STATE OF NEW JERSEY

In the Matter of Joseph Hans,
Lakewood Police Department

CSC DKT. NO. 2022-1727
OAL DKT. NO. CSR 01264-22

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: DECEMBER 27, 2022

The appeal of Joseph Hans, Police Officer, Lakewood, Police Department, removal, effective March 2, 2021, on charges, was heard by Administrative Law Judge Elia A. Pelios (ALJ), who rendered his initial decision on November 14, 2022. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, including a thorough review of the exceptions and reply, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of December 21, 2022, did not adopt the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision. Rather, the Commission remanded the matter to the Office of Administrative Law (OAL).

This matter turns on the reports and subsequent testimony of the two expert witnesses presented. While the ALJ indicated that he credited Dr. Gary Glass' testimony over Dr. Nicole Rafanello's, and noted that both doctors apparently agreed about the appellant's unfitness at the time of the original evaluation, he presents several reasons to question Dr. Glass' testimony. These concerns are also of concern to the Commission, such that, it believes that a further assessment of the two doctors' reports is required. Accordingly, the Commission remands this matter to the OAL. In doing so, it is requiring that an independent psychological assessment of the appellant's psychological fitness for duty at the time of the removal be conducted.[1]

[1] The Commission notes that it is not particularly interested in the appellant's current psychological fitness for duty. In this regard, in order to meet its burden of proof, the appointing authority is only required to establish that the appellant was psychologically unfit for duty at the time of his removal.

To accomplish this, the Commission assigns its independent psychological evaluator, Dr. Robert Kanen, to review the psychological reports in the record from Dr. Glass and Dr. Rafanello and make a determination as to whether the appellant was psychologically fit for duty at the time of Dr. Glass' assessment. As Dr. Kanen has performed innumerable independent reviews for the Commission, it values his expert opinion.

The Commission shall forward copies of the psychological reports of Dr. Glass and Dr. Rafanello, and a copy of the ALJ's initial decision to Dr. Kanen. Upon completion of his review, his subsequent report shall be forwarded to the ALJ, who shall forward it to the parties. The parties shall be afforded the opportunity to provide written exceptions to Dr. Kanen's report to the ALJ. Upon receipt of Dr. Kanen's report and any exceptions, the ALJ should issue a new initial decision taking into account Dr. Kanen's report, as well as the previous reports of Dr. Glass and Dr. Rafanello. No further hearing proceedings are required.

Finally, the Commission notes that, as it is the appointing authority's burden of proof in this matter, the cost incurred for Dr. Kanen's review be assessed to the appointing authority in the amount of $530.[2]

ORDER

The Civil Service Commission remands this matter to the Office of Administrative Law for proceedings as described above.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21ST DAY OF DECEMBER, 2022

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Assuming such unfitness at that time, any current fitness for duty only goes to the question of penalty. For example, whether such a removal should be modified to a lesser suspension or a resignation in good standing.

[2] Similar to psychological appeals of candidates removed from an employment list which the Commission sends for an independent psychological assessment, Dr. Kanen will be initially paid by the Commission, which will then seek reimbursement from the appointing authority.

Inquiries
and
Correspondence

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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 01264-22

AGENCY DKT. NO. N/A

2022-1727

IN THE MATTER OF JOSEPH HANS, LAKEWOOD TOWNSHIP (POLICE DEPARTMENT).

Charles J. Uliano, Esq., for appellant, Joseph Hans, (Chamlin Uliano and Walsh, attorneys)

Steven Secare, Esq., for respondent, Lakewood Township, Police Department, (Secare & Hensel, attorneys)

Record Closed: August 15, 2022 Decided: November 14, 2022

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

STATEMENT OF THE CASE

Joseph Hans ("Hans" or "appellant") a police officer with the Camden County Police Department ("respondent," "CCPD" or "Department") appeals the Department's decision to remove him from employment for violating N.J.A.C. 4A:2-2.3(a): (1) incompetency, inefficiency or failure to perform duties; (3) inability to perform duties; (7) neglect of duty; and (12) other sufficient cause. All charges are supported by the single

specification that appellant was declared unfit for duty through a psychological exam on March 2, 2021.

PROCEDURAL HISTORY

Respondent issued a Final Notice of Disciplinary Action (FNDA), dated January 21, 2022, removing him from employment on that date based upon the sustained charges. Appellant appealed the FNDA to the Office of Administrative Law (OAL) on February 8, 2022. The matter was heard on June 9, and June 24, 2022. The record closed at the conclusion of the second hearing date. By way of letter, dated March 17, 2022, appellant waived the 180-day rule. The record was reopened on August 3, 2022, to clarify an issue with the exhibit list and re-closed on August 15, 2022.

FACTUAL DISCUSSION

On December 14, 2020, appellant contacted the Department to state that he was calling out of work to attend to a family emergency. He was informed that he did not have leave time to take and that he should seek to swap a shift with another colleague. He did not do so and did not report to work. The Department opened an internal affairs investigation and appellant was interviewed on January 11, 2021. During the interview, he made comments that caused his supervisors to refer him for a fitness for duty evaluation. On March 2, 2021, the Department received the evaluator's report finding him psychologically unfit for duty. The next day the preliminary notice of disciplinary action was filed, reflecting the charges described above. A charge of insubordination was not included because the internal affairs investigation determined that appellant was not ordered to report for duty on December 14, 2020.

