

P-13 Letter from Levanda to Dsurney dated October 24, 2019

P-14 Administrative Investigation Form signed by Dsurney on November 11, 2019

P-15 Witness Acknowledgement Form signed by Dsurney on September 17, 2019

P-16 Memorandum from Kroll to Dsurney dated March 11, 2020

P-17 Confidential Report by Levanda dated March 10, 2020

P-18 South Orange Police Department Rule and Regulations

P-19 New Jersey Police Vehicular Pursuit Policy dated September 17, 2009

P-20 South Orange Police Department Vehicular Pursuit Policy effective January 7, 1989, revised dated June 1, 2014

For Respondent:

R-1 Preliminary Notice of Disciplinary Action dated March 11, 2020

R-2 South Orange Police Department Rule and Regulations

R-3 New Jersey Police Vehicular Pursuit Policy dated September 17, 2009

R-4 South Orange Police Department Vehicular Pursuit Policy effective January 7, 1989, revised dated June 1, 2014

R-5 Confidential Report by Levanda dated March 10, 2020

R-6 Email from Dan Grasso to Kroll, Stephen Dolina, and Levanda dated June 3, 2019

R-7 Vehicular Pursuit Report by Dsurney dated June 2, 2019

R-8 Incident Report by Dsurney dated June 2, 2019

R-9 Property Report by Dsurney dated June 2, 2019

R-10 Administrative Submission by Cucciniello dated June 2, 2019

R-11 Continuation Report by Dsurney dated June 19, 2019

R-12 Continuation Report by Zavian Bryant dated June 22, 2019

R-13 Recordings from dashboard cameras on June 2, 2019

R-14 Email from Ed Heckel to PD Supervisors dated February 1, 2019

R-15 Final Notice of Disciplinary Action dated November 11, 2020