The preceding statements are not in dispute and are hereby **FOUND** as **FACT**.

Gregory Staffordsmith

The Township called Captain Gregory Staffordsmith (Staffordsmith) to testify. He has been with the Lakewood Police Department for twenty-two years and has moved through the ranks. He briefly discussed the demographic makeup of Lakewood, describing it as a melting pot. Not like New York City or Jersey City in size but it's a regional city. It is a city of 140,000 people. Forty percent of whom are orthodox Jewish. He recalled that a policeman was executed in 2012. He characterizes the job as a stressful occupation. He described the day-to-day stress as involving traffic, streets, and neighborhood communities.

Staffordsmith was assigned to internal affairs in 2016. He was trained by the attorney general shortly after he arrived, as well as by the Ocean County prosecutor. He commands the unit and the detective bureau.

Staffordsmith knows the appellant in this matter. He was a supervisor for appellant's background investigation when he was hired in 2017. He never personally supervised appellant.

He notes that officers are evaluated annually, and that on their face the appellant's evaluations look OK, but he notes they are subpar compared to those of his colleagues. He referred to report he wrote on November 5 of 2019 stating that on October 1, 2019, appellant failed to report. Incident was noted in the guardian system. The tracker reflects positive and negative performance tracking. There was a negative entry completed by Lieutenant Cunliffe on October 21, 2019. Appellant was not present during the briefing. It was checked to see if there was a day off or if he called out. Officers went to locate appellant, but they could not. He later called in, saying that he had overslept, and that his phone died, and that he did not have an alarm clock.

It was noted that between January 1, 2020, and December 31, 2021, appellant had taken 730 hours of time off. He had taken 491 and a half hours in 2019. The witness described these levels as unusual. A pattern was developing. Appellant was served with internal affairs notice to come in to sit for a talk. It was clear he was using sick time in coordination with days off to extend his weekends. Tardiness was becoming an issue.

On December 14, 2020, the appellant reached out to his sergeant, and described a family problem, asking if he could call out. The sergeant went to the captain and the captain told him to find a mutual exchange. The appellant did not make any attempt to find a mutual exchange and did not report for duty. The reason he gave for not trying to find an exchange was that he had tried before and had been unable to.

The pattern that family issues were appellant's priorities even if he was docked or disciplined became apparent. His absence impacted morale of the Department. The missed shift on December 14, caused the captain to meet with the appellant. He was entitled to representation. In the IA interview, he was asked for a reason he did not show up. He stated that there was a family matter that was not emergent, but that he needed to be there. He called in and was told to find a mutual exchange, and he admitted that he did not try to do so.

Staffordsmith believes that the appellant is a nice guy, and he believes that he will tell you what you want to hear. He will thank you for making him see the light, but he will not change what happens.

In June 2020, Staffordsmith saw that the appellant was having a hard time emotionally. His lieutenant suggested to give him desk duty. He logged over 200 hours on the desk and then returned to patrol. However, he continued with his pattern of absenteeism. Appellant stated that he felt that the Department catered to the orthodox and that the Department spend more time policing depressed neighborhoods. Staffordsmith noted that the appellant excelled at domestic and family aspects of the job and had a great rapport in response to children. Staffordsmith asked appellant if he

wanted to be a police officer. Appellant asked if that was a serious question. Staffordsmith responded that it was. Appellant responded that he did not think he could. As a result of his comment that he did not think he could be a policeman the Department sent the appellant to Dr. glass for a fitness for duty evaluation. Staffordsmith believes that appellant could excel at teaching or social work, but not as a police officer. He described him again as a really nice guy.

On cross examination, Staffordsmith was presented with an evaluation, dated March 11, 2020, that had been signed by the appellate on May 11, 2021. It stated that all-in-all, he sees a bright future for appellant if he minimizes his time off. Staffordsmith agreed that's what he said. He is somewhat, but not intimately, familiar with the appellant's background. He went on desk time in the aftermath of the George Floyd incident because he could not get his head right. In November 2019 appellate was referred by Staffordsmith to Dr. Glass due to concerns about his use/abuse of leave time. Dr. glass found him fit for duty and returned him to work and did not write a report at the time. Staffordsmith reviewed an April 25, 2020, memo/letter from Dr. Glass. (R1.) It was not in the file, but it looks familiar to Staffordsmith. Dr. glass said that appellant's matter fell through the cracks and wanted to re-examine him. The shutdown was in 2020 of March. Staffordsmith did not ask for any follow up at the time

With regard to the December 14 incident that led to the internal affairs investigation which led to these charges, appellant was offered an opportunity for a union representative or lawyer to be present and he was told that he was being videotaped. Staffordsmith, sat in, as he often does. He did not clear his calendar to sign in. The interview investigation started with possible insubordination, but it was determined that appellant was never ordered to come in, so they did not believe an insubordination charge was sustainable. Instead, the charge of neglect of duty was made. Appellant was scheduled to work at two o'clock and found out about the family matter at eleven o'clock in the morning. Appellant noted in the interview that in the past he had problems getting mutual exchange even though he had done them for others. He says his colleagues have decided that they would not help him anymore. Staffordsmith stated that the time he

asked appellant if he wanted to be a police officer and respondent, he didn't think he could be he raised the issue of a school resource officer but noted that he would have to show up for four years and possibly still not get the job.

Staffordsmith agreed that appellant was truthful in the interview. He did say that matters were his fault. He said that he expected to be docked and disciplined. Again, he was described as a nice guy, but in the captain's opinion, police work was not for him. Based on the alarming statement that he does not think he could be a police officer, the captain authorized a referral to see Dr. Glass because the statement indicated that appellant may not be able to perform the duties of his job.

Turning back to the 2019 in 2020 leave issues, there was a difficult social climate in the wake of the George Floyd incident but noted that the leave situation was not the basis for the desk duty. The problem was that appellate was having a difficult time enforcing the law.

Gregory Meyer

The next witness was Chief Gregory Meyer. He became the chief in 2016 and has been with the Department for thirty-seven years. He described Lakewood as a very busy town and growing with a population more than 130,000 people. He stated that appellant has used excessive days off. He reviewed the scale of leave time utilized. This was all brought to the chief's attention and the appellant was sent for fitness for duty evaluation. The chief does not want appellant back as he believes that the absenteeism impacts the Department and its morale.

Dr. Gary Glass

Dr. Gary Glass (Glass) testified on behalf of the appointing authority. He reviewed his Curriculum Vitae (CV). He is board certified since 1980 or 1981. He discussed the board certification process. He has an active practice and sees twenty patients per week. He

works at the intersection of psychology and medicine which is psychiatry. He is a physician.

Glass discussed the Minnesota Multiphasic Personality Inventory (MMPI), which he described as a gold standard of fitness for duty examinations. He described it as a screening tool. It is not standalone. It has proven to be reliable and valid, and it is self-validating. It consists of a series of 567 untimed true/false questions.

Glass also discussed the Personal Assessment Inventory (PAI), the personal assessment inventory, which he does not use. The MMPI is scored by a computer. When asked if you can rely on the MMPI, Glass said yes and no. He never reads the result before he interviews the person. Then, if his feeling is inconsistent with the scoring, he will then bring them back in. He gives a greater wait to clinical examination. If a test is contradicted by his gut, he trusts his gut and repeats the test. He does not believe that virtual presentation is as effective for examination as he believes that technology has a way of filtering out emotion.

Glass was offered as an expert in psychiatry. There was no objection, and he was qualified as offered.

He stated that November 7, 2019, was the first time he saw appellant who had been sent to him by Captain Staffordsmith. The referral was for a fitness for duty evaluation. In this instance it was due to burning leave time. Glass administered two MMPIs and interviewed the appellant. His clinical impression was that appellant was a good-looking athletic male who experienced difficult life circumstances. He was born to drug addicted parents and subject to abuse. He was ultimately raised in foster care.

According to Glass, appellant graduated high school and Monmouth University. He took the civil service examination. He was a class two officer in Point Pleasant. He went to the police Academy and began his career.

With the first MMPI, Glass felt that appellant was uncooperative and many of the responses were unreliable. They reflected an attempt to project an overly positive image and appear unrealistically virtuous. Glass states that the test can tell if you're trying to manipulate it. This was concerning but not uncommon. In his interview he noted the appellant appeared to get it. Dr. glass would have preferred that the test be more valid, but he saw no psychosis. He recommended that appellant be returned to duty and enter counseling. He provided a list of counselors. Appellant chose Robin Kaye. After June 20, 2020, they met. Appellant's absenteeism problems were persistent. He appeared to own the problem, but when it was addressed by his peers, he appeared more apathetic, stating that it was his time to do with as he pleased. Absenteeism is a problem for everyone and can affect morale in a police setting.

Dr. glass has given over 500 fitness examinations. He believes only 11 or 12 has he ever found unfit. The overwhelming majority come looking to fix a problem and the vast majority do. He expected the appellant to understand how his external problems were impacting his work. Glass was encouraged by what the appellant responded and confirmed attendance but later learned that he skipped or stopped appointments. Appellant told Glass upon re-interview that he learned so much from the two sessions that he did keep but Dr. glass felt that was unrealistic.

Glass learned later that the problem was that appellant knew the counselor outside of the professional relationship. Appellant thwarted any efforts to help. He told no one about the problem and just discontinued the sessions.

On January 19 of 2021 Glass saw appellant again. He watched the video where appellant indicated he did not think he wanted to be a police officer. He said that the appellant told him the same during the interview, saying he's not sure if his personal views are consistent with police work and that he did not "give a shit" about his colleagues.

Dr. glass administered appellant a second MMPI on December 7 of 2021. He never saw appellant between January and December 2021. He again found appellant to be in

a defensive mode of trying to demonstrate excessive virtue and seeking individual approval. He found this to be consistent with a personality disorder and felt that there was a poor prognosis and that he only sought help to ease the pressures that are on him, not out of a desire to resolve the issues.

Glass felt that the clinical exam was precisely consistent with the MMPI. His opinion is that appellant is unfit for duty. He highlighted some areas of his report. He noted that appellant cut off his foster mother because she did not wish him a happy birthday. Appellant initially said he stopped seeing Dr. Kay because of time and later said he stopped because he knew her. According to Glass appellant acknowledges that he treats his colleagues poorly, but he believes he can win them back which is unrealistic. He knows that he has burnt bridges.

Glass discussed Dr. Rafanello who also saw and examined appellant. When he said he could not return to Dr. Kay she provided appellant a list of counselors. He saw Dr. Mandel who subsequently was in an accident and was not available to see appellant for months. Appellant did not seek alternate help. He was just really going along with the minimum the system required and not truly wanting help.

Reviewing Dr. Rafanello's report Glass noted that it was all done via zoom. He understands that it can be required and that is the way things are done these days, but it does present issues. Glass was bothered by the fact that Dr. Rafanello indicated that she would not release the report unless appellant approved it. He took that to mean that appellant could rewrite the report, although he was not saying that that would happen.

While discussing the difference between the MMPI 's, Glass said that the second one was a little more impacted. If the second MMPI had been the same result at the time of the first, he would not have cleared appellant to return to duty. He states that no one is "fixed" after two counseling sessions or after two months. He would not tell a patient how much treatment is needed. It just doesn't work that way. The Police Department never instructed Dr. Glass to find appellant unfit for duty. He never spoke to the chief before

seeing him in the hallway today. he believes that appellant should not be a law enforcement officer, and that he would benefit from long-term therapy.

Glass never knew appellant before 2019. At that time, he saw him, tested him, and sent them back to work. He did write the April 25, 2020, memo. It was a follow up acknowledging that the matter had fallen through the cracks. He never received a response. He saw appellant again on June 29, 2020. This visit was initiated by the department. Appellant was working on desk duty. He was told to go to therapy. It was at that time that he was given a list and chose Dr. Kaye.

Glass issued nothing in writing after his November 2019 meeting. He saw nothing further regarding appellant after July and August until he saw him again in January 2021. Nothing was written after June 2020. Glass noted that when he saw appellant again in January 2021 Captain Staffordsmith had received an alarming statement that could impact the ability or fitness for duty. Glass watched the video of the IA interview the morning of his testimony for the first time. He wrote to the captain that appellant was not fit for duty on January 28 but did not write his written report until March 2, 2021. Appellant was assigned desk work until the report came in. Although glass saw appellant in January, he did not re-administer the MMPI to him. Rather, he referred back to the November 19, 2019, test. Glass was concerned that appellant had stopped seeing Dr. Kaye and did not tell anyone. Glass does not have a treating relationship with appellant.

Appellant accused glass of not seeing his side, and that the deck was stacked against him. Dr. Glass believes that appellant was trying to play or manipulate him and was frustrated that he couldn't. Glass saw appellant again in December 2021 to evaluate him for fitness of duty and retested him at that time. He noted that Dr. Rafanello criticized him in her report for not retesting and relying on the 2019 MMPI. He was skeptical of the treatment received from Dr. Mandel because he found him on a list and appeared to bond over sports which Glass felt was ridiculous. He states that appellant's pattern is that he does not want to be treated. It's not his business to know what goes on in treatment.

Dr. Glass felt that appellant basically stuck his tongue out at Glass and told him that he couldn't make appellant do what he didn't want to do. He states that objective testing tells us that appellant says what he believes should be said. When I asked if that was in the computer read out, he said it's no different than reading it in an ECG.

Video

The video of the IA interview was shown. It was held on Monday, January 11, 2021, at 2:14 PM (J – 1). Appellant was wearing a hat and a mask, and his face was not visible. There were four people in a small room. Appellant was aware that he was there to discuss neglect of duty regarding December 14, 2020. He expected that he would be docked if not disciplined. He understood that he had no leave time in the bank. He was providing care for his mother. He stated that everything was OK now with the emergency issue. It involved his mother and his brother.

Appellant stated that he had gone to therapy in the past, and that his head is clear and takes responsibility for the fact that he "effed up a lot". He stated his understanding that it was a pattern. He indicated that he wants to with the department but honest answer he doesn't feel he can be who he is in this particular department. He felt that he failed. He is committing to making changes in his life. He doesn't feel that 50% of the department has his back. Staffordsmith indicates in the video that he was not prepared for that response but appreciates the honest answer. They discussed some areas where appellant has performed positively, particularly, families in crisis. They noted that that is just one part of the job. Appellant stated that he doesn't feel he'll get anything out of it even if he puts in four years of hard work and he feels he's been treated fairly.

Joseph Hans

Appellant testified on his own behalf. He lives in Forked River with his girlfriend. He is twenty-five years old. He is interested in police work. His passion is being a role model to young people. He was adopted. He lived with his biological parents until he was

nine and then he was moved into foster care. The second time it was permanent. He was adopted at twelve-years-old. He has a brother and sister. He was subject to abuse and violence. He identifies as a black man. He started his police work in Point Pleasant. He took two psychological evaluations and passed them both. He worked two years in Point Pleasant. He applied to Lakewood. He passed all of the exams and the psychological evaluation.

He attended the ocean county police Academy and received his class leadership award in March 2018. He joined the Lakewood force after graduation. He underwent field training and ride along for three months. He was released to full duty after one year. Appellant was a patrolman and expected to do that role for three years. He acknowledges that he started a pattern with his leave time. He took his entitled time off. He was enjoying a life that he never had. He enjoyed his time off. He did things that he could not do or afford to do while growing up.

In 2019 or 2020, his mother suffered a cardiac arrest. She went home and needed care. He was spoken to about his use of leave time. No one told him that he could not use his leave time but that his use of leave time was raising red flags. He would use leave time to care for his mother or to help his family with his mother. He went to see Dr. Glass in November of 2019. He took an examination and met with him. Based on that Dr. glass sent him back to work.

In 2020 Covid hit. Appellant described the George Floyd incident as really impacting how he viewed law-enforcement - the system not the people in it. He said that incident revealed the flaws in the system. He notes the two people lost their lives as a result of that incident: One died, and one lost their life to prison.

Appellant had a conversation with Lieutenant Peterson explaining the issues with his family and the system. He was in a position of caring for his mom and his siblings. That brought up a lot of memories from his childhood and caring for his siblings. The next

day he was removed from the road, and he went to see Dr. Glass again for the second time.

Dr. Glass suggested therapy and gave him a list of names. Appellant went to see Dr. Kaye. He was sent back to work and back to the patrol. He got along well with Dr. Kaye. Their first visit was on zoom. He recognized her. There was no tension but in person he felt uncomfortable. He felt like he was bad mouthing his family to someone who knew them. Dr. Kaye's son played baseball with appellant's little brother, so they were around each other two seasons per year. Appellant was never told how long he need a treatment for. He went back to patrol.

In December 2020 there was an incident with his family. His brother was his mother's primary caregiver. He was overwhelmed by the position, the pressure, and he threatened to take his own life. He has been hospitalized a number of times due to the threat. On the date in question appellant made a decision to be there for his brother and not work. No one told him at the time that he would be charged. He was told that he would either lose time or money. During the interview of January 19, 2021, he was told that he would be charged with neglect of duty.

Appellant knows what a mutual exchange is and explained that it is basically shift swapping so that no time off is used. He acknowledges that he did not reach out for mutual exchange because he knew he had burnt that bridge with his previous use of time off. He thought it felt disrespectful to call someone last minute on their day off. He excepted a docking of pay and expected discipline. He expressed feeling that he cannot be himself given the standards of the job and the reputation that he had made for himself.

He did not mean to say that he did not want to be a police officer anymore. He was saying that he did not feel he could speak up, especially after his track record. He felt that it was a closed environment. He had a problem doing his job, but it was not his motivation. His motivation is the service community. He let his frustrations out in the IA interview.

Appellant made reference to a number of changes he was making and felt he had been neglecting his health. He was neglecting his work. He was neglecting his friends. He said it meant that he couldn't afford to care about what others thought - not that he didn't care about his colleagues. He knew that he would be disciplined, but did not know what to expect

Several hours later he received an email telling him to see Dr. Glass again. He was not retested. He just spoke with Glass, who told him that he was a manipulator who created a pattern. Appellant felt that it was the wrong conversation. He felt that Glass was upset that he had "ghosted" Dr. K and returned the focus to his use of time off. He was focusing on the entirety of the two years and not on the incident. Appellant knows that he articulated himself poorly in his IA interview.

Dr. Glass told him that he needed therapy but not with him. He refused to give him another list of doctors because he felt that he would manipulate it. Glass told appellant he did not believe appellant could take the matter seriously. After the meeting, appellant contacted the department and was told that Staffordsmith was unavailable. Staffordsmith returned his call. Appellant expressed that he felt the meeting did not go well. He felt the outcome was preordained. He went back to work.

One-week later appellant was called upstairs and told to hand over his weapon. He was assigned to desk duty until Glass's new report came seven weeks later in March. As a result of that report, he was terminated because Dr. Glass said that he was unfit for duty. His attorney referred him to Dr. Rafanello with whom he did a video session. She wanted him to have one on one therapy and said that she would reevaluate him. After she provided him with a list, he saw Dr. Mandel. He saw Dr. Mandel also via zoom. They discussed everything. He still sees Dr. Mandel. It had been every week but now they meet is every two weeks.

Appellant went back to Dr. Rafanello who performed more testing and wrote a report in October 2021. Rafanello also spoke to Dr. Mandel. In the meantime, Appellant

worked several jobs trying to make a living. He worked for a solar company; a furniture company add a restaurant.

Appellant went back to see Dr. Glass again in December 2021 this time in person. He gave him a test and spoke to him for 30 to 40 minutes. They discussed what he had been up to. They spoke about appellant's mother. Glass asked him if his colleagues would receive him if he returned. Appellant expressed that he thought he would be accepted but not celebrated. He states that some officers have reached out to him.

Appellant did discuss his mother with Glass. He explained that she has memory issues. Glass asked how she had been and as an example appellant offered that she did not call for his birthday and for some reason Dr. Glass focused on that. Glass knows that the relationship is fine, and that appellant spent Thanksgiving and her birthday and Easter with her.

Appellant wants to be a police officer. When asked how he would be different he states he would show his commitment to his job and to himself. He would be the change that he wants to see.

On cross examination, he acknowledges that the third meeting with Dr. Glass did not go well. It was a bad meeting and Dr. glass failed him. He does not blame Lakewood for his situation. He blames himself. He did not go to the PBA to ask for help.

Appellant did tell Rafanello about Dr. Mandel 's accident. She told him that he could look for someone else or stay with Mandel. He chose the latter. The stressors of his family led him to seek therapy. His job is not stressing him out, he thought he made the right decisions but now he knows it was wrong. He still wants to be a police officer. He does not think it will be hard to go back.

Dr. Nicole Rafanello

Dr. Nicole Rafanello (Rafanello) testified on behalf of appellant. She has a PhD in psychology. She is not an MD. She cannot prescribe medicine. She is on the PBA preferred list. Rafanello was offered as an expert in psychology. There was no objection, and she was qualified as offered. She discussed her examination process and referred to the report she authored in this matter. (R-3.) She saw appellant virtually and administered a PAI as well as other instruments referred to in her report. She met with the appellant again in October 2021. She recommended that he needed therapy, and he pursued it. She believes that he needed it before she evaluated him.

Rafanello saw no Post-Traumatic Stress Disorder (PTSD) in appellant. She saw no substance abuse. She saw no anger issues. She noted that his stress level was high, and he scored near at risk. She believed that he needed treatment and was specific about a timeframe. She noted that Dr. Glass administered the MMPI-2, which while still in use is not used by most people who prefer the newer version, MMPI -3. She believes that Dr. Glass could have used a more up-to-date exam.

Rafanello believes that Glass's report does not list the records that he reviewed. She questions the time of the reporting noting that the evaluation was in November 2019. In April 2020 Glass asked about a report. Glass saw appellant again for a new issue in January 2021 and found appellant unfit in March 2021. She took issue with a March 2021 report relying on the November 2019 evaluation.

Rafanello retested appellant, spoke with the therapist and re-interviewed him. She noted that his stress level had dropped to a subclinical range, and she gave her opinion that he was fit for duty based on testing, treatment success, and some aspects of his job. He had previously become stressed out. He lost his understanding of why he wanted to be a cop. He needed a reset.

Rafanello discussed the concept of the last clear chance agreement, noting that some departments use them, but some don't know that the option is available. She has performed 500 to 600 fitness evaluations in her career. She took issue with some missing pages on Glass's second report, noting that the validity scales were not attached. She acknowledged that both Dr. Glass and she recommended treatment for the appellant.

On cross examination, Rafanello acknowledged that appellant was unfit for duty at the time that he was put out but believes that he was restorable. She never saw him in person due to Covid. She does believe that interviews can go better in person. She discussed the paramilitary nature of police departments and the need for order and discipline.

Rafanello believes that his stress level was due more to family than to police work. She agrees that appellant's failure to continue seeing Dr. Kaye was a mistake. In April 2021 he needed counseling. He should have tried to seek alternate treatment. She believes he was not ready to go back until he completed treatment, and she cleared him in October 2021.

Rafanello believes that the new MMPI is better than the prior version, but that clinical evaluation is more important. She states at the MMPI and the PAI are both self-validating. She did not find appellant to be narcissistic. She found him unfit due to being under stress. She agrees it was problematic that he said he "did not give a shit about his colleagues." That answer connotes a need to be addressed. Rafanello says it was correct to send him for fitness for duty evaluation when he was sent, but states again that she believes that he is fit for duty today.

The charges in this matter are supported by the single specification that appellant was declared unfit for duty through a psychological exam on March 2, 2021. This statement is not in dispute and is hereby **FOUND** as **FACT**. Furthermore, both expert witnesses in this matter testified that when appellant was put out, he was indeed unfit for duty. Accordingly, this statement is not in dispute and is also **FOUND** as **FACT**. I further

find that. Appellant was urged on a number of occasions to seek counseling and for one reason or another did not follow through with that recommendation.

The experts disagree as to whether appellant was progressed to a point so as to be deemed fit to be returned to duty. Dr. Rafanello suggests that he was as of the time that she reevaluated him in October 2021. Dr. Glass believes that as of the date of his reevaluation of appellant in December of 2021, appellant was still not fit for duty. The legal import of this, if any, will be addressed later in this decision in accordance with the legal conclusions and/or determination of penalty as appropriate. But for now, I will endeavor to resolve this factual dispute. To do so requires an assessment of the credibility of the witnesses' testimony.

Credibility is best described as that quality of testimony or evidence which makes it worthy of belief. The Supreme Court of New Jersey considered the issue of credibility in In Re Estate of Perrone, 5 N.J. 514 (1950.) The Court pronounced:

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

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

In order to assess credibility, the witness' interest in the outcome, motive or bias should be considered. Furthermore, a trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura- Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958.) In the present matter, both experts presented their opinions to an acceptable degree of medical certainty and based their

opinion on a clinical examination and administering of psychological evaluation instruments and testing.

"Credibility" can be a frustrating term as it often connotes a degree of veracity. I take no issue with the truthfulness of either expert witness, and both are well credentialed and qualified. What the analysis requires is an evaluation of which expert was more persuasive in their testimony. Each presented with some strengths and weaknesses.

Dr. Glass's persuasiveness was hampered by the degree to which his testimony seemed personally invested in the outcome. His testimony often came off more about himself than about appellant. He came off as defensive and seemed to focus on issues such as the degree to which he felt Dr. Rafanello was critical of his opinion, or that he felt that appellant was personally taunting him with his interactions and by not following his advice. It appeared that he administered a second MMPI in December of 2021 only because Dr. Rafanello was critical of his relying on the 2019 MMPI in writing his March 2021 report when she issued her report in October of 2021.

Another example occurred at the outset of his testimony and his qualification as an expert. Counsel for appellant agreed to stipulate Dr. Glass's CV into the record and to stipulate as to his expertise. Counsel for the Department felt it helpful to still highlight some aspects of Dr. Glass's experience and credentials. Even after that, and in the face of no objection and little to no voir dire as to his qualifications, Dr. Glass wanted to take several minutes on his own initiative to delineate his qualifications and experiences before proceeding with his testimony. While certainly impressive and worthy of pride, it was unnecessary at that point and unprompted. It suggested an expectation that his testimony would be evaluated on his credentials rather than its substance and the basis for his opinions. This is not to suggest that there were not strong aspects to his substantive testimony.

Dr. Rafanello was also impressively experienced and credentialed. Her persuasiveness however was undermined by the totality of appellant's experience. On

several occasions from 2019 through 2021 he was advised to seek counseling and failed to follow through. She acknowledged in her testimony that appellant did not handle this in the best way and that his lack of follow-through was problematic and sub-optimal. She agreed that he needed counselling. Ultimately Rafanello saw appellant in April and October. While he took her advice to attend counseling when confronted with the loss of his job, he still did not follow through when it became a little more difficult to do so. While it was unfortunate that his counsellor was in an accident and that his counselling was interrupted, he was offered an alternative and for the second time chose to not seek an alternate route to get help. That after five months, in three of which counselling was interrupted and not received, appellant's issues were addressed and managed to a degree that he was now fit to return, seems a tenuous proposition that does not hang together.

Additionally, whatever the reason for the administering of the second MMPI, the results do seem to confirm what Dr. Glass said about manipulation and this notion is reinforced by appellant's actions, again that he only followed through when faced with the loss of his job. Whatever the other weaknesses of his testimony, Dr. Glass was strong and clear in his explanation of the MMPI and how it is utilized and the results he received. While Dr. Rafanello expressed a preference for a newer version, she acknowledged that Dr. Glass's version is in use and did not dispute is validity.

Given the foregoing, I am ultimately better persuaded by Dr. Glass. The record reflects, and both experts agree, that appellant was unfit for duty when charges were proffered. I further FIND that appellant has not demonstrated that he is fit to return, and that the appointing authority has demonstrated that he is not.

LEGAL ANALYSIS

Under the Civil Service Act, a public employee may be subject to major discipline for various employment-related offenses, N.J.S.A. 11A:2-6. In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the

burden of proof to show that the action taken was appropriate. N.J.S.A. 11A: -2.21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962.)

The respondent has charged appellant with violations of N.J.A.C. 4A:2-2.3(a): (1) Incompetency inefficiency or failure to perform duties; (3) inability to perform duties; (7) neglect of duty; and (12) other sufficient cause. All charges are supported by the single specification that appellant was declared unfit for duty through a psychological exam on March 2, 2021.

Under N.J.A.C. 4A:2-2.3(a)(1), an employee may be subjected to major discipline for "incompetency, inefficiency, or failure to perform duties."

Although progressive discipline is the general rule, sheer incompetency can be the grounds for firing without progressive discipline. Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline.)

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998.) (NOTE: Gaines had a substantial prior disciplinary history, but the case is frequently quoted as a threshold statement of civil service law.)

"In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper remedy for a county treasurer who couldn't balance the books, after the auditors tried three times to show him how.)

> In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that "[t]he [MSB's] application of progressive discipline in this context is misplaced and contrary to the public interest." The court determined that Klusaritz's prior record is "of no moment" because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the county.
>
> [In re Herrmann, 192 N.J. 19, 35-36 (2007) (citations omitted).]

There is no definition in the administrative code of the term "inefficiency," and therefore, it has been left to interpretation.

In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980.)

In the present matter, the record reflects that the only specification, or incident giving rise to any of the charges sustained, was that "on or about March 2, 2021 [appellant] was declared unfit for duty through a psychological evaluation by a Gary Michael Glass, M.D." I CONCLUDE that this statement does not lend itself to the concepts outlined or provide a sufficient basis to sustain a charge of incompetence, inefficiency, or failure to perform duties and that this charge must be **DISMISSED**.

"Neglect of duty" has been interpreted to mean that "an employee . . . neglected to perform an act required by his or her job title or was negligent in its discharge." In re

Glenn, CSV 5072-07, Initial Decision (February 5, 2009) (citation omitted), adopted, Civil Service Commission (March 27, 2009), http://njlaw.rutgers.edu/collections/oal/. The term "neglect" means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977.) "Duty" means conformance to "'the legal standard of reasonable conduct in the light of the apparent risk.'" Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted.) Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955.) Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job.

As noted above, the record reflects that the only specification, or incident giving rise to any of the charges sustained, was that "on or about March 2, 2021 [appellant] was declared unfit for duty through a psychological evaluation by a Gary Michael Glass, M.D." While the events that led the appointing authority to open the internal affairs investigation where appellant made the comments that led to the referral for a fitness for duty evaluation may be rooted in some form of neglect of duty, the only specification provided in the FNDA is the evaluation itself and as such I **CONCLUDE** that this statement does not provide a sufficient basis to sustain a charge of neglect of duty and that this charge must be **DISMISSED**.

With regard to the violation of N.J.A.C. 4A:2-2.3(a)(3), inability to perform duties, the fundamental concept that one should be able to perform the duties of the position is stated in Briggs v. Department of Civil Service, 64 N.J. Super. 351, 356 (App. Div. 1960), which happens to be a probationary period case involving a nurse:

> Manifestly, the purpose of the probationary period is to further test a probationer's qualifications. Neither the Legislature nor the Commission has given the courts any guidance in determining the extent of assistance or orientation which a probationer must receive. Undoubtedly her duties must be explained to her, and she must be given reasonable opportunity to perform the duties expected of her. But this

> does not mean she is entitled to on-the-job training in the manner of performing her duties. This is what she must be qualified for -- the proper performance of her duties as outlined by the appointing authority.

In the present matter, the record reflects that both medical experts, including appellant's own expert, provided expert testimony that at the time the charges were proffered appellant was psychologically not fit for duty as a police officer. I **CONCLUDE** that respondent has proven by a preponderance of the competent, credible evidence, the charge of inability to perform duties, and that the charge must be **SUSTAINED**.

Appellant was also charged with a violation of N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause.) Again, the only specification supporting this charge is that appellant was declared unfit for duty. This analysis was covered in accordance with the inability to perform duties discussion and is applicable here. The charge is **SUSTAINED**.

PENALTY

In West New York v. Bock, 38 N.J. 500, 522 (1962), which was decided more than fifty years ago, our Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Herrmann, 192 N.J. 19, 29 (2007) (citing West New York v. Bock, 38 N.J. 500, 522 (1962)). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." West New York v. Bock, 38 N.J. 500, 523-524 (1962).

As the Supreme Court explained in in re Herrmann, 192 N.J. 19, 30 (2007), "[s]nice Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct." According to the Court:

> . . . First, principles of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct . . .
>
> The second use to which the principle of progressive discipline has been put is to mitigate the penalty for a current offense . . . for an employee who has a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions . . .
>
> . . . [T]hat is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when . . . the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> [In re Hermann, 192 N.J. at 30-33 (citations omitted).]

In the case of In re Carter, 191 N.J. 474 (2007), the Court decided that the principle of progressive discipline did not apply to the sanction of a police officer for sleeping on-duty and, notwithstanding his unblemished record, it reversed the lower court and reinstated a removal imposed by the Board. The Court noted the factor of public-safety concerns in matters involving the discipline of correction officers and police officers, who must uphold the law and "present an image of personal integrity and dependability in order to have the respect of the public." In re Carter, 191 N.J. 474 (2007)

In the matter of In re Stallworth, 208 N.J. 182 (2011), a Camden County pump-station operator was charged with falsifying records and abusing work hours, and the ALJ imposed removal. The Civil Service Commission (Commission) modified the penalty to a four-month suspension and the appellate court reversed. The Court re-examined the

principle of progressive discipline. Acknowledging that progressive discipline has been bypassed where the conduct is sufficiently egregious, the Court noted that "there must be fairness and generally proportionate discipline imposed for similar offenses." In re Stallworth, 208 N.J. 182, 208 (2011). Finding that the totality of an employee's work history, with emphasis on the "reasonably recent past," should be considered to assure proper progressive discipline, the court modified and affirmed (as modified) the lower court and remanded the matter to the Commission for reconsideration.

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

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

In the present matter, respondent has brought and sustained charges of violations of N.J.A.C. 4A:2-2.3(a)3 (inability to perform duties) and N.J.A.C. 4A:2-2.3(a)12, (other sufficient cause). The record reflects that appellant's disciplinary record was unremarkable prior to the incident that is the subject of this matter.

When an employee cannot competently perform the duties and requirements of their position, termination is the appropriate penalty as opposed to progressive discipline.

Klusaritz v. Cape May County, 387 N.J. Super. 305 (App. Div. 2006). However, in the present matter, appellant's competency on the job has not been questioned. The sole specification supporting his removal was that he failed a fitness for duty evaluation. Both testifying medical experts agree and the record reflects a finding that at the time charges were proffered appellant was indeed unfit for duty.

In an unpublished opinion, In re Rankin, 2007 N.J. Super. Unpub. Lexis 201 (App. Div, 2007), the appellate division upheld the Merit System Board's converting the removal of a police officer who had been found unfit for duty to a medical leave of absence contingent upon the officer's being found fit for duty by a psychologist or psychiatrist agreed upon by the parties. While similarities exist, this is not an analogous situation. In the present matter the appointing authority had demonstrated, and the record reflects that appellant remains unfit for duty.

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

ORDER

The appointing authority has proven by a preponderance of credible evidence the charges against appellant with violations of N.J.A.C. 4A:2-2.3(a)3 (inability to perform duties) and N.J.A.C. 4A:2-2.3(a)12, (other sufficient cause). I therefore **ORDER** that these charges be and are hereby **SUSTAINED.** Furthermore, I **ORDER** that the remaining charges be **DISMISSED**. I finally **ORDER** that the penalty of removal be and is hereby **AFFIRMED.**

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.

November 14, 2022
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

EAP/tat

APPENDIX

WITNESSES

For appellant:

Joseph Hans

Dr. Nicole Rafanello

For respondent:

Captain Gregory Staffordsmith

Chief Gregory Meyer

Dr. Gary Glass

EXHIBITS

Joint Exhibits:

J-1 Video of Internal Affairs interview

For appellant:

A-1 Curriculum Vitae of Dr. Nicole Rafanello

A-2 Psychological evaluation and opinion by Nicole J. Rafanello, Ph.D., October 25, 2021

A-3 Psychological fitness-for-duty evaluation guidelines

A-4 Personality assessment inventory clinical interpretive report by Leslie C. Morey, PhD., April 22, 2021

A-5 Personality assessment inventory clinical interpretive report by Leslie C. Morey, PhD., October 6, 2021

For respondent:

R-1 Preliminary notice of disciplinary action, March 3, 2021

R-2 Final notice of disciplinary action, January 21, 2022
R-3 Report of Dr. Gary Glass March 2, 2021

R-4 Report of Dr. Gary Glass, January 1, 2022

R-5 Curriculum Vitae of Dr. Gary Glass

R-6 MMPI-2 computer read-outs